



Agricultural Marketing Service

9 CFR Part 201

[Doc. No. AMS-FTPP-22-0046]

RIN 0581-AE18

Poultry Grower Payment Systems and Capital Improvement Systems

AGENCY: Agricultural Marketing Service, U.S. Department of Agriculture.

ACTION: Final rule.

SUMMARY: This final rule by the United States Department of Agriculture's (USDA or the Department) Agricultural Marketing Service (AMS or the Agency) amends the Agency's regulations under the Packers and Stockyards Act, 1921 (P&S Act or Act). The Act protects fair trade, financial integrity, and competitive markets for poultry. The final rule prohibits certain payment practices under poultry grower ranking systems (commonly known as tournaments) in contract poultry production for broiler chickens, requires live poultry dealers (LPDs) to adopt policies and procedures for operating a fair ranking system for broiler growers, and requires LPDs to provide certain information to broiler growers when the LPD requests or requires the grower to make additional capital investments. These regulations will increase transparency and address deception and unfairness in broiler grower payments, tournament operations, and capital improvement systems.

DATES: This rule is effective July 1, 2026.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Chief Legal

Officer/Policy Advisor, Packers and Stockyards Division, USDA AMS Fair Trade

Practices Program, 1400 Independence Ave. SW, Washington, DC 20250; phone: (202)

690-4355; or email: s.brett.offutt@usda.gov.

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I. Executive Summary

The current broiler chicken industry is highly susceptible to both unfairness and deception. Within the last 40 years, the poultry industry has become highly integrated, with most LPDs operating as “integrators” who frequently own or control all segments of the production process except growout. The growout stage of the production process consists of growers raising young poultry to harvest size under poultry growing arrangements (contracts). To pay the grower, most LPDs, which will also be referred to as “integrators” throughout this rule, use a relative performance or poultry grower ranking system, commonly known as a tournament. Under the tournament system, poultry growers compete against one another to determine payment for their services. As discussed throughout this rule, growers cannot reasonably avoid certain practices that cause them harm. Additionally, growers lack access to certain information, which inhibits their ability to meaningfully understand, negotiate, and enforce poultry growing contracts with LPDs, including in relation to capital investments that LPDs request.

The Packers and Stockyards Act, 1921, as amended (P&S Act or the Act) (7 U.S.C. 181 *et seq.*), authorizes USDA to issue regulations and orders to prohibit unfair and deceptive practices by LPDs.

In a June 8, 2022, advance notice of proposed rulemaking (ANPR), AMS sought comments and information to inform policy development and future rulemaking regarding the use of poultry grower ranking systems (87 FR 34814, June 8, 2022)).

Commenters expressed both support and concern about the use of tournaments in poultry production, with the majority expressing support. Other commenters, especially advocacy

associations, objected to the current tournament payment system, stating that tournament systems do not fulfill the integrators' claimed purposes and that the tournament payment systems exemplify the manipulative and unjust practices that Congress designed the Act to prevent. These commenters cited integrators' arbitrary, unjust, or punitive distribution of inputs and production variables, potentially punitive manipulation of the group composition, and penalties for small deviations below average performance. Some of these ANPR commenters also stated that the rulemaking could help address bargaining power imbalances for growers by providing proper enforcement, minimum base pay, and other provisions.

Trade organizations commented on the ways input variability affects pay and that LPDs lack incentives to take action to reduce unpredictability in grower inputs and pay outcomes. AMS has observed that monitoring and intervention to remedy unpredictability requires an LPD to expend effort and incur cost, and that the LPD does not directly benefit from the increased fairness to growers. Without an explicit prohibition on unfair variability, LPDs lack compelling incentives to operate their tournament system contracts fairly. Comments in response to the ANPR, other available data and information, and AMS's Packers and Stockyards Division's (PSD) expertise provided the basis for a proposed rulemaking.

On June 10, 2024, AMS published the proposed rule, Poultry Grower Payment Systems and Capital Improvement Systems, in the *Federal Register* (89 FR 49002). In response to the proposed rule, AMS posted 755 comments, some with multiple signatories, over a 60-day comment period. Comments were submitted by a variety of stakeholders, including farmers' coalitions, government entities, advocacy organizations, industry trade organizations, processors, producers, and other individual interested parties. Stakeholders commented on the proposed rule, as well as several specific questions containing alternate proposals. The proposed rule covered, among other things,

rate of compensation for growers, transition and implementation costs, the proposed duty of fair comparison, and reasonable recoupment for required additional capital investments. Farmers' coalitions, advocacy associations, government entities, and unaffiliated individual commenters broadly supported the proposed rule, while the regulated trade organizations and LPDs opposed the proposed rule. Live poultry growers both supported and opposed the proposed rule. Many growers who support the rule raised concerns of unfairness within the tournament system, including that pay rates are influenced by factors outside growers' control, that growers are forced to make new capital investments that have poor to nonexistent return while putting growers in more debt, and that growers must compete against fellow growers in an unfair manner. Those growers who opposed the proposed rule felt that the tournament system does a good job of rewarding effort, and that the rule would upset this system by shifting money away from high-performing growers and by reducing overall bird quality. However, several growers that opposed the rule expressed concern that LPDs force growers to make additional capital investments that do not produce an economic return for the grower.

Section 407(a) of the P&S Act (7 U.S.C. 228(a)) authorizes the Secretary of Agriculture (the Secretary) to make rules and regulations as necessary to carry out the provisions of the Act (7 U.S.C. 181 *et seq.*), and the Secretary has delegated the responsibility for administering the Act to AMS. *See* 7 CFR 2.22(a)(3)(iii) (delegating authority to administer the Act from the Secretary to the Under Secretary for Marketing and Regulatory Programs); 7 CFR 2.79(a)(17) (in turn, delegating authority to administer the Act from the Under Secretary to the Administrator, Agriculture Marketing Service). Under this authority, AMS issues this rule to carry out the provisions of section 407 of the Act, as well as provisions of sections 202(a) (7 U.S.C. 192(a)) (which prohibits "any unfair, unjustly discriminatory, or deceptive practice or device"), 401 (7 U.S.C. 221) (which requires an LPD to "keep such accounts, records, and memoranda as fully and

correctly disclose all transactions involved in his business”), and 410 (7 U.S.C. 228b) (which bans the failure to pay “the full amount due [to the] poultry grower on account of such poultry”).

In this final rule, AMS amends 9 CFR part 201, subpart N, by adding several new provisions, including: § 201.106 regarding LPD responsibilities for the design of broiler grower compensation arrangements; § 201.110 regarding the fair operation of broiler grower ranking systems; § 201.112 regarding disclosure requirements for LPDs when requesting additional capital investments from broiler growers; and § 201.290 regarding severability. In particular, the Agency is:

- Prohibiting LPDs from discounting or reducing a grower’s rate of compensation as disclosed in the broiler growing arrangement based on the grower’s grouping, ranking, or comparison to others (§ 201.106(a)).

- Establishing that it is a presumptive violation of the Act when aggregate gross annual payments based upon a grouping, ranking, or comparison of growers exceeds 25 percent of total gross payments to growers in a complex on an annual-calendar year basis (§ 201.106(b)).

- For each of the three calendar years following the publication date of the above-referenced provisions, requiring LPDs to submit certain documentation to the Secretary when any contract modification or renewal subject to the prohibition on discounts results in a decrease in the prior annual-calendar year’s complex-wide average gross payment to the grower (§ 201.106(c)).

- Establishing a duty of fair comparison that requires LPDs to design and operate their broiler grower ranking system to provide a fair comparison among growers, with particular attention to certain factors in the methods of comparison, including the distribution of inputs and flock production practices, the time period of the comparison, the conditions and circumstances for the comparison, the reasonableness of efforts to

resolve disputes, and how the LPD will compensate growers when the LPD cannot conduct a fair comparison (§ 201.110(a)).

- Requiring LPDs to establish and maintain written documentation of their processes for the design and operation of a broiler grower ranking system that is consistent with the duty of fair comparison and to retain all relevant written records for five years (§ 201.110(b)).

- Requiring LPDs to provide growers with a Capital Improvement Disclosure Document when an LPD requests that a grower make an additional capital investment and requiring that LPDs make reasonable efforts to assist the grower in translating the document, as well as ensure that the grower is aware of their right to request translation assistance (§ 201.112).

- Introducing a severability clause that specifies that it is USDA's intent that the provisions in subpart N remain in effect even if any provision or component of any provision is deemed unenforceable (§ 201.290).

II. Background

A. Vertical integration and market power

Today, the broiler chicken industry is highly vertically integrated. That is, a single entity owns or controls nearly all the steps of production and distribution, with the only partial exception being the growout stage, during which broiler growers raise chicks on their farms to slaughter weight. The USDA National Agricultural Statistics Service's (NASS) Census of Agriculture (Agricultural Census) reported that 96.2 percent of broilers were raised and delivered under production contracts between LPDs and independent farmers, or broiler growers.¹ Under a production contract, the LPD provides the grower chicks, feed, and veterinary treatment services, which the grower uses to grow

¹ USDA, NASS, *2022 Census of Agriculture: United States Summary and State Data*, volume 1, part 51, issued February 2024 pp. 51 and 411.
https://www.nass.usda.gov/Publications/AgCensus/2022/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

out the flock. The LPD maintains ownership of the chickens throughout the production process. The grower provides the poultry growing facility, flock management, labor, and utilities required during flock growout.² At the end of growout, the LPD collects and weighs the mature poultry and pays the broiler grower for their services.

To grow broiler chickens on a commercial scale, a grower must make a substantial initial investment in housing. Over time, LPDs may request or require that growers make additional capital investments to upgrade housing and equipment, which are intended to improve efficiency or respond to customer preferences (*e.g.*, relating to the use of antibiotics or other animal-raising concerns) during the contracting relationship. Growers generally finance these long-term assets against much shorter-term production contracts.³ This exposes growers to financial risk and uncertainty around debt repayment and the recoupment of their investments. For example, compared to other commodity producers, broiler growers registered among the highest share of farms in extreme financial stress, measured as carrying a term debt coverage ratio less than one and a debt-to-asset ratio greater than 55 percent.⁴ Growers are thus dependent on LPDs—who control most aspects of a grower’s production—to recoup their substantial initial and continuing investments.⁵ Growers also currently receive little to no information about the purpose, process, and outcomes expected around such investments.

² Growout period is defined as the period of time between placement of poultry at a grower’s facility and the harvest or delivery of such animals for slaughter, during which the feeding and care of such poultry are under the control of the grower.

³ MacDonald, James M. "Financial Risks and Incomes in Contract Broiler Production." Amber Waves August 04, 2014. <https://www.ers.usda.gov/amber-waves/2014/august/financial-risks-and-incomes-in-contract-broiler-production/> (last accessed 12/13/2023).

⁴ Nigel Key, Christopher Burns, and Greg Lyons, "Financial Conditions in the U.S. Agricultural Sector: Historical Comparisons," EIB-211, U.S. Department of Agriculture, Economic Research Service (2019), <https://www.ers.usda.gov/webdocs/publications/95238/eib-211.pdf?v=4876.5> (In 2017, compared to other commodity categories considered, poultry farms showed the greatest share of farms in extreme financial stress – around four times that of larger-scale general livestock and specialty crop, fruit, nut, and vegetable producers and twice that of large-scale grain and oilseed producers. Moreover, the percentage of poultry farmers in extreme financial stress has been increasing since 2006).

⁵ For a discussion the difficulty in adapting of broiler grow houses for other purposes see Tom Vukina and Poramet Leegomochai. "Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry." American Journal of Agricultural Economics 88 (2006).

Currently, most LPDs operate with the benefit of substantial market power and bargaining power in local markets to purchase grower services. Broiler grower operations must be close (usually less than 50 miles) to an LPD's feed mills, hatcheries, and processing plants due to the costs of transporting feed to the grower's farm and the costs (including death loss) associated with transporting finished chickens from the grower's farm to the processing plant. This results in poultry production that is often localized and regionally concentrated. Most growers have few LPDs in their area with whom they can contract. Even where multiple LPDs are present, there can be significant costs associated with switching to a different LPD, including adjustments for differences in technical specifications that LPDs may require. To switch LPDs, a grower may need to invest in new equipment and learn to apply different operational techniques for different breeds, target weights, and growout programs. Facility-specific investments may inhibit the ability of growers to switch to a competing LPD where different facility specifications are required. Growers have recently complained of at least one LPD penalizing growers that are trying to switch to an LPD's competition. AMS referred the complaint to the Department of Justice for enforcement under the Packers and Stockyards Act. The Department secured a consent decree that stopped the conduct, prohibited its recurrence, and compensated the harmed growers.⁶

Owing to the vertical integration in the system, LPDs exercise substantial control over growers' operations through the provision of inputs, control over production practices, their tournament settlement and comparison practices, and their level of performance in relation to communication and dispute resolution. In this rule, AMS uses the term "inputs" to mean resources supplied by LPDs, such as chicks or feed. Inputs

⁶ Final Judgment, *United States v. Koch Foods, Inc.*, No. 23-cv-15813, Dkt. No. 23 (N.D. Ill. Feb. 12, 2024). See also, Zimmerman, Sarah, "Department of Justice, "Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Koch Foods from Imposing Unfair and Anticompetitive Termination Penalties in Contracts with Chicken Growers," <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-koch-foods-imposing>.

often vary among growers, which impacts the growers' flock performance, thereby unfairly skewing relative performance measures. Likewise, LPDs determine production practices on growers' farms, and those production practices affect growers' pay. AMS uses the term "production practices" to refer to features of the on-farm production process that are determined by the LPD, such as density of bird placement (number of chicks delivered or placed with a grower per square foot of broiler housing), age at harvest, and weight at harvest. These practices greatly impact grower compensation. If LPDs fail to apply production practices evenly across grower participants in tournaments, that unevenness also unfairly skews relative performance measures.

Additionally, information asymmetry in poultry contracting arrangements contributes to market inefficiencies and unfair and deceptive practices. Asymmetric information occurs when one party to a contract has more critical information than the other party. Information asymmetry leads to market failure in the broiler production industry as growers lack the information needed to make informed business decisions, whereas LPDs know what each grower makes. This increases LPDs' to set contractual terms in ways that benefit themselves, while the grower lacks the information needed to effectively negotiate compensation for the provision of growout services or to make a comparison and switch to a competitor that offers more competitive terms. Another feature of this information asymmetry is that while LPDs know the amounts they have fixed for grower compensation, growers do not know this amount, which can span a wide range. Similarly, LPDs know the distribution of inputs as well as which growers may be grouped together for settlement in the complex, while growers cannot easily track that information. Exploiting this information asymmetry, LPDs can adjust down compensation in ways that are difficult for growers to know or competitively discipline the LPD, *e.g.*, by switching out. As highlighted by grower comments and based on AMS's experience in evaluating grower concerns in this area, without an accurate

projection of purposes, processes, and outcomes related to capital improvement programs, growers cannot accurately and effectively evaluate their allocation of resources to cover necessary expenses⁷ or engage in rational decision-making around whether to pursue (or resist) additional capital investments to improve and protect their own financial interests. Additionally, having widely variable income prevents growers from knowing which elements under their control they can adjust, and how to adjust them, to correspondingly increase compensation. This can cause growers to futilely expend extraneous resources that do not yield proportionate increases in performance and compensation.⁸ Information asymmetry also facilitates abusive practices, whereas the provision of information would help growers and AMS identify and halt those practices sooner. Disclosure is not an absolute defense. Acts or practices can be unfair or deceptive and violate section 202(a) of the Act even if they have been disclosed.

LPDs often use incomplete contracts in broiler production. When a contract is incomplete, the LPD interprets material terms in their favor as the grower lacks the ability to require a fairer interpretation. Contracts are incomplete when key terms basic to its functioning are vague or missing. Incomplete contracts magnify risks with respect to

⁷ For example, a grower without an accurate projection of future income may forgo making an expenditure that costs less long-term, *e.g.*, making a bundled purchase for two pieces of equipment at a reduced per-unit price. Instead, if they don't know if they can afford a future purchase, they purchase the minimum amount—one piece of equipment at a time at a higher unit price – to sustain operations short-term.

⁸ Numerous commenters described how they would make all of the upgrades recommended by the LPD technician and inexplicably place last compared to other growers: “Six months of down time spent installing several more thousands of dollars of equipment. We’ve grown two flocks since then and have failed to make enough money to even pay the bank each time. We’ve had to take out a loan to even survive our day-to-day life and are behind on all farm bills. We do everything the company tells us, but when we finish in the negative, were given all kinds of reasons for why our birds weren’t good enough. When speaking with other farmers and techs from other companies, we’re told that our weight and feed conversions are good, but a couple of farms seem to continuously have unexplained successful numbers. Basically, were losing money that goes to pay the ones at the top. On one flock, 12 farms were pitted against each other. Two farms performed at a level so high that isn’t believable, and three farms performed below the bottom level we can be paid at. The integrator took the bottom three farms out of the tournament calculation and compared the remaining farms without them. How fair is it that they drop the bottom farms, but not the top ones? This resulted in the farms that were close to average being pushed down and making less money because the average was raised considerably with the highflyers included and the bottom places excluded. The company tells us that this helps us, but it doesn’t. We’ve made the decision to sell because we can’t continue to put our children through this”).

the performance of the other contractual party, leading to other potential inefficiencies. For example, broiler production contracts regularly disclaim LPD responsibility for input quality or usability. Nor do they provide enforceable detail around LPD management of tournament operations, including tournament groupings or dispute resolution expectations. Moreover, the complexity of such pay systems makes it difficult for growers to fully understand the potential range of payments they are likely to receive or the ways in which LPD performance or nonperformance may affect that pay, preventing them from properly evaluating the fairness of the contract before signing. Preventing LPDs from injuring producers using these contracts is among the purposes of the Act.⁹ Contracts may be viewed as complete, with no material gaps, if the contract terms include the substantive legal, practical, and economic promises, obligations, and contingencies needed to operate in a poultry growing arrangement. These terms should be verifiable and legally enforceable.

Finally, contracts that require investments in contract-specific assets give rise to the hold-up problem. The economic concept of hold-up refers to a situation in which one or both parties to a transaction must make investments in such contract-specific assets, and the two parties may be unable to cooperate efficiently due to incomplete or asymmetric information and the inability to write, enforce, or commit to contracts. Once a party becomes locked into a transaction by making a transaction-specific investment, they lose bargaining leverage and become vulnerable to exploitation by the other party. Hold-ups occur in broiler production due to market failures associated with incomplete grower information, contract-specific investments, market power, relative capital

⁹ See, e.g., Luke Herrine, “Cutthroat Business,” U. of Alabama Legal Studies Research Paper Forthcoming, Aug. 2024, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4936628; Michael Kades, “Protecting livestock producers and chicken growers,” Washington Center for Equitable Growth (May 2022); Peter C. Carstensen, “The Packers and Stockyards Act: A History of Failure to Date,” *The CPI Antitrust Journal* (2) (2010), available at <https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf>; Herbert Hovenkamp, “Does the Packers and Stockyards Act Require Antitrust Harm?” (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at https://scholarship.law.upenn.edu/faculty_scholarship/1862.

leverage, as well as insufficient enforcement of law intended to maintain market integrity and prevent market abuses—including unfair breaches of contract. Growers are commonly unable to exercise contract rights to remedy LPD performance failures owing to the risk of hold-up and to the necessity of timely remedies when dealing with living birds. Examples from grower complaints include failure to correct improper or insufficient feed delivery, the delivery of successive inputs that are lower performing, or tournament groupings that are suspect.

B. Tournament practices

Since the 1990s, the broiler industry overwhelmingly uses the tournament system to compensate growers. As discussed above, under a tournament system the contract between the broiler grower and the LPD provides for payment to the grower based on a grouping, ranking, or comparison of broiler growers delivering broilers to the same company during a specified period (usually one week). AMS will refer to this as a settlement group. Under a typical tournament system, the broiler grower receives a fixed payment per pound of broilers produced, that LPDs often call a “base pay rate,” plus a calculation adjustment that is supposed to be based on how efficiently, compared to other growers, the grower used the resources provided by the LPD to produce each pound of broilers (informally referred to as a performance adjustment).¹⁰ LPDs typically calculate the performance adjustment primarily by comparing the feed conversion ratio (*i.e.*, the quantity of feed consumed by the flock divided by the weight of the flock delivered) to the average ratio of all growers in the tournament settlement group. Broiler growers whose feed conversion ratio is less than the average ratio for that tournament settlement group receive a bonus above the base pay rate, while those whose costs are above the

¹⁰ There is some inconsistency in the use of payment terms across broiler contracts at different companies or complexes. Most grower contracts define the term base pay rate as it is described in this paragraph. However, some contracts instead use the term base pay when referring to a fixed amount plus the performance adjustment.

average incur a discount from the base pay rate.

LPDs benefit from the tournament system in several ways. The tournament system provides LPDs control and certainty over total grower compensation as a group. For each tournament, the LPD knows and sets the total compensation that will be paid per pound of broilers produced by the group. In other words, the LPD is never concerned about paying an excess bonus for an individual flock because the LPD allocates the pool of payments among growers through performance adjustments for growers relative to the floating average performance (*i.e.*, in today's system, amounts above, or deductions from, the base pay rate). LPDs (and growers, as discussed below) also get the benefit of utilizing a floating average (relative to external shocks, such as weather, as noted below) to incentivize performance. However, the tournament system comes at a cost to growers: that of seeing payment for the services they provide reduced for reasons outside of their control yet within the control of the LPD. This outcome is magnified by the fact that growers cannot easily switch over to a competitor LPD—even if the competitor LPD offers more attractive compensation—due to the high barriers to switching imposed partly by LPDs.¹¹

LPDs have long claimed that tournaments systems reward growers financially for their experience, skill, effort, and investments in up-to-date and efficient housing and equipment.¹² The extent to which the tournament actually incentivizes additional grower

¹¹ See, *e.g.*, “Settlement Administrator Angeion Group Announces Proposed Settlement In Broiler Grow-Out Services Class Action,” PR Newswire (2024), <https://www.prnewswire.com/news-releases/settlement-administrator-angeion-group-announces-proposed-settlement-in-broiler-grow-out-services-class-action-302252706.html> (In 2024, some of the largest LPDs agreed to settle grower claims that the LPDs conspired with rivals to suppress pay by agreeing not to hire growers from each other. Multiple commenters also described the difficulty in switching.); United States Department of Justice, United States Department of Agriculture, (May 2010), Public Workshops Exploring Competition in Agriculture, <https://www.justice.gov/archives/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10>.

¹² See, *e.g.*, “How the Tournament System Works,” National Chicken Council (informing farmers that: “1 All farmers are provided the same quality of chicks, the same feed, and access to veterinary care. 2 Farmers who invest in more advanced facilities, as well as use the best management practices will likely produce higher quality chickens more efficiently. 3 Farmers receive a base pay (per their contract) and potentially a bonus, based on the health and quantity of the flock (tournament system).”); available at <https://www.chickencheck.in/faq/tournament-system/> (last accessed May 22, 2024).

effort and expenditure of resources, and whether those efforts and expenditures were necessary and fair to growers, depends on a range of factors, including the magnitude of the tournament but, in some circumstances, also the design of the housing specification (*e.g.*, the use of automation and other technology), the type of bird being raised (*e.g.*, some require special efforts), the availability of other payment incentives, and the absence of arbitrary distortions in the allocation of payments, among other factors. In theory, provided that all growers in a tournament grouping were treated materially the same and the variables within the tournament grouping were within the control of the growers, a tournament system could insulate growers to some degree against external shocks that affect all growers in the grouping. This is because, in this scenario, performance is based on an average that floats and adjusts to the particular external circumstances that all growers in the pool experienced during the period.¹³ In reality, the tournament system does not sufficiently protect from external shock. A range of shocks and factors external to the growers—some of which are within the control of the LPD—still adversely affect the overall weight of the broilers in a tournament and thereby reduce the compensation for all participating growers.

AMS has concluded that several widely adopted aspects of LPDs' operations are unfair, deceptive, or both. First, without a clearly stated base pay rate, LPDs deceive growers regarding their actual minimum pay. The complexity and unpredictability of LPDs' current operation of tournaments makes it difficult for growers to clearly understand before entering into a contract the minimum amount they could actually receive under the contract.¹⁴ For example, base pay can be, but is not commonly, a

¹³ Knoeber and Thurman show that tournaments shift most of the risks of broiler production from broiler growers to LPDs relative to a fixed payment system. See Knoeber, C.R. and W.N. Thurman. "'Don't Count Your Chickens...': Risk and Risk Shifting in the Broiler Industry," *American Journal of Agricultural Economics* 77 (August 1995) p. 486-496.

¹⁴ *United States v. Cargill Meat Solutions Corp.*, 1:22-cv-01821-ELH (D. Md. July 25, 2022) (Wayne-Sanderson), pars. 153-56, available at <https://www.justice.gov/media/1238931/dl?inline>; AMS-FTPP-22-0046-0913 ("As a third-generation contract poultry farmer, this is one of the most unstable times

guaranteed minimum pay.¹⁵ Second, if performance pay—particularly performance pay that is based on comparisons with other growers—is substantial relative to total compensation, the arbitrary lottery-like aspects in a tournament system operation will, in most circumstances, undermine its effectiveness as a compensation scheme because compensation outcomes will not reflect the effort or performance of growers, and is unfair and deceptive. Third, arbitrary or unjustly discriminatory distribution of inputs, production practices, tournament groupings, or communications and dispute resolution—as key aspects of LPD performance under the contract—also can create a system in which compensation does not reflect the effort or performance of growers, deprives growers of the full amount due for their performance, and is unfair. These provisions are meant to be complementary and mutually reinforcing. AMS explains each of these concerns in greater detail below, under section IV., “Provisions of the Final Rule.”

As noted above, many broiler growers operate in regions with just one to two LPDs.¹⁶ The local competitive conditions result in higher-risk, lower-paying grower

I have witnessed or heard about with the growers in the majority. For many years we have been paid based on the tournament system, and for several years I viewed it to be fair, but no longer. Currently, we as growers compete against each other on a weekly basis to see who has the best cost. The list used to be really tight on what cost of top versus bottom grower, but in our complex alone, that is no longer the case. The top grower is making a healthy check, while those below average are not making enough to cover the cost of production and overhead. It is no longer the ones that put in the effort of hard work that are successful in this business”); Transcript, United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshop May 21, 2010, Normal, Alabama. Lee Schrader and John Wilson, “Broiler Grower Survey Report,” in Farmers’ Legal Action Group, Assessing the Impact of LPD Practices on Contract Poultry Growers, ed. Farmers’ Legal Action Group (FLAG Survey) (September 2001). <http://www.flaginc.org/publication/assessing-the-impact-of-LPD-practices-on-contract-poultry-growers/> (In 1999, Lee Schrader of Purdue University and John Wilson of Duke University surveyed over a thousand broiler growers in ten of the largest broiler-growing states (Alabama, Arkansas, Delaware, Georgia, Maryland, Mississippi, North Carolina, South Carolina, Texas, and Virginia). Based on AMS’ experience, the survey results still provide a relevant reflection of the views of growers today, including companies’ representations about compensation to growers).

¹⁵ See “A Bird’s Eye View of How Chicken Farmers Are Paid,” National Chicken Council (informing farmers that: “All farmers are guaranteed a base pay from the chicken company per their contract.”; “No matter what, farmers get paid.”; and “Bonuses are given to farmers who raise healthy flocks and invest in their farm. This is referred to as the tournament system.”); available at <https://www.chickencheck.in/faq/tournament-system/> (last accessed May 22, 2024).

¹⁶ MacDonald, James M. 2014, Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, USDA Economic Research Service, https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=1829.6 (Half of respondents with two integrators in their area and over a third of those with three integrators asserted that they could not shift to another integrator).

contracts that commonly subject the grower to arbitrary and unfair payment; in particular, these contracts do not guarantee growers an adequate minimum base pay rate, flock placements and stocking densities, or length of contract in relation to the loan obligations commonly necessary to engage in broiler growing. Because LPDs control the distribution of inputs and assignment of production practices, growers repeatedly tell AMS that they experience unfair and deceptive operation of the contract. The typical tournament contract introduces levels of complexity and uncertainty for growers in the calculation of their compensation and in evaluating growers' return on investments so as to render the payment system unfair and deceptive. Furthermore, under that payment system, growers are commonly unable to discover unscrupulous conduct by LPDs, compare offers from competing LPDs, and plan and manage their businesses effectively. LPDs also say growers will operate "independently"—*i.e.*, their individual effort will produce commensurate higher compensation—though in practice their comparison-based compensation pay is heavily dependent on the LPD's inputs and comparison method, close supervision, responsiveness, and the performance of others in their LPD-determined settlement group.

AMS concludes that the "incentive system" in its current form does not excuse the unfair and deceptive operation of tournament systems because factors outside of the grower's control impact performance. Without adequate regulation under the current system, LPDs fail to provide fair compensation for the grower's effort and deceive the grower regarding tournament operation and pay.

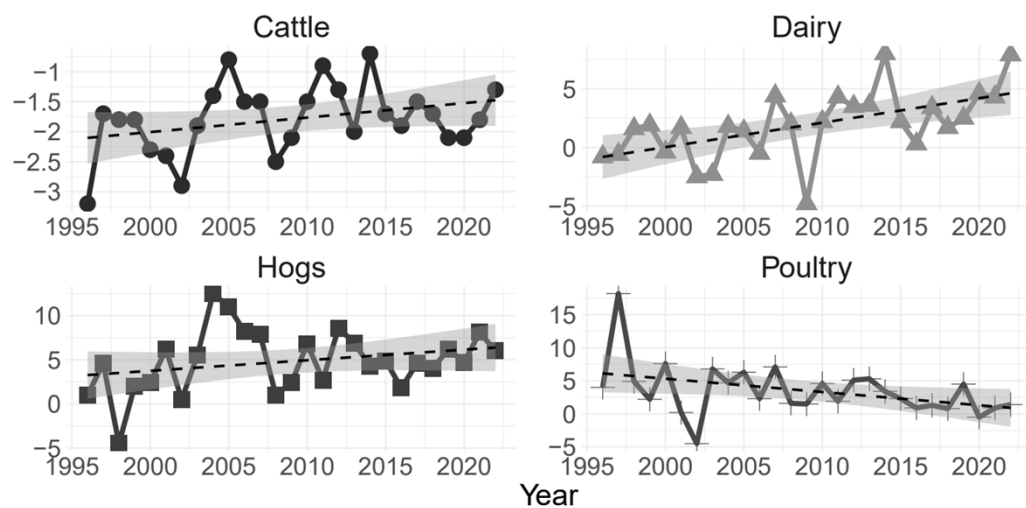
C. Debt and financial vulnerabilities

Requests by LPDs for growers to make additional capital investments are a pervasive part of the broiler growing industry such that Congress required that LPDs disclose the possibility of such requests to growers in their contracts (7 U.S.C. 197a(b)). These additional capital investment requests occur against a backdrop of significant

financial vulnerability for growers, which implicates issues of potential unfairness and deception. Under this system of capital improvement, the LPD requests—and indeed, in practice, largely requires—growers to invest in housing improvements with little to no information regarding the purposes, processes, outcomes, or likely return to be achieved by the investment. These omissions of material information critical to growers’ decision-making is unfair and deceptive. These additional capital investments are highly particularized, which leaves the growers investing in projects and investments that may be used only for growing broilers with a particular LPD. Growers have long complained to AMS that they face a perpetual cycle of debt owing to successive requests by LPDs for additional capital investments, suppressing their returns and leaving them even more vulnerable to the range of abuses outlined above.

Indeed, the Figures below show a declining rate of return on assets and higher debt to asset ratios carried by poultry operations compared to cattle, dairy, and hog operations.

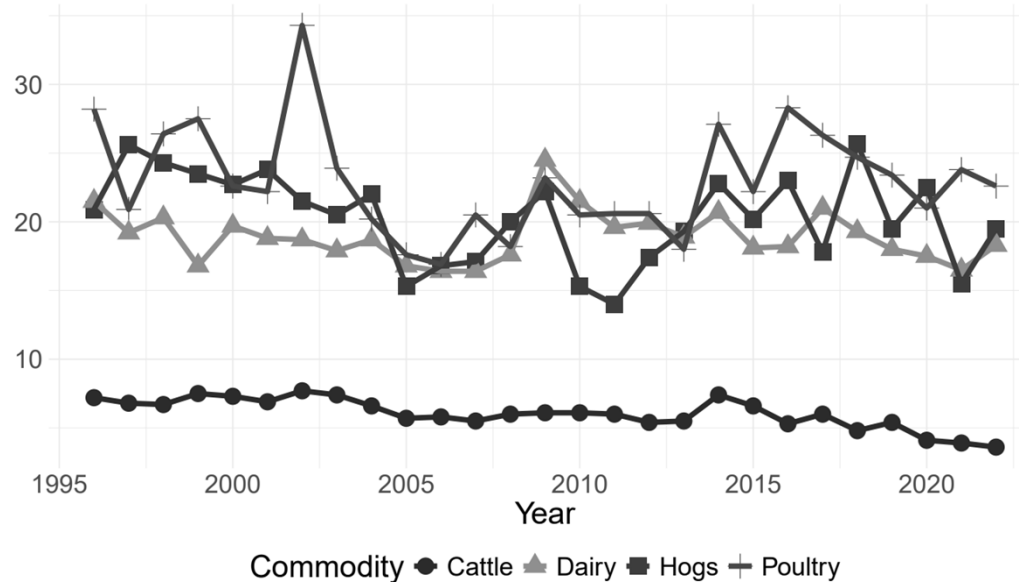
Figure 1: Rate of return on equity for poultry growers has been declining for growers from around 5 percent in 1995 to 2.5 percent in 2022, compared to upward-trending returns for cattle, dairy, and hog producers (with values scaled freely to show the trend in each panel)*



* U.S. Department of Agriculture, Economic Research Service. ARMS Farm Financial and Crop Production Practices (1996 – 2022) (Analysts retrieved information through the ARMS API. Poultry farms showed declining net farm income; livestock income (*e.g.*, receipts from broiler contract fees); lower working capital to expense ratio, which reached negative values in 2016 and 2018; and declining return on farm equity. For conciseness, analysts only present figures showing return on farm equity and debt to asset

ratios.)

Figure 2: Debt to asset ratio for poultry growers exceeds that for cattle, dairy, and hog producers*



*U.S. Department of Agriculture, Economic Research Service. ARMS Farm Financial and Crop Production Practices (1996 – 2022) (Analysts retrieved information through the ARMS API. Poultry farms showed declining net farm income; livestock income (e.g., receipts from broiler contract fees); lower working capital to expense ratio, which reached negative values in 2016 and 2018; and declining return on farm equity. For conciseness, analysts only present figures showing return on farm equity and debt to asset ratios.)

The higher debt to asset ratios carried by poultry operations are driven, in part, by LPD requests for additional capital investments and are also facilitated, partially, by loan guarantees authorized under Federal law. Additionally, the gains from upgrades commonly flow to LPDs, and so growers' higher debt levels are not always supported by efficiency gains that would result from the additional capital investments. Under those circumstances and because of the willingness of lenders to loan due to guarantees, when growers are asked by LPDs to make additional capital investments without critical information about their purposes, processes, or outcomes, they are deprived of key information relating to those decisions. This practice is both deceptive and unfair because it deprives growers of their ability to identify fundamentally coercive or otherwise unfair capital improvement programs at an early enough time to seek AMS enforcement assistance in halting them, if appropriate.

Accordingly, AMS adopts this final rule prohibiting practices that, in AMS's view, violate the Act. The overall tournament system is highly problematic for poultry growers, and it is crucial to implement some guardrails for the industry to prevent unfair and deceptive contracting practices.

III. Summary of the Proposed Rule and Changes in the Final Rule

In the June 2024 proposed rule, AMS proposed amending 9 CFR 201, subpart N, by adding several new provisions: § 201.106 regarding LPD responsibilities for the design of broiler grower compensation arrangements; § 201.110 regarding the fair operation of broiler grower ranking systems; § 201.112 regarding disclosure requirements for LPDs when requesting additional capital investments from broiler growers; and § 201.290 regarding severability.

AMS proposed adding § 201.106, titled "Broiler Grower Compensation Design," to prohibit the reduction, or discounting, of any compensation rate under the broiler growing arrangement based on a grower's performance relative to other growers. The proposed provision would have required broiler grower arrangements to clearly state the grower's rate of compensation and not reduce that rate based on the grower's performance relative to other growers. The arrangement could provide for the rate of compensation to be increased based on that comparison.

AMS proposed adding § 201.110, titled "Operation of Broiler Grower Ranking Systems," to prevent unfair and deceptive practices in LPDs' operation of ranking systems for broiler growers. Proposed paragraph (a)(1) would have required LPDs to design and operate their poultry grower ranking system to provide a fair comparison among growers, and under proposed paragraph (a)(2), the Secretary would evaluate specific factors to determine if the poultry grower ranking system is reasonably designed to deliver a fair comparison among growers. Proposed § 201.110(a)(3) also included a requirement that, when LPDs could not conduct a fair comparison, they must compensate

growers through a non-comparison method. Proposed paragraph (b)(1) would have required documentation regarding the processes (policies and procedures) the LPDs must establish and maintain for the design and operation of poultry grower ranking systems for broiler growers that is consistent with the duty of fair comparison. Under proposed paragraph (b)(2), LPDs would have been required to review their compliance with these processes, and under proposed paragraph (b)(3) they would have been required to retain all written records relevant to their compliance for no less than 5 years from the date of record creation.

AMS proposed adding § 201.112, titled “Broiler Grower Capital Improvement Disclosure Document,” detailing in proposed paragraph (a) that an LPD would be required to provide the grower with a Capital Improvement Disclosure Document (Disclosure Document) upon requesting that the grower make an additional capital investment. Paragraph (b) of the proposed regulation described the disclosures that the LPD would be required to include in the Disclosure Document. These disclosures included a justification of the request, financial incentives for the grower, specifications for construction, and a thorough analysis of the grower’s projected returns.

Lastly, AMS proposed adding § 201.290, titled “Severability,” to ensure that if any provision of subpart N or component of any provision is declared invalid, or if the applicability of any of these provisions to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected. Such a provision is typical in AMS regulations that cover several different topics and was proposed here as a matter of housekeeping.

Upon consideration of public comments on the proposed rule, AMS has modified the proposed provisions as follows:

- Revised proposed § 201.106 by designating the proposed text as paragraph (a) and adding the paragraph heading “Rate transparency.”

- Added a new § 201.106(b), “Excessive variability,” that establishes a presumptive violation of the Act when aggregate gross annual payments based upon a grouping, ranking, or comparison of growers exceeds 25 percent of total gross payments to growers in a complex on an annual-calendar year basis.

- Added a new § 201.106(c), “Transition,” that requires that LPDs, for each of the three calendar years commencing with and including the rule’s effective date, submit to AMS a copy of the prior and modified contract and any LPD Disclosure Document prepared under § 201.102 for any modified or renewed contracts under specified conditions.

- Simplified proposed § 201.110(b)(1)(i) and (ii) (concerning LPDs’ processes for determining inputs and production practices) by removing the subparagraphs that itemized each component of the required processes.

- Simplified proposed § 201.110(b)(1)(iii) (concerning LPDs’ processes for grower comparison flexibility) by removing subparagraphs (A) through (C) and placing those requirements into three simple paragraphs: (b)(1)(iii), “League composition;” (b)(1)(iv), “Evaluation period;” and (b)(1)(v), “Non-comparison.” Accordingly, AMS also redesignated proposed § 201.110(b)(1)(iv), “Communication and cooperation,” as paragraph (b)(1)(vi).

- Removed proposed § 201.110(b)(2), “Compliance review” and redesignated proposed § 201.110(b)(3), “Record retention,” as paragraph (b)(2).

- Revised proposed § 201.112(a) and (b) to include the paragraph headings “Disclosure requirement” and “Disclosure contents,” respectively.

- Revised proposed § 201.112(b)(1) through (3) to remove the term “relevant” as a technical change, along with conforming grammatical edits.

- Revised proposed § 201.112(b)(5) to clarify that, in addition to disclosing any required or approved manufacturers or vendors, the Capital Improvement Disclosure

Document must disclose all financial benefits, if any, that the LPD or other affiliated persons receives from the use of the required or approved manufacturer or vendor.

- Revised proposed § 201.112(b)(6) as a technical stylistic change.
- Added a new § 201.112(c) to require the LPDs to make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Capital Improvement Disclosure Document.

Section IV. below explains in detail AMS's reasons for making these changes.

IV. Provisions of the Final Rule

Throughout this final rule, AMS's analysis of unfair and deceptive trade practices in poultry contracts is informed by prior P&S Act case law, States' unfair and deceptive practice laws, and, in particular, the Federal Trade Commission (FTC)'s encapsulation of principles governing unfairness, unfair methods of competition, and deception.¹⁷ AMS looks to the FTC's policy statements owing to the FTC's extensive experience enforcing prohibitions against unfair practices, unfair methods of competition, and deception arising under the FTC Act, which are similar to provisions prohibiting unfair and deceptive practices under section 202(a) of the P&S Act. Like section 202(a) of the Act, section 5 of the Federal Trade Commission (FTC) Act also prohibits unfair and deceptive practices and unfair methods of competition. In 1980, 1983, and 2022, the FTC adopted the aforementioned policy statements summarizing its longstanding approaches to these matters under its cases. While recognizing that the P&S Act is broader than the FTC Act,

¹⁷ Federal Trade Commission, Policy Statement on Unfairness, 1980, <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> (last accessed Oct. 2024); Federal Trade Commission, Policy Statement on Deception, 1983 available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (last accessed Oct. 2024); Federal Trade Commission: Policy Statement on the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Nov. 2022, available at <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission> (last accessed Oct. 2024).

Spencer Livestock Comm'n Co. v. USDA, 841 F.2d 1451, 1455 (9th Cir. 1988); *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968) ("Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission (15 U.S.C. 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic").

AMS references these policy statements because they offer useful guidance owing to the similarity of the statutory provisions and case law histories.¹⁸ In addition, AMS recognizes the benefits to the practical application of this final rule by grounding it on the well-understood principles of unfairness, unfair methods of competition, and deception as identified in the FTC policy statements. It is for these reasons that the FTC Act has, in part, informed this final rule.

A. Broiler Grower Compensation Design (§ 201.106)

AMS is finalizing new § 201.106, “Broiler grower compensation design,” with two notable changes from the proposed rule. In the final rule, AMS is retaining § 201.106 as proposed and designating it as paragraph (a), “Rate transparency.” AMS is adding paragraph (b), “Excessive variability,” and paragraph (c), “Transition.” Paragraph (b) adds a presumption against excessive variability in performance compensation to growers competing in a tournament. Paragraph (c) provides for grower protections during the transition from the existing payment systems to systems compliant with this final rule. Each paragraph will be discussed further below.

Most large LPDs today include a tournament component as part of their grower compensation arrangements. Under this type of arrangement, if a grower’s feed conversion ratio (*i.e.*, the quantity of feed consumed by the flock divided by the weight of the flock delivered) is above the average of other growers in the tournament, the grower receives a bonus; if the grower is below average, the LPD reduces the grower’s compensation. Under the tournament system, the contract between the grower and LPD provides for payment to the grower based on a grouping, ranking, or comparison of growers delivering broilers to the same company during a specified period. These pay rates are generally expressed in cents per pound. Applying these adjustments, whether

¹⁸ Michael Kades, “Protecting livestock producers and chicken growers,” Washington Center for Equitable Growth (May 2022).

positive or negative, significantly affects growers' effective rates of compensation and net income.

In its current form, the tournament system operates unfairly and deceptively. Without clearly stated base rates of compensation, the complexity of the tournament makes it difficult for growers to clearly understand the minimum amount they could be paid. Moreover, compensation based on relative performance when LPDs control the operation of the tournament (such as the distribution of inputs and assignment of production practices) creates the potential for growers' performance to be determined by factors outside their control, thereby making the tournament system an ineffective incentive system that is arbitrary and unfair to growers. The tournament system also introduces considerable complexity and uncertainty for growers in calculating their anticipated total compensation and evaluating the potential return on their investments. Furthermore, if the comparison-compensation factor (*i.e.*, the bonus or deduction) is a large percentage of total compensation, that variance in total grower compensation is no longer a legitimate business but simply shifts economic risk from processors onto poultry growers without a demonstrable countervailing benefit. Without additional guardrails, the current tournament system creates significant risk of deception or unfairness for growers under the Act.

AMS has not found any evidence that poultry tournament systems that include deductions from the base pay rate or excessive variability in grower compensation provide a benefit to growers or competition in the market for grower services that outweighs the harm to growers. Deductions in other livestock contracts commonly reflect performance attributes of the animal itself, which is owned by the producer. Here, the producer provides a service with no ownership interest in or role in the selection of the animal. These deceptive and unfair payment practices create an unfair competitive advantage for LPDs at the expense of growers. Therefore, the widespread adoption of

these types of contracts has frustrated fair competition, instead of enhancing it. Such discounting and pay variability also reflect the market power and bargaining power of the LPD in dictating contract terms.

Section 201.106 will provide growers with greater clarity and protection regarding the minimum payments they can expect under broiler growing arrangements. This rule prohibits a range of unlawful behavior by establishing a threshold presumption against excessive pay variability, establishing a transition period to preserve existing pay, and making minimum pay clear for growers. This rule will better enable growers to compare contract terms, evaluate revenue generation, and assess the value of additional capital investments.

i. Section 201.106(a) – Rate transparency

AMS is finalizing new § 201.106(a), which prohibits the reduction of any rate of compensation under the broiler growing arrangement on account of the grower's grouping, ranking, or comparison to other growers. This provision is identical to that which was proposed, except that the provision is now designated paragraph (a), with the paragraph heading "Rate transparency." Under this provision, the broiler growing arrangement must clearly state the compensation rate. The arrangement may not provide for mechanisms or calculations that would reduce the compensation rate based on the grower's performance relative to other growers, but it can provide for the rate to be increased based on the grower's performance relative to others. The broiler growing arrangement could provide for the compensation rate to be increased based on the broiler grower's performance relative to others, but in no event could the rate be decreased or discounted by that comparison.

"Rate of compensation" refers to any payment amount that the LPD utilizes to compensate the grower under a broiler growing arrangement, which could include "base pay," "minimum pay," or any other rate defined in the contract. That rate would have to

be prominently and clearly defined as the guaranteed level of pay a grower will receive if the grower performs to the minimum specifications of the relevant provisions of the contract. To the extent that a broiler growing arrangement had more than one rate of compensation, none of the rates could be reduced or discounted by a comparison. Under existing AMS regulations, a broiler growing arrangement must include all payment terms in the contract (9 CFR 201.100(c)(2)).

Under section 202 of the P&S Act, AMS concludes that the practice of discounting disclosed “base” pay rates in broiler contracts is an unfair and deceptive practice. This practice forces growers to estimate potential earnings using contractually stated “base” pay rates that, under the tournament system, only half of the settlement group can achieve. This unfair and deceptive practice obscures the value of the contract, thereby frustrating comparisons with competing LPD contracts in markets where growers are fortunate enough to have more than one or two LPDs to contract with.

AMS expects that, under this regulation, LPDs will still be able to elicit a competitive level of performance using a broiler compensation design that conforms to the requirements of this final rule. The LPD could reward performance for feed efficiency relative to the growers in the settlement with a minimum base pay rate per pound and an upward adjustment to the payment formula. Depending upon the facts and circumstances, mere compliance with this regulation does not absolve an LPD of its other legal obligations. A compensation structure without a penalty or reduction from a true guaranteed minimum pay rate may still—if the facts demonstrate it—result in other violations of the Act.

ii. Section 201.106(b) – Excessive variability

In the final rule, AMS is adding new paragraph (b), “Excessive variability,” which establishes a presumption that an LPD has violated section 202 of the Act when aggregate gross annual payments based upon a grouping, ranking, or comparison of

growers exceed 25 percent of total gross payments to growers in a complex on an annual-calendar year basis. AMS is adopting this approach because excessive variance in total grower compensation arising from comparison-based compensation would, generally, create excessive variability that is deceptive because growers cannot reasonably assess the risk they are undertaking or forecast, predict, or budget their business operations. Further, excessive pay variance makes compensation dependent on arbitrary criteria, random factors, or other criteria that the grower cannot control or affect. When the comparison performance pay too substantially affects compensation, it is unfair.

When growers perform reasonably under the terms of the production agreement, excessive variability in performance pay arises at least in part due to LPD-controlled factors or unavoidable inherent natural variability. These factors are outside of the grower's control and cannot be completely offset by grower effort or skill. LPDs design ranking systems to allocate grower payments based upon grower effort and skill. When factors other than grower effort and skill are comingled with the metrics used to allocate pay, the practice is ripe for potential abuse and unfairness because excessive variability in performance payments unfairly reduces compensation to growers. This unfairness to growers is particularly pronounced owing to high indebtedness among growers, which leaves them more financially vulnerable to harms from excessive income variability that does not reasonably reflect their own efforts.¹⁹ That pay variability also frustrates growers' ability to accurately assess, or reasonably control, their rates of compensation and the overall financial risk they undertake under a broiler growing arrangement, which is particularly problematic given the risk they bear. The injury is not offset by attendant benefits, since the practice tends toward distorting the market's true pay amount and reducing growers' ability to accurately assess, or reasonably control, their finances and

¹⁹ In contrast to contributions by the grower, LPDs contribute much more significantly to overall performance by furnishing the inputs, *e.g.*, genetics, feed, nutrition, sex of chicks, and close supervision of the grower's managing production.

make informed business decisions.

Though § 201.106(a) addresses the problem of reductions to rates of compensation that arise owing to groupings, rankings, or comparisons of growers, it does not alleviate all potentially unfair aspects of the tournament system or of the integrated model of broiler production. The proposed rule indicated that AMS intended to engage in case-by-case enforcement to remedy other aspects of tournament system unfairness, including issues arising from excessive variability in payments. In addition to a prohibition on discounting rates of compensation, the proposed rule particularly highlighted the potential importance of a 25 percent presumption on total compensation based on a grouping, ranking, or a comparison (the tournament) to total of base pay rate plus performance compensation. As AMS indicated in the proposed rule, this approach could alleviate extreme variability as an aspect of existing tournament system unfairness.

In the proposed rule, AMS included questions containing additional proposals. One such proposal solicited comment on whether it is presumptively unfair for comparison-based compensation to equal or exceed 25 percent of total (base pay rate plus comparison-based) compensation for any grower and asked a range of questions around the appropriateness of the specific threshold, how to calculate it, and how it would affect the industry.²⁰ These questions included highlighting the role of the 25 percent presumption as a potentially binding constraint, and how LPDs might respond to the prohibition introduced in § 201.106(a) by modifying the compensation structures in grower contracts. AMS's questions indicated that it could raise base pay and/or limit performance payments—thus reducing the difference between top and bottom performing growers—without increasing total grower compensation expenditures. It also left open the possibility that LPDs could potentially adjust their compensation structures in other ways, such as by providing non-comparison-based incentives to growers they might seek

²⁰ 89 FR 49002, 49011-49012 (June 10, 2024).

to reward (such as per pound or per square foot compensation for housing known to provide efficiencies to the LPD) or deploy other incentives (such as fixed performance bonuses).

In response to the proposed rule, growers and advocate commenters overwhelmingly supported the need for additional limitations on excessive variability in payment arising from rates of compensation, with a particularly strong endorsement of the 25 percent limitation on performance. Commenters underscored the importance of this limitation for some of the reasons that AMS indicated in the proposed rule: that it is necessary to protect growers from unfair reductions in payments.

To incentivize grower effort, LPDs allocate grower pay using relative performance metrics; however, grower effort alone is an insufficient determinant of grower performance. Growers' performance depends on many factors, some of which are under the control of growers while others are not. Some known factors, including a grower's skill and effort, are within a grower's control. Other factors are outside a grower's control, such as feed quality, chick quality, and the skill or other efforts of other growers in the comparison group. Even if all these known factors are accounted for, there is still some unavoidable inherent natural variation in performance that would explain growers' performance volatility, flock to flock, even if all the known factors remain constant. The nature of this variability creates harm to growers in reduced performance payments.

The use of flock performance metrics, specifically feed conversion, as a proxy to grower effort is imperfect. Feed conversion itself is affected by variables beyond grower effort. AMS is not aware of existing technological innovations that could serve to better isolate grower effort, which is exclusively under grower control. That is not to say flock performance metrics serve no purpose in assessment of grower effort and allocation of grower payments. AMS's experience in analyzing performance payments suggest that

ranking systems can be a useful and reasonably equitable mechanism for pay allocation with proper regulation and in proper magnitude. Within a reasonably contained range—*i.e.*, presumptively 25 percent of total compensation—the tournament may offer a reasonable benefit to growers by enabling LPDs to efficiently measure grower performance and guard against natural forms of variability that would arise were compensation fixed rather than floating (*i.e.*, the comparison-based average of growers). Yet at too high a level, the potential harms of comparison-based compensation (performance pay dominating grower pay allocation without rewarding commensurate differences in effort) outweigh the potential benefits. That is unfair under section 202(a) of the Act because compensation under the tournament becomes correlated to input distribution (and other circumstances under the control of the LPD, such as flock production practices or responsiveness to complaints), which is commonly arbitrary—or, in some cases when not arbitrary, can be punitive. Some growers who comply with the contract and are unfairly penalized for factors beyond their control suffer unavoidable harm; they are denied the full amount due for their growout services. While growers can benefit from participation in the tournament, excessive pay variability can cancel out those benefits as they are outweighed by the harms.

Based on previous analysis of grower compensation data for a small sample of broiler complexes, AMS is not aware of any complex with performance payments that are as much as 26 percent of total payments. Additionally, in *United States v. Cargill Meat Solutions Corp.*, commonly referred to as “Wayne-Sanderson,” the final judgment also contains a 25 percent limitation on performance payments.²¹ The Wayne-Sanderson settlement is significant because it was agreed to by one of the largest market participants and has not caused any demonstrable harm to the company or to the market, nor is there

²¹ *United States v. Cargill Meat Solutions Corp.*, 1:22-cv-01821-ELH (D. Md. July 25, 2022).

any evidence that it disincentivized grower effort or lowered performance. While Wayne-Sanderson had agreed to a 25 percent limitation on performance payments, this final rule establishes that performance payments above 25 percent are *presumed* to be unfair. This is because performance pay variability causes injury to growers when the magnitude of performance pay is so excessive. That is, the performance pay significantly affects whether the grower is successful, yet the amount depends on unavoidable variance and does not reflect grower performance. In those circumstances, compensation no longer correlates to factors within grower control, such as their effort and expertise. This deprives growers of the value, both real and expected, of their services. The vast majority of commenters who addressed the topic of comparison-based compensation endorsed the idea of 25 percent as an appropriate level for a presumption of this type.

We note that this presumption will provide guardrails in helping LPDs set and maintain performance pay standards that achieve appropriate goals, such as rewarding effort and skill against a floating average that adjusts for common circumstances, like weather, without unduly denying growers the expected value of their growout services. This clarity will guide LPDs that need to modify existing contracts to comply with this final rule, such as with § 201.106(a). For example, absent the existence of § 201.106(b), LPDs could comply with § 201.106(a) by decreasing base pay and excessively increasing the proportion of pay that is dependent on performance compensation. Such contract modifications would supercharge pay variance in the tournament while penalizing growers under the guise of complying with reforms designed to improve transparency and fairness. The presumption under § 201.106(b) helps ensure continuity in compensation at an aggregate level because it guards against excessive variability of performance pay relative to total pay. To stay within the presumptive boundary set by § 201.106(b), an LPD must set a reasonable compensation rate for any new base payment under the contract. AMS underscores that nothing in the rule prevents LPDs from

providing other forms of incentive compensation to growers for reasons other than relative performance, such as payments for improved facilities or utility subsidies. Overall, the 25 percent presumption against excessive variability is useful to provide clarity and consistency around when AMS may seek to investigate for case-by-case compliance and enhances the fairness and transparency of compensation rates in broiler growing arrangements. As such, it reflects a logical outgrowth of the proposed rule.

Separately, AMS notes that it also expects to examine for excessive variability other forms of performance payments that are based on how efficiently a grower uses inputs supplied by the LPD: such payments could emerge as a method for evading this provision's purpose. Examples of such performance payment systems include what are commonly called fixed metric performance payments, which predate the current tournament, whereby growers' performance payments are tied to their individual achievement of certain fixed metrics around efficient use of inputs. AMS expects to examine these types of performance systems for excessive variability for similar risks of unfairness, including because the LPD provides the inputs and production practices and in those circumstances would be setting the fixed metrics.

In review of the presumption, AMS will consider other complex-specific incentives as requested by the LPD that would otherwise not be appropriate to consider as part of the rates that make up base payment. For example, energy incentives may be considered differently because they vary significantly based on geographic location, and so would result in somewhat different application of the provision for growers at different complexes. Where a relatively high degree of variability in performance pay exists, even within the 25 percent, due in part to energy incentive payments, AMS may examine whether the tournament is unfair.

To rebut the presumption of unfairness triggered when comparison compensation payments exceed 25 percent of total compensation, the LPD may affirmatively

demonstrate (i) that a given tournament's compensation system allows all growers to be economically successful without the need to receive any payments based upon a grouping, ranking, or comparison of growers that exceed the amount covered by the presumption; (ii) that payments to all growers that exceed the amount covered by the presumption are sufficient to reflect the increased risk of variability to all growers under that system; and (iii) that the system is not otherwise unfair or deceptive. The Agency would examine any rebuttal on a case-by-case basis to comport with the purposes of the presumption to prevent LPDs from engaging in unfair or deceptive practices or devices that harm poultry growers.

AMS adopted this provision after considering the case-by-case presumption set forth in the proposed rule and public comments that urged AMS to instead establish a greater limitation on excessive variability of payments arising from performance, especially comparison-based, compensation. Public comment regarding this provision, and AMS's response to those comments, are discussed in greater detail below in section V., "Comment Analysis."

iii. Section 201.106(c) - Transition

In the final rule, AMS is also adding new § 201.106(c), which requires that, for any contract modification or renewal subject to § 201.106(a) that results in a grower receiving less than the prior year's complex-wide average gross payment, the LPD must submit a copy of the prior contract and the modified contract, as well as any LPD Disclosure Document prepared under § 201.102 with respect to the prior and the modified contract, to the Secretary.

AMS will monitor contracts to identify signs of the unfair exercise of LPD bargaining power during this transition period. These could include, for example, a predatory method of competition whereby an LPD seeks to lower pay across the entire complex or discriminatory or retaliatory conduct that seeks to lower the pay of some

subset of growers. Unfair conduct by the LPD could potentially arise where the LPD seeks to undermine contractually agreed-upon earnings from the previous contract irrespective of the tournament. One way for AMS to identify such conduct could be through LPD Disclosure Documents (currently required under existing 9 CFR 201.102), which would be required if LPDs modify or replace contracts in seeking compliance with this rule. The record-keeping and reporting requirements in this final rule will further help identify any potential illicit exertions of market power by allowing AMS to closely scrutinize contract modifications that jeopardize grower welfare during the transition period.

In keeping with the requirements in § 201.102(d)(2), AMS expects LPDs to explain why the annual gross payment averages for the previous five years may not provide an accurate representation of projected future payments. AMS also expects a distinct explanation of how any changes the LPD is proposing under the new contract are necessary to comply each part of final § 201.106. That is, changes made to comply with § 201.106(a) and (b) should be explained. AMS strongly encourages LPDs to explain changes needed to comply with § 201.106(b) first, and then apply a conversion scale from whatever updated approach is adopted to comply with § 201.106(a).

AMS will evaluate the reported contract modifications and associated documentation to assess grower welfare, given that growers will be particularly susceptible to economic hold-up concerns. In particular, AMS will consider the following variables: (1) the number of flock placements annually; (2) the stocking density; and (3) the distributional range of payments. If, upon consideration of these variables, AMS identifies contract modifications that negatively impact grower welfare or that include supply reductions from the complex, the Agency will closely scrutinize the modifications, including rates, for fairness and reasonableness.

It is crucial that growers are meaningfully informed about the terms of the grower

arrangements and the expected compensation for their services so that they can make financially sound decisions and identify potential economic hold-up. The reporting requirements will only be in effect for three years including and from the effective date of this rule.

During the three-year transition period, LPDs must evaluate average grower compensation at the complex level for each of the three calendar years commencing with and including the rule's effective date to determine if they need to submit their contract to AMS for review. The rule requires LPDs to use the average grower compensation across the complex, because this analysis shows if an LPD has cut grower compensation overall. The rule uses averages because performance-based compensation is unpredictable on a grower-by-grower basis and because using total grower compensation at the complex would be overinclusive. For example, grower turnover might skew an analysis based on total grower compensation. This makes the § 201.106(c) method of evaluation comparable to how unfair levels of performance-based compensation are defined under § 201.106(b).

AMS chose a transition period of three years for several reasons. First, it is nearly impossible to evaluate the changes to grower pay made to contracts within 180 days or even a single year with any level of confidence. Many contracts are three, five, or ten years in length, so it may take up to a year of payments to even begin evaluating the financial effect of changes. Reviewing payments within a 180-day period may not indicate what growers would earn in a year and would be limited in scope and value; any conclusions based on that limited review would be speculative, and violations of the Act cannot be based on speculation. After a full year of operation following contract modification, the realization of grower performance outcomes and practical application of the compensation structure are known and translated into actual grower payments. This will facilitate AMS's analysis of the actual distribution of grower payments and

overall level of compensation that resulted from the new compensation structure and allow for a more fulsome evaluation of fairness concerns. It also allows AMS to consider the market environment as context for LPD actions.

Additionally, this new rule may necessitate adjustments to the compensation structures used in grower contracts, and it will take time for growers to become used to the new regulation. AMS needs to look at how the overall market is adjusting to this new reality and prevent evasion during that adjustment period. For example, an LPD may make a series of small contract changes, which would require AMS to review the overall market adjustments, not just the initial changes. Failure to capture the full implications of the transition period would put growers at risk from LPD market power and bargaining imbalances between LPDs and growers.

AMS underscores that this is a monitoring and reporting requirement, owing to the ongoing risk to growers that the contracts could be modified and re-modified during this transition period. This contract review will help the Agency decide whether to conduct more specific oversight and enforcement while the new regulatory regime is implemented.

Three years is the period of financial information that banks request from borrowers, such as growers, and so it provides a reasonable period for AMS to engage in these market-monitoring activities. After three years, AMS agents will continue to monitor contracts and ensure they are following the requirements of this final rule, but LPDs will not need to submit contract modifications.

In the proposed rule, we asked for public comment on this issue, and received overall support for a provision to protect growers that rely on existing contracts from holdups and potential market abuse. Specifically, we asked the following question: “To minimize transition risks to growers, should AMS include a requirement that LPDs submit to AMS for review any contracts modified or revised to comply with new §

201.106?”¹⁷ The comments received in response to this specific question were mixed in their support and are addressed below in sections V.A.iv. and v.

Because the Secretary will subject the updated contracts to close scrutiny for unfairness, the Secretary would seek access to the dealer’s business records. During any investigation, AMS may examine any changes to average annual gross payment per pound for growers in the complex and any changes to average payment per square foot increased. Each investigation will consider the individual facts and circumstances of each situation, as these considerations are important in examining whether growers were held at least no worse off during the contract modification process. Although the final rule is designed to benefit growers and reduce unfair and deceptive practices, growers face a significant risk of unfair practices owing to the risk of hold-up when they may be required to change their contracts so that LPDs comply with this rule. Based on AMS’s experience implementing rules, LPDs may seek during any compliance and implementation period to extract changes to the contract unrelated to the regulatory requirements of this rule. The purpose of providing contracts to AMS is to identify unfair practices or otherwise unlawful reductions to payment that are favorable to LPDs and harmful to growers.

B. Operation of Broiler Grower Ranking Systems (§ 201.110)

AMS is finalizing new § 201.110, “Operation of broiler grower ranking systems,” which regulates how LPDs operate ranking systems (*i.e.*, tournaments) for contract broiler growers, establishing a duty of fair comparison when calculating comparison-based compensation among a group of poultry growers in a settlement group. This section contains factors for the Secretary to consider when evaluating whether LPDs have abided by the duty of fair comparison requirement. When LPDs are unable to make a fair comparison for one or more growers, they are required to use a non-comparison compensation method as specified in the contract. LPDs are required to document how

they design and operate their poultry grower ranking systems in a manner that is consistent with the duty of fair comparison. The documentation must show that LPDs take measures to mitigate the impact of inequitable distribution of inputs and flock production practices on grower performance and, hence, comparison-based compensation.

The purpose of the rule is to ensure that comparison-based compensation reflects grower effort, not factors that injure the grower, such as feed or chick quality or timing of feed delivery that are outside of grower control but within the control of LPDs. The problem this rule seeks to address is how LPDs manage variation in quality or timing of inputs, flock production practices, and how LPDs handle growers' concerns (*i.e.*, groupings, responsiveness to problems). AMS certainly believes that rewarding grower effort is fair, but unfair and deceptive comparison systems are not.

For example, breeding hens have a lifecycle of 50 weeks. They produce optimal chicks between weeks 20–34, but they also produce chicks that have value outside the optimal window. The LPD has a financial incentive to grow all these chicks to maturity, and thus will distribute a mix of higher and lower quality chicks in any one settlement period to its growers. Those growers receiving a higher proportion of suboptimal chicks are disadvantaged in a relative comparison to growers who received a higher proportion of optimal chicks.

In theory, LPDs would provide uniformly high-quality inputs (such as chicks and feed) and appropriate production practices (such as flock density) to all growers to ensure maximum efficiency, product quality, and profit. LPDs would also ensure tournament groupings are reasonably random or otherwise not biased and would also reasonably control for problems that growers faced (such as accidental delivery of the wrong feed). However, inputs are natural systems and, therefore, variation in input quality necessarily exists. This variation in input quality affects performance. Moreover, human error can be

present in vertically integrated systems as well, for example, the accidental delivery of feed designed for older birds. LPDs want to obtain the full value from all usable inputs and are not inclined to dispose of lower quality chicks or feed to ensure growers only get the highest quality inputs. Thus, LPDs routinely distribute lower quality, lesser performing inputs to their contract growers, even though growers who receive those inputs will likely receive lower compensation than their peer growers in the same tournament that receive higher quality, higher performing inputs. Within a given poultry complex (group of growers serving a single processing plant), a significant share of each grower's compensation is determined by their rank in tournaments between growers at the complex, even though a proportion of performance variation across growers is attributable to variation in inputs, including feed and chick quality, timing of feed delivery and flock pick-ups.

LPDs purport that this system works to promote fair competition in the market for grower services. From an LPD's perspective, as outlined in several public comments, a grower receiving poorly performing inputs and a low rank in one tournament is how the system works; over the long term, according to the commenter, the grower will likely receive better-performing inputs that help to balance out one tournament's losses. LPDs also stated in their public comments that they have no incentive to furnish a grower with poorly performing inputs and/or otherwise mistreat growers.

In practice, LPDs assertions do not bear out. LPDs have limited financial incentive to expend extra efforts to evenly distribute optimal inputs and production practices across growers in a poultry settlement pool or even to some extent to promptly address problems. LPDs have not provided supporting evidence that long-term provision of inputs balance out uniformly. Even if over the long-term the variability, on average, balances out, there will be growers who do not benefit from the balancing or for whom the balancing comes too late to address the harms caused by variability. LPDs'

assurances of long-term balancing out do not provide comfort to the grower facing decreasing ability to pay for immediate operating expenses – and who does not have the extra cash to buffer one tournament’s losses. Furthermore, under the current compensation system, LPDs have little motivation to limit performance variability, exercise appropriate care in input distribution, or generally create reasonable uniformity regarding other aspects of tournament operations.

As growers and grower advocacy organizations have asserted, LPDs often provide the “noisy” grower (who exercises their dissatisfaction or seeks redress for bad treatment) “bad” or otherwise inappropriate or untimely inputs or flock production practices, or even organize them into comparison groupings designed to adversely affect their performance. This can even occur for those seeking timely assistance or correction for supposedly inadvertent mistakes (*e.g.*, feed delivered to new chicks that is designed for older birds, and hence is not edible by the younger birds). Growers have consistently reported over the years that LPDs commonly exercise punitive control over inputs, production practices, tournament groupings, and the availability of assistance for ordinary problems. These circumstances suggest an environment characterized by unavoidable unfairness and oppressive methods that adversely affect growers’ and even LPDs’ ability to compete on the merits. Growers who receive bad treatment cannot competitively discipline an LPD by negotiating better terms or choosing a different LPD. They must accede to continued poor treatment by the LPD.

LPDs’ practice of basing grower compensation on factors beyond growers’ control distorts the competitive market for grower services. LPDs possess power – whether regionally, within the contract relationship with growers who depend on that relationship to pay down debt, and/or through information asymmetry (*i.e.*, through knowing detailed information about inputs and growers’ finances while growers know relatively little). This power allows them to reduce growers’ compensation to unfair

levels they know growers can barely bear; in turn, growers' reduced financial stability further reduces their countervailing power. Another feature of this practice is that LPDs are not actually allocating more funds to better compensate higher-performing growers: they fix overall compensation to their growers from tournament to tournament and deduct pay from those who performed below the average to reward those who performed above average. In so doing, they prevent growers from actually earning compensation commensurate to services – a circumstance that numerous commenters described experiencing but possessed little recourse to counterbalance, *i.e.*, “Take it or leave it.” This practice further erodes the competitive conditions in the market for grower services. Numerous commenters discussed how just a few below-average rankings caused them to not be able to afford operational expenses and perform worse and worse; and/or exit. By basing compensation on factors outside of actual grower services, LPDs also distort the actual price signal for grower services. And, by fixing overall compensation and deducting from the bottom to reward the top, they prevent honest competitors that actually allocate more funds for better-performing growers. Altogether, AMS believes these are unfair and deceptive practices under the Act.

LPDs harm growers when they compare growers where inputs, production practices, tournament groupings, and assistance are not equitably distributed. Grower pay becomes undeservedly low and fosters unlawful variability in both performance and compensation that have no relationship to the grower's work, initiative, or skill. Growers have no control over how inputs, production practices, tournament groupings and assistance are allocated, owing to the vertically integrated model of broiler chicken production. Unfair comparisons do not benefit growers or competition, and indeed frustrate the LPDs' claimed purpose of the tournament structure. The tournament is a form of performance payment that is intended to incentivize grower deployment of effort, skill, and investment to foster more efficient use of the inputs provided by the LPD.

Purportedly, tournaments capture actual differences in grower performance during a given period, while adjusting for overall conditions affecting performance, such as adverse weather conditions, that affect all growers in the complex. The rule sets out reasonable alternatives to these harms that do not undermine the benefits to growers from the vertically integrated production system or from using comparisons to establish flexible baselines for evaluating grower performance, within its appropriate limits.

AMS notes that growers get paid by the pound and start with a static number of chickens. Thus, they have contractually inherent incentives to grow their chickens to the target weight and to minimize the death loss of chickens, even in the absence of a performance payment. Yet AMS also acknowledges that ensuring growers' use of the minimum amount of inputs, such as feed, to achieve maximum growout is also an important part of the overall mix of cost efficiencies. AMS agrees, to the extent that the pool of growers in a tournament is sufficiently random and that the necessary conditions for equitable comparison are met, a tournament may spur growers to operate more efficiently as they seek higher comparison-based compensation, while reasonably guarding against commonly shared external conditions. Yet as discussed in the proposed rule and reflected in comments from grower groups and others, those conditions are often not met. Nor, indeed, are arbitrary or inequitable differences in inputs and production practices inherently essential features required to deliver the benefits of the poultry industry's vertically integrated production and comparison-based performance compensation system. In fact, arbitrary or inequitable practices undermine these benefits, producing instead arbitrary or otherwise inequitable grower pay differences that run contrary to the industry's avowed purpose of the tournament system.²²

²² See, e.g., "How the Tournament System Works," National Chicken Council (informing farmers that: "1 All farmers are provided the same quality of chicks, the same feed, and access to veterinary care. 2 Farmers who invest in more advanced facilities, as well as use the best management practices will likely produce higher quality chickens more efficiently. 3 Farmers receive a base pay (per their contract) and potentially a bonus, based on the health and quantity of the flock (tournament system)."); available at <https://www.chickencheck.in/faq/tournament-system/> (last accessed May 22, 2024).

Because the tournament system determines a component of grower pay, LPD practices that impair a fair comparison of grower performance cause a misallocation of performance compensation, thereby unfairly reducing the compensation that may otherwise be due to some growers. Studies²³ have shown that differences in production practices and inputs, such as stocking density, slaughter weight, bird gender, and breeder flock age, can impact the performance metrics used in determining the performance adjustments in tournament payment systems. If LPDs provide all growers in a tournament group similar-quality inputs and compare growers using similar flock production practices, or if they take steps to balance these differences over time or otherwise adjust pay to account for the relevant differences, these production factors under LPD control are unlikely to unfairly affect growers.

However, when LPDs rank growers who received lower quality (*i.e.*, lesser performing) inputs or less favorable flock production practices against growers who received higher quality (*i.e.*, higher performing) inputs or more favorable flock production practices the former group will likely receive lower pay than the latter group due to factors beyond their control. The ranking in the tournament will not reflect the grower's actual performance; it will reflect the inputs and flock distribution practices the grower received and the grower's performance relative to that of other growers. This is an unfair practice unless the LPD took effective steps to make appropriate adjustments to

²³ Dozier III, W.A., et al. "Stocking Density Effects on Growth Performance and Processing Yields of Heavy Broilers," Poultry Science 84 (2005): 1332–1338; Puron, Diego et al. "Broiler performance at different stocking densities." Journal of Applied Poultry Research 4.1:55–60 (1995). Burke, William and Peter J. Sharp. "Sex Differences in Body Weight of Chicken Embryos." Poultry Science 68.6 (1989): 805–810; Beg, Mah, et al. Effects of Separate Sex Growing on Performance and Metabolic Disorders of Broilers. Diss. Faculty of Animal Science and Veterinary Medicine, Sher-e-Bangla Agricultural University, Dhaka, Bangladesh, 2016; Wilson, H.R. "Interrelationships of Egg Size, Chick Size, Posthatching Growth and Hatchability." World's Poultry Science Journal 47.1 (1991): 5–20; Washburn, K.W., and R.A. Guill. "Relationship of Embryo Weight as a Percent of Egg Weight to Efficiency of Feed Utilization in the Hatched Chick." Poultry Science 53.2 (1974): 766–769; Weatherup, S.T.C., and W.H. Foster. "A Description of the Curve Relating Egg Weight and Age of Hen." British Poultry Science 21.6 (1980): 511–519; University of Kentucky/Kentucky Poultry Federation, Poultry Production Manual, <https://afs.ca.uky.edu/poultry/production-manual> (uky.edu), last accessed 08/21/2023.

the compensation structure for this settlement group to reasonably neutralize the impact of the inequitable distribution of inputs and flock production practices within the ranking group. The problem this section of the rule addresses is how tournaments can be designed to effectively counteract the impact of inequitable tournament practices and lead to a fair comparison in poultry ranking systems.

Some LPDs have taken steps to design their compensation systems to appropriately account for the maldistribution of inputs and production practices within a poultry ranking group. In response to the Advance Notice of Proposed Rulemaking that preceded the proposed rule for this final rule, LPDs and their trade associations described different steps LPDs have taken to correct for the inequitable distribution of inputs and production practices among growers and resulting comparisons. A meat industry trade organization indicated that LPDs are known to reduce unpredictability in grower outcomes by having contracts that evaluate performance over multiple flocks and adjust pay for factors outside growers' control. For example, some LPDs adjust payments for different densities of birds placed or provide credits for excess seven-day death loss.

Complementing these examples, AMS investigations have also found that some LPDs will attempt to ensure that broiler growers do not receive chicks from young laying hens too often because this can negatively affect growers' tournament performance. Some LPDs will communicate and correct ordinary problems on a timely basis. This helps growers avoid unintentionally punitive outcomes than would otherwise be the case. Yet, while LPDs assert that quality communication and fair operation are universal, AMS has found through interviews and comment review that LPD behavior currently depends extensively on the goodwill of the LPD, commonly via the manager of the local complex, and LPDs are not uniformly consistent in addressing issues that lead to unfair outcomes. Some local complexes make discretionary decisions that harm growers.

For instance, while LPDs regularly maintain extensive grower manuals, LPDs are

not obligated to have their manuals address the range of situations that undermine a fair comparison or monitor whether the local complexes comply with that manual in practice. Growers need a poultry ranking system that meets a reasonably reliable standard. For there to be fair payments under sections 202(a) and 410 of the Act, LPDs must properly adjust their comparison-based compensation systems used in poultry grower ranking systems. Rules, like this final rule, must reasonably neutralize the impact of inequitable distribution of inputs and flock distribution practices on poultry grower compensation.

Because different inputs and flock production practices affect performance under the tournament, LPD decisions are an outsized component of grower payments. When an LPD operates a tournament that uses arbitrary or inequitable delivery of inputs and production practices without establishing systems to mitigate material differences in inputs and production practices among growers in a comparison group or otherwise reasonably neutralize comparison impacts, the LPD has committed an unfair and deceptive practice under the Act. Such a practice is unfair because it uses criteria outside the growers' control to evaluate their performance. It is deceptive because it purports to evaluate growers on their effort when in fact it does not, often leading to payment rates that are wildly fluctuating and unpredictable. The duty of fair comparison established in this rule also arises out of the Act's prohibitions on unfair practices, unjust discrimination, the manipulation of prices, and failure to pay. Comparison-based compensation systems can be used to proactively cause harm to one or more growers by placing them in grower settlement groups that are inappropriate based on distribution of inputs or flock production practices. LPDs likewise can use league composition (*i.e.*, the formation of settlement groups) to manipulate prices downward for a given grower or group of growers. Finally, such practices can lead to a failure to pay for services provided. Violations of the Act include an LPD failing to maintain policies and procedures necessary to document the company's compliance with those fair comparison

duties, owing to the Act's recordkeeping authorities (7 U.S.C. 221).

AMS is adding a new § 201.110, "Operation of broiler grower ranking systems," to regulate LPDs' operation of poultry grower ranking systems (*i.e.*, tournaments) for broiler growers. Paragraph (a) establishes an LPD duty of fair comparison in tournaments. This duty of fair comparison requires LPDs to structure their tournament system to provide a fair comparison among growers. AMS acknowledges that sometimes a fair comparison is not possible due to unforeseen differences in inputs or other circumstances, in which case an LPD must compensate growers through a non-comparison method specified in the contract that reflects a reasonable compensation to the grower for its services. Paragraph (b) establishes basic documentation that LPDs must maintain regarding how they design and operate their poultry grower ranking systems for broiler growers.

i. Section 201.110(a) – Fair comparison

Paragraph (a)(1) requires LPDs that use comparison-based compensation systems for their poultry growers to design and operate their poultry grower ranking system (*i.e.*, comparison-based compensations system) in a way that provides a fair comparison among growers. This final rule uses in various places the definition of "poultry grower ranking system"—commonly called the tournament contract—already set forth in PSD regulations at § 201.2.²⁴ Recognizing that LPDs have long claimed that tournament contracts are designed to promote efficiency, not frustrate it, AMS has written this rule to affirm the duty to fairly compare growers. Specifically, this rule requires LPDs to advance a fair comparison among growers in a poultry ranking group based on grower effort and skill. Measuring performance based on input quality—which is outside of the grower's control—is unfair and deceptive. LPDs have a multitude of means to maintain

²⁴ *Poultry grower ranking system* means a system where the contract between the live poultry dealer and the poultry grower provides for payment to the poultry grower based upon a grouping, ranking, or comparison of poultry growers delivering poultry during a specified period.

fair comparisons. This includes correcting for: input quality variations, inappropriate feed type delivery, gaps in feed delivery, variation in production practices such as flock density, pick-up time or pick-up weight across the comparison group. LPDs can manage fair comparisons through extending the period over which the comparisons are made, adjusting payment for certain inputs or production practice differences, or removing growers from tournaments where a fair comparison is not possible. LPDs can ensure league composition (ranking groups) are reasonably random and robust enough to establish a fair comparison baseline. LPDs can also establish processes for responding to complaints in a timely manner or making appropriate adjustments to comparisons. But LPDs violate the Act when they do not design and operate their comparison poultry compensation system in a manner that delivers a fair comparison among growers within any given ranking group.

Paragraph (a)(2) of § 201.110 establishes the factors the Secretary will consider in determining whether an LPD reasonably designed or operated its poultry grower ranking system to deliver a fair comparison among growers or whether the LPD must utilize a non-comparison compensation method. This provision establishes a violation for either the LPD's failure to design or failure to operate a poultry grower ranking system to deliver a fair comparison among growers. In the first instance, AMS could bring an enforcement action for an LPD's failure to design the ranking system in a manner that would deliver a fair comparison; such an action would be based upon the processes set forth in the documentation required under paragraph (b) of this section. In the second instance, AMS could bring an enforcement action based upon an LPD's failure to operate the ranking system in a manner consistent with the duty of fair comparison. Such a failure could be because the LPD was not following the documented processes or because in practice the documented processes do not deliver a fair comparison. The factors listed in § 201.110 (a)(2)(i) through (vi) are designed to establish what constitutes reasonable

delivery of a fair comparison. That is, the Secretary will examine these factors when determining whether the LPD has reasonably designed or operated their ranking system. Reasonableness should be viewed as an objective test that accounts for growers' contract expectations, basic considerations of equity, and the LPD's ability and willingness to prevent harms to growers resulting from factors outside growers' control. However, it should also provide some flexibility to LPDs to achieve distinct goals provided they are well-designed, justified, and not otherwise unfair or deceptive.

Paragraphs (a)(2)(i) and (ii) of § 201.110 address whether an LPD's distribution of inputs and assignment of flock production practices caused material differences in performance that growers cannot avoid, and whether the LPD made appropriate adjustments to compensation. Fair comparison of growers requires that growers do not receive a distribution of inputs or assignment of production practices that cause material differences in performance from other growers to whom they are being compared and are caused by factors outside of a grower's control. Material differences in performance are differences that meaningfully (from the perspective of the grower) impact grower payments.

To comply with these requirements, LPDs must identify inputs and flock production practices under their control that impact grower payment and ensure that these factors do not meaningfully impact grower payments. LPDs also must improve their monitoring of how inputs and flock production practices are allocated across growers, and, as appropriate, adjust such allocations to reduce the unequal distribution among growers within a settlement group or across a given time period. An LPD could still provide certain growers with different inputs, for example because an LPD believed certain growers were better at raising particular types or quality of birds (*e.g.*, chicks from older hens), provided it adjusted compensation if material differences in performance affected the comparison. The LPD would also be free to use a non-

comparison method for those growers.

LPDs must adjust how grower pay is calculated if a fair comparison is impractical due to unavoidable inequitable allocations. For example, the LPD may determine that a five-flock average may be appropriate for determining a grower's pay when the LPD provided chicks for that grower are later discovered to be diseased, and no fair comparison is reasonably possible, practical, or appropriate for that grower within the tournament for that flock. Any adjustment to how grower compensation is determined must use a non-comparison method specified in the contract that reflects reasonable compensation to the grower for its services. The contract should set forth the preferred approach(es) of the parties. Ensuring that agreed-to payment adjustments are fair will be part of regular AMS poultry compliance reviews. An average of the last five settlements by the grower is considered a non-comparison method for the purpose of the tournament settlement that the grower is being excluded from, even though the average is affected by the previous comparisons (unless unusual facts and circumstances call into question the fairness of such an approach).

Section 201.110(a)(2)(iii) addresses whether the designated time period used in an LPD's comparison is appropriate, including whether the LPD uses one or more groupings, rankings, or comparisons of growers to mitigate the effects of any differences in inputs over the designated time period. Fair comparison of growers does not require that LPDs provide all growers precisely equal inputs and identical production practices for each flock. This rule permits LPDs to minimize production inefficiencies that would arise from a standard requiring strict equality in inputs, while avoiding an unfair comparison of grower performance. If the LPDs compare growers fairly over reasonable period of time, randomly selecting inputs is one way, in most cases, to minimize the effect of the flock-to-flock variance in inputs. Companies may use non-random distribution, including temporarily correct for what would otherwise be an inequitable

distribution of inputs under an otherwise random system, provided they ensure comparisons are fair.

AMS considers a period of one year or less to be a reasonable timeframe across which to compare growers' performance because it provides sufficient time to limit variation from one event while ensuring that LPDs treat growers fairly over a reasonable timeline. The one-year period coincides with commonly used five-flock averages and with one-year comparisons used in some live poultry growing arrangements.

Paragraph (a)(2)(iv) of § 201.110 addresses whether conditions and circumstances outside the control of the LPD render comparison impractical or inappropriate. A settlement group may have differences in LPD-provided inputs, LPD-assigned production practices, or other factors beyond the control of LPDs and growers that render a reliable comparison impossible. The Secretary will consider the facts and circumstances applicable to each case. One example might be the previously described situation where an LPD unknowingly delivered chicks to a grower that are later discovered to be diseased so that no fair comparison is possible.

Section 201.110(a)(2)(v) addresses whether an LPD has made reasonable efforts to resolve in a timely manner grower concerns regarding the LPD's exercise of discretion over the implementation of its fair comparison processes. In determining compliance with this requirement, through compliance reviews or in response to a complaint, AMS will consider whether an LPD has demonstrated enough responsiveness and commitment to resolving legitimate concerns to avoid potential secondary harm to the grower. What constitutes "reasonable efforts" and "timely" resolution of a grower's concerns will depend on the facts and circumstances of each case, with particular attention placed on whether and how the situation adversely impacts the fairness of the comparison(s) for the grower. For example, if a grower raises immediate and urgent concerns about feed quality, such as the delivery of feed meant for older chicks than the grower has, the LPD

should have in place processes to—and in fact, actually—resolve this concern as soon as possible to minimize any additional undue damage to the grower’s flock due to lack of proper nutrition. If a grower raises concerns about feed persistently being delivered late or in an insufficient quantity, the Agency will examine the LPD’s “reasonable efforts” taken to adjust the delivery method. Additionally, an LPD is prohibited from retaliating against a grower in any manner for raising concerns as to whether a fair comparison method was used.

Lastly, § 201.110(a)(2)(vi) states that the Secretary shall consider any other factor relevant to a fair comparison among broiler growers in a poultry ranking system. This provision gives AMS the authority to address any other facts or circumstances that adversely affected the fairness of the design or operation of the poultry grower ranking system. AMS will determine compliance by examining the facts and circumstances, and in particular, whether the LPD took specific actions to undermine the comparison process. For example, this prong allows AMS to consider whether an LPD’s intentional grouping of certain growers in a poultry ranking group to manipulate or adversely affect comparison-based outcomes constitutes a violation of the Act.

When determining whether an LPD has designed and operated its broiler grower ranking system to provide a fair comparison among growers, AMS will consider the fair comparison factors set forth in § 201.110(a)(2) against how and to what degree comparison factors account for total grower compensation. When relative grower performance pay accounts for a very small portion of grower compensation, AMS expects differences in inputs and flock production practices to cause fewer material differences in pay. AMS expects this dynamic to operate on a sliding scale; the smaller the role of comparison pay in total grower compensation, the smaller the effect of variations in inputs and flock production practices on total compensation. AMS will also consider the design of the formula to determine its impact on the magnitude or

distribution of compensation, if any.

In some situations, differences among LPD-provided inputs, LPD-assigned flock production practices, or factors beyond the control of both LPDs and growers make a reliable comparison impossible, impractical, or inappropriate for one or more growers. In such cases, § 201.110(a)(3) requires that an LPD must fairly compensate growers through a non-comparison method specified in the contract that reflects reasonable compensation to the grower or growers for their services. For example, if an LPD is unable to pick up a flock in a timely manner because of processing disruptions (as occurred during the COVID-19 pandemic), the LPD may remove the grower from the settlement rather than compare that grower's flock performance against growers delivering flocks of a significantly different age. In such cases, the LPD must compensate the grower using a reasonable non-comparison alternative. Multiple approaches could be considered reasonable depending on the circumstances, and LPD costs are an appropriate consideration as part of those particular facts and circumstances. AMS is aware that LPDs often pay the grower an amount equal to the average rate they received over their previous five flocks. The non-comparison method is intended to fairly compensate the grower. Therefore, absent special circumstances where a rationale and an agreement to do otherwise are reasonable and appropriate (and documented as such), the non-comparison compensation method needs to equal or exceed the pay that the comparison-based compensation rate would have delivered. AMS will rely on the documentation of written processes set out in § 201.110(b), as well as the facts and circumstances of specific occurrences, to evaluate compliance.

ii. Section 201.110(b) – Documentation

Paragraph (b) of § 201.110 details the documentation an LPD must establish and maintain of its processes for the design and operation of its poultry grower ranking system for broiler growers that is consistent with the duty of fair comparison. This

paragraph has changed considerably from the proposed rule to provide greater flexibility in meeting the terms of this regulation. AMS also revised paragraph (b) in response to commenters' concerns that the specific documentation requirements laid out in the proposed rule were very similar to documentation requirements delineated in existing regulations at § 201.102(b) and that burdening LPD service technicians with increased paperwork would take away from their core responsibilities of attending to the production needs of growers.

In the final rule, § 201.110(b) sets forth documentation requirements regarding LPDs' duty to ensure the fair design and operation of broiler grower ranking systems. Under section 401 of the Act, AMS is authorized to prescribe "the manner and form in which such accounts, records, and memoranda shall be kept" whenever the Secretary finds that the records of an LPD do not fully and correctly disclose the LPD's business transactions (7 U.S.C. 221). Paragraph (b)(1) requires that LPDs establish and maintain written documentation of their processes for the design and operation of a poultry grower ranking system that is consistent with the duty of fair comparison. This rule requires documentation to include written processes, referred to as policies and procedures, regarding the process for (i) inputs under LPD control, (ii) flock production practices (iii) league composition, (iv) the evaluation period, (v) non-comparison factors, and (vi) LPD communication and cooperation with growers. These processes must provide a general description of the items that the rule requires to be included, with sufficient detail to provide a typical user of the documentation—such as a local poultry complex manager that directs the operation of the complex's tournament—with an understanding of how duty of fair comparison is to be operationalized within this complex's poultry grower ranking systems.

To simplify the documentation requirements and minimize paperwork burdens for poultry complex service technicians, AMS revised paragraph § 201.110(b)(1)(i), "Inputs

under live poultry dealer control,” from what was proposed by removing subparagraphs (b)(1)(i)(A) through (E), which delineated detailed requirements pertaining to identification, management, and adjustment of differences in input distribution to growers, and how LPDs adjust compensation calculations based on the inputs a grower receives. In the final rule, paragraph (b)(1)(i) contains no subparagraphs and simply requires that the LPD’s written processes include how and when the LPD assigns, adjusts, or otherwise accounts for similarities and differences of quality and quantity in the delivery of inputs to growers. The removal of subparagraphs (A) through (E) simplifies the requirement by including one all-encompassing requirement that LPDs must explain how they assign, adjust or otherwise account for similarities and differences of quality and quantity in the delivery of inputs to growers. Revised paragraph (b)(1)(i) clearly requires that LPDs address all the ways that variation in inputs can impact a poultry growing ranking system, while giving LPDs flexibility in how to mitigate the impact of uneven distribution of LPD-provided inputs on fair comparison in the tournament and, hence, comparison-based grower pay. In sum, AMS determined that the deleted subparagraphs were not needed to establish that LPDs must explain in their written documentation how they account for the possible distortions and resulting inequities that can manifest in poultry grower ranking systems when they fail to properly account for variations in inputs.

Under paragraph (b)(1)(i), LPDs are required to create a written process for how and when the LPD assigns, adjusts, or otherwise accounts for similarities and differences of quality and quantity in the delivery of inputs to growers. This provision requires LPDs to have a defined process governing how they will ensure the duty of fair comparison is met. Such a process needs to explain how the LPD will operate its poultry complex and its related poultry grower ranking system, so growers have fair opportunity to compete on a level playing field in individual flock settlements or in a comparison settlement that

stretches beyond individual flocks, where the impact of variation in quality, quantity, or timing of inputs may be significantly reduced or eliminated. LPDs unfairly harm growers when they distribute inputs in a manner that disadvantages a grower relative to other growers in said tournament(s) and base their compensation accordingly. Growers cannot control the nature of the inputs they receive from their LPD, whether that be quality of chicks or feed, appropriateness of feed delivered for stage of growth, gaps in feed delivery, or delivery of veterinary services. Receipt of low-quality, insufficient, or inappropriate inputs can unfairly impact growers' performance in tournaments if the LPD does not have appropriate processes in place for mitigating such variation in input delivery. LPD processes required under paragraph (b)(1)(i) must include ongoing accounting and monitoring of inputs supplied to each producer using objective measures of quality and performance that are generally accepted in the industry. Such monitoring and accounting should aim for as minimal variation as possible in input delivery quality or quantity across the members of one or more grower poultry ranking groups, and appropriate mechanisms for detecting and correcting for input variations in a timely manner. Such processes should address key areas of concern, including allocation of chicks that differ in quality and performance, variation in quality or quantity of feed, or variation in medication across grower groupings. LPDs may include policies and procedures for balancing disparity of inputs either within a single flock or over multiple flocks as appropriate and feasible.

In the final rule, AMS also simplified § 201.110(b)(1)(ii), "Flock production practices," from that which was proposed. AMS removed subparagraphs (b)(1)(ii)(A) through (E), which described, in detail, the processes LPDs must include in the design and operation of their poultry grower ranking systems pertaining to assignment of flock density at delivery, timing of pick-up, adjustment of comparison based on different assignment flock production practices, and adjustment of compensation calculations

based on the grower's receipt of specific flock production practices. In the final rule, paragraph (b)(1)(ii) contains no subparagraphs and simply requires that written processes include how and when the LPD assigns, adjusts, or otherwise accounts for differences in production practices. The removal of subparagraphs (A) through (E) simplifies the requirement by including one all-encompassing requirement that LPDs must explain how they assign, adjust, or otherwise account for similarities and differences regarding assignment of flock production practices. Revised paragraph (b)(1)(ii) clearly requires that LPD address the ways that variation in flock production practices assigned to growers can impact a poultry growing ranking system, while providing flexibility on the appropriate processes LPDs can establish to mitigate the negative impact LPD-assigned production practices can have on fair comparison in the tournament(s) and, therefore, comparison-based grower pay. In sum, AMS determined that the deleted subparagraphs were not needed to establish that LPDs must explain how they account for the possible distortions and resulting inequities that can manifest in poultry grower ranking systems when LPDs fail to account for variations in flock production practices.

Under paragraph (b)(1)(ii), LPDs must maintain written documentation of its processes for how and when the LPD assigns, adjusts, or otherwise accounts for differences in production practices across growers in a poultry ranking system. Similar to paragraph (b)(1)(i), such processes should include ongoing monitoring of how flock production practices are allocated across different growers in one or more poultry grower ranking systems, and mechanisms for adjusting for disparities in flock production allocations in a reasonable time frame such that additional harm does not result. Such processes governing flock production processes should cover how and when the LPD assigns density at delivery; how and when the LPD manages pickup of birds with respect to slaughter weight and bird age; how and when the LPD adjusts how a grower is compared to other growers with different assigned flock production practices or

otherwise adjusts the flock production practices the grower receives; any steps the LPD takes to adjust compensation calculations based on suboptimal allocation of flock production practices to growers; and how and when the LPD minimizes, adjusts, or otherwise accounts for differences in production practices. LPDs can unfairly manipulate grower payments when they compare growers even within a single tournament settlement group within which the LPD has assigned different types of production practices to growers in the group. Under this rule, LPDs must develop policies and procedures that describe the processes for ongoing accounting and monitoring of LPD-determined flock production practices allocated to each producer. The LPD's processes must provide a consistent approach to minimize differences in production practice assignments and describe methods to compensate growers for differences that result in harms.

In the final rule, AMS also simplified paragraph (b)(1)(iii) of § 201.110 from what was proposed. In the final rule, AMS removed subparagraphs (A) through (C) from paragraph (b)(1)(iii) and instead separated out the requirements into three distinct paragraphs: (b)(1)(iii), "League composition;" (b)(1)(iv), "Evaluation period;" and (b)(1)(v), "Non-comparison."

Under the final rule, paragraph (b)(1)(iii), "League composition," requires LPDs to create written processes governing league composition, which is how LPDs assign groups of growers to settlement groups. AMS revised this paragraph for simplicity and readability. Formerly, the provision was contained in paragraph (b)(1)(iii)(C), reading, "If the live poultry dealer groups growers for settlement in any manner other than the one used in recent settlements, how the dealer determines such groupings." Settlement groupings, also called league composition, are most commonly based on their chronological availability for slaughter within the complex but could also be based on housing type or other commonalities across a group of growers. Generally, the settlement grouping is determined by flock placement timing, which commonly varies based on the

timing needs of the growers. For example, growers may need additional time between flocks for cleaning, maintenance, vacation, or other similar reasons.

Paragraph (b)(1)(iii) of this rule serves to identify practices or circumstances that diverge from these ordinary reasons for determining settlement groupings. While legitimate reasons exist for deviating from a strict chronological availability-based grouping, this provision is principally meant to ensure that LPDs do not use league composition to interfere with fair comparison by intentionally grouping specific growers together to lower the pay of one or more members of the settlement group, or to otherwise manipulate pay to deliberately benefit certain growers over others.

Under § 201.110(b)(1)(iv) of the final rule, “Evaluation period,” the LPD is required to maintain written documentation of how it establishes a reasonable time period over which the LPD evaluates the duty of fair comparison. This provision was proposed with slightly different phrasing as paragraph (b)(1)(iii)(A). This provision requires the LPD to describe its process for how it determines the number of settlement groupings over which grower comparisons will be made. The duty of fair comparison requires that LPDs design and operate their poultry growing ranking systems to provide a fair comparison among growers. This means that the comparison must genuinely reflect effort by the growers, not variability in inputs or flock production practices, which are outside of the growers’ control and thus not criteria that form the basis of a fair comparison. It may be that over the course of a year variations in inputs or flock production practices will cancel each other out. The evaluation period must account for the length of its growers’ contracts and the reasonable expectation of renewal. If the duty of fair comparison requires five flocks, then the contracts need to span at least five flocks, or if they do not, there must be a very high likelihood that the contract will be renewed such that the growers will receive the five flocks and thus be subject to a fair comparison that evens out fluctuations in input quality or quantity or flock production practices.

In the final rule, § 201.110(b)(1)(v), “Non-comparison,” requires that an LPD’s written processes explain when the LPD might remove a grower from a ranking group, and how the LPD will compensate growers removed from a ranking group to satisfy the non-comparison compensation method required under § 201.110(a)(3). This provision was proposed as paragraph (b)(1)(iii)(B) in similar language. There are myriad reasons why an LPD may decide to remove a grower from a ranking group. For example, LPDs may not have enough comparable growers with which to make a reliable comparison in the current grouping and may use growers settling in previous periods to make a reliable comparison. Likewise, a specific grower may have received undesirable inputs or an assignment of production practices that materially impacted the grower’s performance, necessitating the removal of the grower from the grouping and compensation under a non-comparison compensation method. Under this provision, the LPD is required to explain how and when the LPD removes a grower from a ranking group because the grower received unfavorable inputs or production practices and how it will fairly compensate such growers through a non-comparison compensation method.

In the final rule, § 201.110(b)(1)(vi), “Communication and cooperation,” is very similar to the provision as proposed, with the only notable change being the paragraph designation: in the proposed rule, the paragraph was designated paragraph (b)(1)(iv); in the final rule, the paragraph is designated paragraph (b)(1)(vi). This paragraph requires LPDs to create written processes for how the LPD will resolve a grower’s concerns with the LPD’s exercise of discretion over the implementation of the policies required by this section, including the timeliness of the resolution. A tournament system cannot be fair if it fails to permit growers to contest, without fear of retribution, negligent or malicious actions taken by the LPD that may impact grower performance. The rule provides flexibility on how LPDs can satisfy this requirement. A range of procedures are available, such as timely communication with complex management, communication with LPD

headquarters, and grower councils, wherein disputes are resolved with input from other growers. The implementation of processes to manage and resolve grower disputes can serve to alert LPDs to potential unfairness in their comparison of growers and enable them to resolve issues in a timely manner.

In the final rule, AMS removed proposed § 201.110(b)(2), “Compliance review.” In the proposed rule, this paragraph delineated detailed compliance review procedures for the processes set out in paragraph (b)(1) of this section. AMS removed this requirement in response to comments that such self-audits are a somewhat burdensome requirement for LPDs that can be eliminated with minimal effect on effective compliance. Rather than requiring self-audits, AMS will review the policies and procedures required under § 201.110(b)(1) through its ongoing compliance review process. This will ensure regular review of LPDs’ compliance with the provisions of this regulation with minimal additional recordkeeping burden on LPDs.

In the final rule, § 201.110(b)(2), “Record retention,” mirrors that which was proposed, with the only notable change being the paragraph designation: in the proposed rule, the paragraph was designated paragraph (b)(3); in the final rule, the paragraph is designated paragraph (b)(2). This paragraph requires LPDs to retain all written records relevant to their compliance with paragraph (b) for no less than five years from the date of record creation. These records should be made available to AMS upon request. Relevant records include, for example, copies of existing processes (policies and procedures); written documentation of LPD processes used within the last five years, including documentation of inputs and flock production practices provided to growers; written documentation of league composition; written documentation of grower complaints and their resolution; board minutes discussing compliance with this section for five years from the date of the board meeting; current and expired grower contracts for five years for the date of last effectiveness of the contract; disclosures provided to

growers for five years from the date of the disclosure is provided to the grower; information on payments to growers or other forms of adjustment made to ensure a fair tournament, etc. Under the regulation, LPDs must retain these records for five years to enable the Agency to monitor the evolution of compliance practices over time in this area and to ensure that records are available for what may be complex evidentiary cases. As noted earlier in this section, section 401 of the P&S Act authorizes AMS to prescribe the manner and form in which LPDs keep business records. This recordkeeping requirement will enhance LPD management's ability to establish and monitor compliance, as well as AMS's ability to supervise and enforce the rule.

iii. Compliance and Enforcement

Compliance with § 201.110(b) requires LPDs to retain records that document the LPD's design and operation of broiler grower ranking systems in a manner that is consistent with the duty of fair comparison. These policies and procedures are necessary to document compliance precisely because the options for delivering a fair comparison are so diverse. Policies and procedures developed pursuant to this rule should describe the LPD's framework for assigning inputs and LPD-determined flock production practices, comparing grower performance, and resolving growers' concerns regarding the LPDs' implementation of its policies and procedures. Recordkeeping should enable periodic review by the LPD to examine and report on the LPD's compliance with its established written processes and, as such, with its compliance with the duty of fair comparison.

Enforcement of § 201.110 can occur in several ways. Growers can contact AMS-PSD to submit a complaint regarding an alleged violation of § 201.110. PSD would then investigate, which could lead to referral to DOJ for appropriate action or, where failure to

pay is implicated, to USDA enforcement through administrative action.²⁵ AMS will also review LPD contracts, along with other required records from the LPD, in connection with routine compliance reviews and investigations to ensure LPD compliance. Injured individuals also have a right to proceed directly in Federal court.

C. Broiler Grower Capital Improvement Disclosure Document (§ 201.112)

AMS is finalizing new § 201.112, “Broiler grower Capital Improvement Disclosure Document,” which requires that LPDs provide growers with a Capital Improvement Disclosure Document (Disclosure Document). Paragraph (a) requires that when an LPD requests that a grower make an additional capital investment, the LPD must provide the grower with a Disclosure Document. Paragraph (b) describes the required disclosures in the Disclosure Document. AMS made slight modifications to provisions of paragraph (b), which will be described below. AMS also modified proposed § 201.112 in response to public comment by adding a new paragraph (c), which requires the LPD to assist with translating the Disclosure Document.

The inclusion of § 201.112 is necessary because LPDs often request or require that growers make costly additional capital investments, which may benefit LPDs and growers in some ways, but may also be problematic and unfair. The LPD requesting an additional capital investment may be deploying bargaining leverage and forcing the grower to bear unreasonable risk, and the purposes, processes, and outcomes of the additional capital investment may be opaque, complicated, or otherwise difficult to evaluate. Additional capital investments can also further serve to lock in growers to specific LPDs, making it harder to switch. Growers, however, are often not in a position to choose not to make an additional capital investment. Many growers come under significant pressure from LPDs to make a requested additional capital investment. Even

²⁵ Additional information on reporting violations of the P&S Act can be found here: <https://www.ams.usda.gov/services/enforcement/psd/reporting-violations> (last accessed 11/13/2023).

when a grower has sufficient bargaining leverage to negotiate the terms of compensation, the LPD may not provide sufficient information for the grower to assess the full risk and reward of undertaking the additional capital investment. Indeed, based on AMS's knowledge of industry disclosure practices and decades of hearing complaints from growers, growers today often undertake additional capital investments for the LPD without the opportunity to fully understand the additional capital investment's purpose, design, risks, and impacts on their financial well-being; or, are pressured in some way to make those investments.²⁶ Information asymmetry impairs growers' ability to negotiate, effectively exercise independent decision-making to reject an additional capital investment, and, more broadly, manage their farming operation upon choosing to make the additional capital investment. When information asymmetries prevent growers from evaluating whether they are able to recoup their investment or whether they can engage in other farming practices that could achieve the goals of the additional capital investment, growers cannot effectively protect their financial interests or freely exercise decision-making with respect to their farming operation. Growers and AMS may also be unable to identify circumstances where LPDs are seeking to compete through additional capital

²⁶ MacDonald, James M. 2014, Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, USDA Economic Research Service, https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=1829.6 (In a 2011 survey of contract growers, sixty percent of growers making any capital expenditures reported that the LPD required those expenditures). AMS-FTPP-22-0046-0799 ("Poultry companies require capital improvements that do not improve my bottom line. I must pay for the capital improvements, which may not be a capital improvement that will benefit my operation. It will not benefit the quality of the bird. The benefit is not clearly proven or explained, just I am required to make the improvement or get paid less or dropped as a grower."); AMS-FTPP-22-0046-0737 ("For years, I've been forced to upgrade my farms facilities at my own expense just to maintain contracts. These costly and often unnecessary upgrades, dictated by companies like [name redacted], have left me in debt and struggling to cover basic expenses. The financial burden is unsustainable and has made it incredibly challenging to keep my farm afloat"); AMS-FTPP-22-0046-0176 ("For way too long these poultry integrators have been let off the hook for bullying, forcing their contract growers into making large investments in upgrades that will never see a payback beyond the initial investment to build the infrastructure to keep their growers under their total control and blaming growers for everything that goes wrong..."). United States Department of Justice, United States Department of Agriculture, (May 2010), Public Workshops Exploring Competition in Agriculture, <https://www.justice.gov/archives/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10> ("It's typical for growers to be asked to do expensive upgrades on their poultry houses before this first loan of this building has been paid off. I know because I was one of those growers. The threats put before you, the communication, the threat is put before you, if you do not do this, they're not going to bring you any more chickens to grow").

investment practices that shift or hide costs to growers, which subverts the competitive process.

AMS has identified as deceptive those LPD contracting practices that fail to disclose key information about additional capital investments. Growers make critical investment decisions in reliance on the information required by this rule, most of which is not currently provided by LPDs. AMS emphasizes that disclosure under new § 201.112 is not, and is not intended to be, a remedy to unfairness in and of itself; rather, disclosure provides AMS and growers with information necessary to enforce their rights under existing § 201.216, “Additional capital investments criteria,” and the P&S Act more broadly, when terms are unfair. Without sufficient, simple, and clear disclosures, growers cannot assess the benefits or risks of making the investment. Indeed, given the role of performance pay in determining total grower compensation under the tournament, some voluntary additional capital investments may seem mandatory if growers want to maintain existing revenue levels, even if growers don’t fully understand the purposes and expected outcomes of the requested additional capital investment. Furthermore, growers experience considerable pressure to accept LPDs’ additional capital investment requests given LPDs’ market power, or substantial bargaining power, and growers’ relatively weak market position, including commonly a lack of meaningful choice among LPDs. A majority of broiler growers cannot change LPDs if their current relationship sours.²⁷

AMS notes that the existing regulation in § 201.216 is intended to allow the Agency to partially mitigate additional capital investment problems for growers. The existing regulation sets forth criteria for whether additional capital investments would be an unfair practice or other violation of the Act, including whether the grower can decide

²⁷ MacDonald, James M. 2014. Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, USDA Economic Research Service (Roughly 22 percent of growers operate in a pure monopsonistic local market, and that 52 percent of broiler growers (farms), accounting for 55 percent of broilers produced and 56 percent of total production, report having only one or two LPDs in their local areas).

against the additional capital investments; whether the additional capital investments were a result of coercion, retaliation, or threats by the LPD; and whether the additional capital investments can result in reasonable recoupment, or adequate compensation for the additional capital investments, among other non-exhaustive criteria. However, AMS has found that the presence of the criteria alone is insufficient to effectively address problems stemming from additional capital investments. For example, insufficient information about additional capital investments impacts the criteria at § 201.216(a) that seek to preserve the grower's discretion to decline an additional capital investment. Lacking sufficient information about additional capital investments, a grower cannot effectively assess whether they would still be able to compete against other growers without the additional capital investment.

The Act requires production contracts to disclose the possibility of additional capital investment (7 U.S.C. 197a(b)). However, the majority of contracts contain no information relating to when or how additional capital investments may be required, nor the costs or risks of any such additional capital investment, nor what, if any, limits there are on an LPD's ability to unilaterally impose additional capital investments that do not materially improve production efficiency or meet consumer demands. To better enable growers and AMS to guard against unfairness and to prevent deception, LPDs must disclose more information regarding the purposes, processes, and outcomes of additional capital investments they request from broiler growers. The disclosures must occur before growers take on the financial burden and risks of the additional capital investment. The provision of such information is not, in and of itself, the cure for unfairness, but rather a key tool for AMS and growers to halt abusive practices by arming them with the ability to identify those challenges sooner. The disclosures required in § 201.112 accomplish these goals. Furthermore, the act of disclosing information does not, in and of itself, render the action lawful. Even if disclosed, certain actions may be unfair or deceptive

practices under the P&S Act. Disclosure alone does not mitigate the legal or ethical ramifications of such practices.

The Agency has an existing regulation, 9 CFR 201.216, which sets forth a non-exclusive list of criteria the Secretary may consider in determining if a required additional capital investment violates the Act. In future cases, the § 201.112 disclosures on additional capital investments will improve the Secretary's analysis of § 201.216. Whether the Secretary considers recoupment of the additional capital investment to be reasonable includes consideration of the projected returns under § 201.112(b)(6), the contract terms, and the return to an average grower operating under the LPD's contract. AMS underscores the importance of length of the contract to secure a full opportunity for recoupment. AMS recognizes that growers in many instances cannot avoid the LPD's unfair exercise of market power or bargaining leverage, and that the LPD failing to sufficiently and fairly compensate growers for an additional capital investment is not a cognizable benefit to growers or to competition.

i. Section 201.112(a) – Disclosure requirement

In the final rule, paragraph (a) of § 201.112 requires that when an LPD requests that a broiler grower make an additional capital investment, the LPD must provide the broiler grower with a Disclosure Document that contains the information required by paragraph (b) of this section. AMS slightly modified this provision from the proposed rule by adding the paragraph heading, "Disclosure requirement." Information provided in the Disclosure Document will help growers protect themselves at an earlier stage—before the investment—from unfair practices, by enabling them to report to AMS potentially unfair additional capital investment practices or bring their own action. Improved documentation will also enable AMS to take earlier and more effective action against problematic additional capital investment practices. Transparency will also enable some growers, where sufficient choice exists, to make better additional investment decisions.

Importantly, clear disclosure of additional capital investment parameters will enhance growers' ability to enforce their rights relating to unfair practices under § 201.216 (such as recoupment and discretion to refuse to make an additional capital investment), as well as other provisions of the P&S Act and regulations. Disclosure alone is not a remedy for an additional capital investment that is unfair, but the disclosures required by new § 201.112 will create a record that will facilitate the Agency's ability to enforce the Act under existing § 201.216.

This requirement applies prospectively to requests for additional capital investments. However, if the LPD has previously provided any disclosure to the grower that was incomplete or inaccurate, the company should consider revising it and providing an updated copy to the grower to minimize the risks of having engaged in a violation of deceptive practices.

ii. Section 201.112(b) – Disclosure contents

Section 201.112(b) lists the items the Disclosure Document is required to disclose. AMS slightly modified this provision from the proposed rule by adding the paragraph heading, "Disclosure contents." The required disclosures must be prominently presented in a clear, concise, and understandable manner. Paragraph (b)(1) requires that the Disclosure Document provide the purpose of the additional capital investment for both the LPD and the grower and a summary of all research and other supporting material that the LPD has relied upon in justifying the additional capital investment. LPDs almost always have superior information regarding the outcomes of and risks around the contemplated additional capital investment. LPDs commonly research and design additional capital investments and usually have a plan or intended outcomes with respect to their request for the adoption of an additional capital investment. Growers have limited to no access to that information, yet they are often asked to expend hundreds of thousands or even millions of dollars to implement additional capital investments. As part of any

assessment of risks or benefits relating to an additional capital investment, growers must be provided the information necessary to understand the intended purpose of the additional capital investment and have access to any research or other supporting material regarding that additional capital investment. For example, growers may make different decisions about their approach to additional capital investment depending on whether it is intended to be performance-enhancing (*e.g.*, tunnel ventilation), whether it is intended to enable a change in the product offered (*e.g.*, a switch to “No Antibiotics Ever”), or whether it changes the nature of the controls and risks (*e.g.*, automation and monitoring). Omissions of this information prevent growers from making an informed business decision, negotiating effectively for adequate compensation, or determining if and how the original bargain for exchange has been modified or altered. Thus, an LPD’s failure to adequately disclose this information is deceptive and harmful to growers because that failure imposes undue financial risk and increases the likelihood of a poor financial outcome on the investment.

Paragraph (b)(2) of § 201.112 requires LPDs to provide clear additional capital investment financial incentives and schedules to growers. Under paragraph (b)(2), LPDs are required to disclose to the grower all financial incentives and compensation associated with the additional capital investment. The Disclosure Document shall clearly delineate how long such financial incentives or changes in grower compensation will last and the degree to which benefits accruing to growers making such investments are contingent on how widely they are adopted by other growers. Compensation and financial incentives are broad terms and may include changes to grower base pay or performance pay, payments specifically linked to adoption of the particular technology resulting from the additional capital investment, and any other changes to the economics of the grower’s relationship with the poultry company associated with making the additional capital investment or its implementation once made. Clearly disclosing

financial incentives will assist the grower in assessing the relative risks of non-recoupment, as the reliability of those incentives may vary based on the duration of the contract and whether other growers are likely to incorporate the additional capital investment technology in a way that would make recoupment through performance pay less reliable.

Paragraph (b)(3) of § 201.112 requires that LPDs disclose all construction schedules related to the request for the additional capital investment. Clearly disclosing expected grower construction schedules and other repayment schedules also will assist the grower in assessing incentives and risks relating to borrowing, construction, and payment timing. This disclosure will position growers to better analyze the business risk in undertaking an additional capital investment, including the operational risks relating to implementing the additional capital investment and risks of LPD strict enforcement of these implementation requirements. For example, comments (discussed in further detail below in section V., “Comment Analysis”) noted concerns about LPDs not being sufficiently lenient regarding construction schedules. By enabling growers to clearly understand each component of the additional capital investment requested by the LPD, the required disclosures will address key information asymmetries that exist between the LPD and the grower with respect to LPD’s purposes, bases, and expectations for an additional capital investment. Growers will be better positioned to evaluate the true costs and risks from the additional capital investment, as well as the operational implications for their farming enterprise.

As proposed, paragraphs (b)(1) through (3) of § 201.112 included language requiring that LPDs describe within their Disclosure Document: (1) “any relevant” research or other supporting material that the LPD has relied upon in justifying the additional capital investment; (2) “all relevant” financial incentives and compensation for the grower associated with the additional capital investment; and (3) “all relevant”

construction schedules related to the request for additional capital investment. After consideration and review of public comments, it became clear that the term “relevant” as proposed was ambiguous and confusing. Commenters expressed uncertainty regarding how to determine compliance with these requirements. Some stakeholders believed that the term “relevant” created an ambiguous requirement that could result in the inclusion of unnecessary documents that may not in fact be “relevant” to satisfy the required disclosures. AMS finds these comments persuasive and, thus, AMS has struck the term “relevant” from paragraphs (b)(1) through (3) of § 201.112. After the change, paragraphs (b)(1) through (3) require LPDs to submit: (1) all research and other supporting material that the LPD has relied upon in justifying the additional capital investment; (2) all financial incentives and compensation for the grower associated with the additional capital investment; and (3) all construction schedules related to the request for additional capital investment. The removal of the word “relevant” will ease the burden on LPDs by removing ambiguity regarding which disclosures are required to be included in the Disclosure Document. This technical change does not increase the burden of the disclosure requirement; it merely removes ambiguous phrasing while retaining the same disclosure requirement proposed in the proposed rule. This change will prevent inconsistencies in LPDs’ interpretation of what disclosures are required by paragraphs (b)(1) through (3).

In the final rule, § 201.112(b)(4) requires that LPDs disclose their expectations regarding housing specifications associated with the additional capital investment. LPD housing specifications are critical components to any additional capital investment. The provision of these basic details regarding the additional capital investment will enable a grower to understand the workings, process, and design characteristics of the requested additional capital investment. They thus would enable a grower to identify business risks associated with undertaking the additional capital investment, as well as any unfair or

otherwise impermissible additional capital investment practices prohibited under § 201.216. This provision remains unchanged from the proposed rule.

In the final rule, AMS revised § 201.112(b)(5). As proposed, paragraph (b)(5) required that LPDs disclose any required or approved manufacturers or vendors. In the proposed rule, AMS solicited comment on whether paragraph (b)(5) should also require the disclosure of any material financial benefits that the LPD, or any officer, director, employee or family member of any such person, receives from the use of the required or approved vendor.²⁸ Commenters indicated that LPDs should not be allowed to require growers to use certain equipment or vendors, especially when those LPDs hold any amount of financial interest in those equipment companies or specifically required vendors. Therefore, in the final rule AMS expanded paragraph (b)(5) to require disclosure not only of required or approved manufacturers or vendors, but also all financial benefits that the LPD or any officer, director, decision-making employee, or close family member thereof receives from the use of the required or approved manufacturer or vendor.

In the additional capital investment Disclosure Document, the LPD must disclose any required or approved manufacturers or vendors, and any financial benefits that the LPD or its officers (such as CEO, President, Secretary, etc.), members of its board of directors, decision-making employees, or close family members of any such person, will receive from using such a manufacturer or vendor. Decision-making employees refers to those employees who are involved with the decision-making for the additional capital investment and its implementation. A close family member covers an immediate or other family member where a reasonable person would question the impartiality of the business judgment of the decision-maker. This component of the Disclosure Document applies to possible conflicts of interest that may influence specifications for required or approved manufacturers or vendors.

²⁸ 89 FR 49002, 49025 (June 10, 2024).

The additional language is similar to an existing disclosure requirement under the Federal Trade Commission's Franchise Rule, but requires disclosure of benefits from more individuals.²⁹ AMS found this addition persuasive because it is designed to promote a similar purpose by protecting the more financially vulnerable party—who is making a significant investment—from incurring debt or otherwise expending scarce resources, not solely to achieve the investment's purpose, but rather as a reflection of the presence of a conflict of interest on the part of the less financially vulnerable party (the LPD).

Section 201.112(b)(6) requires that LPDs provide a financial analysis of projected returns the grower can expect related to the additional capital investment, including any assumptions, risks, or uncertainties, sufficient to allow the grower to make their own projections. The language of the final rule is slightly simplified from that proposed to remove the hyphenated text and incorporate that same language closer to the end of the sentence. This technical change improves the readability of the provision without changing its meaning as proposed. This provision is designed to enable the grower to evaluate the reliability of the financial returns that the grower could receive over the duration of the contract. Such information would include, where relevant, assumptions regarding the expected likelihood of whether other growers will adopt the additional capital investment and the impacts on the reliability of returns in relation to the incentives. Financial analysis of projected returns is critical to enabling growers to understand the opportunities, and hence the risks, they may be taking on. For example, revenue projections should include assumptions that can be relied upon by growers in relation to annual flock placements, stocking density, and the expected distribution of performance pay. Omission of this information is central to the inability for growers to effectively identify whether they can adequately recoup the additional capital investment or whether the additional capital investment is otherwise unfair.

²⁹ 16 CFR 436.5(h)(6).

Disclosure under § 201.112 is more detailed than LPD disclosure under the existing regulation in § 201.102(d)(2). The existing disclosures provide guidance to the grower with respect to the relative risks associated with contracting with the LPD to prevent deception before it harms the producer. The disclosures required in this final rule focus on ensuring that growers are aware of known or reasonably expected sources of returns, risks, and costs (including costs such as labor, operating, maintenance, and other costs associated with a request for an additional capital investment). Thus, § 201.102(d)(2)(i) and (ii)³⁰ is a focused revenue disclosure, and references situations where contracts are modified due to additional capital investment or otherwise and requires a projection from LPDs when contract modifications dilute the value of the 5-year revenue tables required in § 201.102(d)(1). If § 201.112 is applicable to the LPD and incorporates what is otherwise required under § 201.102(d)(2)(i) and (ii), the LPD can use one set of disclosures for both § 201.112 and § 201.102(d)(2)(i) and (ii).

Finally, § 201.112(b)(7) requires that LPDs include in the Disclosure Document a specific statement that the Disclosure Document has not been reviewed by USDA, and that false and misleading statements or material omissions may violate State and/or Federal laws.³¹ The statement must also indicate that violations of Federal and State laws may be determined to be unfair, unjustly discriminatory, or deceptive and unlawful under

³⁰ (2) If poultry housing specifications for broiler growers under contract with the complex are modified such that an additional capital investment may be required, or if the 5-year averages provided under paragraph (d)(1) of this section do not accurately represent projected grower gross annual payments under the terms of the applicable broiler growing arrangement for any reason, the live poultry dealer must provide the following information:

(i) Tables providing projections of average annual gross payments to broiler growers under contract with the complex with the same housing specifications for the term of the broiler growing arrangement at five quintile levels or by mean and standard deviation expressed as dollars per farm facility square foot.

(ii) An explanation of why the annual gross payment averages for the previous 5 years, as provided under paragraph (d)(1) of this section, do not provide an accurate representation of projected future payments, including the basic assumptions underlying the projections provided under paragraph (d)(2)(i) of this section.

³¹ This mirrors language in the FTC Franchise Rule at 16 CFR 436(e)(2) that refers to the FTC's position on Franchise Disclosure Documents (FDDs), specifying that while the FTC requires franchisors to provide accurate disclosures, it does not verify the content of the FDD, nor does it endorse the franchise offering.

the P&S Act, as amended. AMS does not intend for the Disclosure Document to be a means by which LPDs may waive any unfairness provisions in law or regulation. AMS maintains that a determination of unfairness is dependent on the facts and circumstances of each case. The required statement must also include Packers and Stockyard Division contact information that growers can use to report violations and other concerns. Lastly, the statement must provide website contact information for those seeking additional information on rights and responsibilities under the P&S Act. This provision is unchanged from the proposed rule.

AMS underscores that the information required to be set out in the Disclosure Document is not currently provided to most growers or in all circumstances. These omissions present material risk of deceiving growers, as well as subjecting them to potentially unfair practices which they are unable to identify at an early enough stage to halt them in their incipency.

iii. Section 201.112(c) – Translation

In the final rule, § 201.112 contains a new paragraph (c). In the proposed rule, AMS asked commenters what considerations, if any, AMS should take into account with respect to the timing, delivery, or readability with respect to the Disclosure Document.³² AMS also specifically asked commenters whether it should include a provision requiring that LPDs make reasonable efforts to assist growers in translating the Disclosure Document and to ensure that growers are aware of their right to request translation assistance.³³ In response to the proposed rule, including specific questions posed related to translation, some commenters requested that translations of the Disclosure Document be made available in languages other than English. Therefore, AMS is adding paragraph (c) to § 201.112, which requires that, upon delivery of the Disclosure Document to the

³² 89 FR 49002, 49025 (June 10, 2024).

³³ *Ibid.*

grower the LPD must make reasonable efforts to ensure that the grower is aware of their right to request translation assistance and must assist the grower in translating the Disclosure Document. Reasonable efforts include, but are not limited to, providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the poultry grower's geographic area. Depending on the facts and circumstances (such as convenience, expense, and timeliness of the translation), reasonable efforts may also include allowing the grower access to a computer-generated translation of the Disclosure Document and additional time to review any translated Disclosure Document. An LPD may not restrict a broiler grower or prospective broiler grower from discussing or sharing the Disclosure Document for purposes of translation with a person or organization that provides language translation services. Nothing in the rule prevents companies from providing a translation, provided it is complete, accurate, and not misleading.

This addition of translation assistance is necessary because language barriers can prevent poultry growers from understanding the Disclosure Document, which would thwart the purpose of § 201.112. If growers do not have a reasonable opportunity to understand the Disclosure Document due to language barriers, the goal of remedying deception is thwarted. Notably, the translation requirements under § 201.102(g)(4) apply to § 201.112 if the latter is applicable to the LPD and incorporates what is otherwise required under § 201.102(d)(2)(i) and (ii) in a single disclosure that meets the requirements of both § 201.112 and § 201.102(d)(2)(i) and (ii).

iv. Compliance and Enforcement

Compliance with § 201.112 requires LPDs to include the information and topics described in § 201.112(b)(1) through (7) in the Disclosure Document and provide that document to growers when requesting an additional capital investment. LPDs are also

required to inform growers of their right to request translation assistance and/or assist growers with translation of the Disclosure Document, if necessary.

Enforcement of § 201.112 could occur in several ways. Growers could contact AMS (PSD) to submit a complaint regarding an alleged violation of § 201.112. PSD would investigate, which could lead to a referral to DOJ for appropriate action or, where failure to pay is implicated, USDA enforcement through administrative action.⁴⁴ As necessary for compliance enforcement or during investigations, PSD will review Disclosure Documents to ensure completeness. Injured individuals also have a right to proceed in Federal court.

D. Severability (§ 201.290)

AMS is adding § 201.290, “Severability,” to subpart N to confirm that if any provision of this rule, any component of any provision, or any provision of subpart N is declared invalid or if the applicability thereof to any person or circumstances is held invalid, it is AMS’s intention that the validity of the remainder of the provision or the applicability thereof to other persons or circumstances shall not be affected thereby with the remaining provision, or component of any provision, to continue in effect. Such a provision is typical in AMS regulations that cover different topics and is included here as a matter of housekeeping.

This rule aims to address different harms common in the broiler production industry: lack of payment transparency in broiler growing arrangements, unfairness in tournament operations, and lack of disclosure from LPDs regarding additional capital investments. Each of the new sections can operate independently in the absence of the others. Conduct that violates one section is not dependent on protections put in place by other sections. For example, if an LPD discounts the rate of compensation provided in a broiler grower arrangement in violation of § 201.106, the Agency would still be able to enforce this provision even if the provision requiring the fair operation of broiler grower

ranking systems (§ 201.110) were struck down. These are not inextricably connected regulations: § 201.110 focuses on establishing a fair comparison among growers in a tournament, while the focus of § 201.106 is ensuring clear (no discounting) and reliable (not unreasonably variable) rates of compensation disclosed in the contract. As another example, if the provision regarding additional capital investments (§ 201.112) was struck, AMS would still retain criteria under § 201.216 to evaluate whether requiring an additional capital investment constitutes a violation of the P&S Act.

AMS intends that the severability provision operate to the fullest extent possible. For example, under § 201.110(b)(1), “Policies and procedures,” if the league composition requirement in paragraph (b)(1)(iii) is severed, this does not necessarily negate the benefits or make unenforceable the other processes requirements contained in paragraphs (b)(1)(i) (inputs under LPD control), (ii) (flock production practices under LPD control), and (iv) (evaluation period), etc. Similarly, AMS intends that the severability provision apply to all of subpart N. If one of the new regulations implemented via this final rule is severed, this does not make unenforceable the existing provisions in subpart N. In other words, if the benefits of a section in subpart N remain intact without the unenforceable provision, AMS’s intent is to retain the enforceable provisions of the section. AMS notes that this discussion is illustrative and not exhaustive.

V. Comment Analysis

Overview

The Poultry Grower Payment Systems and Capital Improvement Systems proposed rule, published on June 10, 2024, received 758 comments, some with multiple signatories, over a 60-day comment period. Of these comments, 671 were in clear support of the rule (the majority of these consisting of form letters from advocacy campaigns), while 13 comments were in clear opposition to the rule and the remaining 74 were ambiguous or unclear. A variety of stakeholders commented on the proposed rule,

including farmers' coalitions, government entities, advocacy organizations, industry trade organizations, processors, producers, and other non-affiliated, individual parties. Topics that garnered considerable attention in the proposed rule, both positive and negative, included the rate of compensation, transition and implementation costs, the duty of fair comparison, and reasonable recoupment of required additional capital investments. A common theme among the majority of supportive comments, particularly by growers, was the fear of retaliation underlying their concerns about LPD practices.

Many farmers' coalitions, advocacy groups, and individual producers argued that LPDs would easily find ways to deny producers fair payment, especially during the industry's transition to adopt the proposed changes. For example, while many commenters supported § 201.106's 25 percent comparison-based compensation presumption, most of these supporters requested other changes to the final rule, such as requiring performance-based pay to be applied at the individual level and pairing it with a requirement of a fair minimum base pay. Other common recommendations for financial safeguards included making the option for non-comparison-based pay more accessible to producers and requiring that producers' contracts be long enough to ensure a reasonable rate of return for their loans.

Another common theme among commenters was the fear of LPD retaliation against producers who made unfairness claims, requested non-comparison-based pay, refused to take on an additional capital investment, etc. Many individual producers shared personal experiences of retaliation, often in the form of intentionally unequal inputs and threatened or actual contract termination, for speaking out against unfair practices. Many commenters emphasized the inherent power imbalance between both parties, pointing out that producers, who carry high amounts of debt, depend on LPDs for paying down the debt. Moreover, commenters described feeling or receiving intimidation against making unfairness claims and pressure to adhere to unfair terms. For instance, commenters

described receiving unexpected deductions or variability in pay and had no choice but to accept their circumstance. Commenters recounted struggling to make ends meet as a result. If they ranked lower than other growers for one or more settlements, the resulting decrease(s) in compensation left them unable to afford necessary expenses. Some commenters stated that experiencing these losses forced them to sell their families' farms, driving them out of the industry entirely. Many commenters requested that the final rule include specific protections against retaliation for producers who made unfairness claims against their LPD or who refused to take on an additional capital investment required by their LPD. Many other commenters requested greater protections for producers who receive unequal inputs from their LPDs, describing numerous input variables that can be and have been exploited by LPDs to deliberately lower producers' placement in their tournament.

Conversely, comments in opposition, many from industry representatives, defended the current system and expressed concerns about the proposed rule. These commenters asserted that the rule is unfair to growers who are successfully operating in the current system and that the rule would unfairly punish high performers. These commenters also stated that the rule disregarded the self-interest of LPDs in ensuring grower success. Opposing commenters further stated the rule would be overly burdensome for the industry to implement.

A. Section 201.106

i. Transparency in pay

Comment: Many commenters, especially growers and advocacy organizations, highlighted the need for stronger protections, greater transparency, and a more equitable balance of power within the poultry industry. Commenters emphasized that greater transparency from LPDs is essential for a fair and equitable payment system. Specific concerns stemming from inadequate transparency included the inability to predict income

due to fluctuations in flock-to-flock payments, and payments below the base price due to factors outside of growers' control. Commenters also suggested safeguards to prevent unfair payment deductions related to stocking density and other external factors. Advocacy groups raised concerns about the potential for LPDs to exploit the system and drive down grower base pay.

Other commenters, especially industry stakeholders, emphasized existing measures and cautioned against government intervention. These commenters asserted that growers face no uncertainty regarding income or input costs and opposed a fixed base price. They also asserted that most contracts already include minimum compensation floors and expressed concern that raising base pay would be unsustainable and lead to higher consumer prices. One commenter suggested that AMS identify and address potential gaps in grower education and outreach.

AMS response: AMS agrees with the comments that asserted the need for stronger protections, greater transparency, and a more equitable balance of power. Accordingly, AMS modified the proposed § 201.106 to include provisions that further these goals. Paragraph (a) will prevent LPDs from reducing a poultry grower's compensation based on the grower's ranking, grouping, or comparison to others. This will improve growers' ability to predict income. As discussed below, paragraph (b) will establish a presumptive limit on comparison-based performance pay, which will enhance growers' ability to predict their income from a contract by reducing variability from that rate due to fluctuations in flock-to-flock payments. Paragraph (c) works to prevent LPDs from exploiting their market power and associated bargaining power by requiring LPDs to notify the Administrator if there are any contract modifications that result in a reduced payment to poultry growers.

Existing regulation fails to protect poultry growers from injury in the manner Congress intended. Contrary to LPDs' claims, growers do face uncertainty regarding

income, because the payment they will receive is not known until the growing cycle is complete and all growers' outputs are compared and performance payments are distributed. AMS has consistently heard reports from growers receiving deductions or excessively variable compensation from LPDs such that their compensation does not align with the LPDs' initial representations.³⁴ Accordingly, a high percentage of growers' operations have sustained net negative incomes – an outcome that growers most likely do not anticipate before agreeing to contract with their LPDs.³⁵ Moreover, AMS has reviewed broiler growing contracts for decades during routine regulatory reviews of LPD's payment practices. While many contracts that AMS has reviewed already include minimum compensation provisions, these provisions are not an industry-wide practice, and do not cure the deception or unfairness arising from deductions in the rates of compensation in the contract, especially the base price, because the minimum price could be far below the base price or even the lower bounds of base plus performance pay. Moreover, requiring that minimum compensation be disclosed allows growers who have the option of contracting between multiple LPDs to meaningfully compare their options,

³⁴ *United States v. Cargill Meat Solutions Corp.*, 1:22-cv-01821-ELH (D. Md. July 25, 2022) (LPDs did not adequately disclose the risk inherent in the tournament systems to growers, so growers could not reasonably evaluate the range of potential financial outcomes, manage their risks, or compare competing poultry processors); AMS-FTPP-22-0046-0777 (“[W]e were told our houses would be paid off raking in the money in 10 years[.] I am now out to twice that still in debt...”); AMS-FTPP-22-0046-0876 (“In our communications with growers, we have learned that when they signed their initial poultry contract, most had expectations that their contract relationship with a poultry company would be one of mutual respect where both parties shared in the risks and rewards of producing chicken for consumers. They expected a transparent system that would reward them for their hard work and management services. Instead, what they quickly found was a dictatorial system that gives growers an unpredictable and often inadequate income stream, and allows poultry companies to shift risks onto growers, without fairly sharing in the economic rewards commensurate with their financial investment and services provided”); AMS-FTPP-22-0046-0156 (“Frequently, that deception begins even before poultry growers sign their contracts. It is a common story for growers to be attracted by unrealistic financial models and integrators’ promises of support. Once the contracts are signed, though, growers find themselves on the short end of a massive power imbalance”).

³⁵ MacDonald, James, Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, USDA Economic Research Service (2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=1829.6 (In 2011, nearly a third of smaller farms and nearly a fifth of larger farms realized negative net farm income); AMS-FTPP-22-0046-0780 (“I’ve been a poultry grower for almost 15 years and it is a shame that you have to have multiple jobs just to make ends meet... Everyone is struggling in this economy right now and we have massive debt loads, insurance and utilities have skyrocketed parts are extremely high and even just the basic necessities to live are at critical levels...”).

enhancing competition in the market for grower services in certain geographies. Nor is this an unworkable or unreasonable requirement; some LPDs have already adopted the reforms included in this final rule, and so this regulation builds on existing, successful models that that commenters said some LPDs have already found workable and effective.

Also, contrary to some commenters' claims, nothing in the regulation requires the base pay to be increased or otherwise be fixed in a manner that would affect supply or the price of chicken for consumers; rather, it is designed to address inadequate poultry grower compensation arising from deceptive and unfair practices by LPDs. Simply, § 201.106(a) enables LPDs to continue to set a base pay and provide bonuses based on a grower's grouping, ranking, or comparison to others, or through other payment incentives schemes. AMS acknowledges that grower education and outreach may be useful but believes that the responsibility to eliminate deception starts with the legal responsibilities Congress placed on the LPDs when it amended the Packers and Stockyards Act. This includes clear contract terms and transparent communication between LPDs and growers.

AMS notes that § 201.102 requires disclosure of stocking density in production contracts. Reductions in stocking density are best addressed under those disclosure requirements. AMS acknowledges that § 201.106 may not address every form of unfair practice that a grower may experience, such as reductions in flock placements or stocking density, and AMS remains committed to robust enforcement of section 202 of the Act to address the full range of potentially unfair practices that growers may face.

AMS agrees that USDA-sponsored education and outreach helps growers' make informed decisions. AMS is taking steps to increase producer education and outreach, including, for example, by establishing the *farmerfairness.gov* portal to facilitate ease of access for submitting complaints. AMS intends to expand education and outreach regarding this rule and other regulatory requirements. Disclosure and education, although beneficial, are unlikely to address unfairness because of the substantial difference in

bargaining power between LPDs and growers. AMS's responsibility, however, is to enforce the Act. Better information concerning an unfair practice does not make the practice fair, nor alleviate the need for regulation.

ii. Performance pay

Comment: Growers and supporting organizations highlighted the need for a more balanced system that protects growers from income volatility and unfair deductions related to factors outside of their control. Many commenters explicitly endorsed a 25 percent cap, citing the potential to curb the negative impacts of the tournament system while preserving performance-based incentives. Several advocacy groups supported calculating the variance at the individual grower level rather than the complex level to allow growers to make more informed financial calculations, better determine whether they are being treated unfairly by LPDs, and to limit the potential for favoritism and retaliation against individual growers. To strengthen fairness and transparency, commenters emphasized the need for objectively measurable bonus criteria and the importance of pairing the cap with a fair minimum base pay. One commenter suggested allowing exceptions for exceeding the 25 percent cap with proper justification. Another pointed to the bonus cap model in the turkey industry and a farm bureau suggested a 20 percent pay difference between growers. Several commenters indicated that bonuses should be linked to factors within a grower's control.

Some industry representatives emphasized the role of performance incentives in driving productivity. Commenters argued that limiting performance bonuses would disincentivize growers and negatively impact productivity. Some commenters questioned the basis for the 25 percent figure.

Many stakeholders expressed concern about the feasibility of case-by-case enforcement to ensure fair comparison-based bonuses. Comments reveal a consensus among stakeholders that case-by-case enforcement alone is insufficient to guarantee fair

comparison-based compensation. Advocacy organizations argued that case-by-case enforcement is ineffective and inefficient and places an undue burden on growers who seek redress. These organizations cited past instances in which this approach failed to adequately protect grower interests. One commenter raised a concern about case-by-case enforcement's vulnerability to changing political landscapes, thereby creating uncertainty for growers and potentially discouraging them from reporting unfair practices. Many stakeholders advocated for clear regulations and proactive measures to prevent unfair bonuses rather than relying solely on enforcement. For example, one commenter requested that USDA establish guidelines defining unfair performance payment structures, proposing a presumption of unfairness for bonuses exceeding 25 percent of total compensation. The commenter also suggested that contracts offered to indebted growers could serve as potential evidence of anti-competitive practices, particularly by processors with significant market power.

AMS response: In the proposed rule, AMS specifically inquired whether it is presumptively unfair for comparison-based compensation to equal or exceed 25 percent of total compensation (base pay rate plus comparison-based) for any grower and asked a range of questions around the appropriateness of the specific threshold, how to calculate it, and how it would affect the industry. These questions included inquiries highlighting the role of the 25 percent presumption as a potentially binding constraint and how LPDs might respond in the compensation structures.

AMS agrees with the majority of commenters suggesting that comparison-based performance pay should be presumptively limited in order to balance the interests of growers and LPDs and prevent unfair outcomes. Grower concerns regarding thin margins, debt load, input variability, and tournament composition invoke equity issues that must be balanced with performance and productivity incentives. While useful as an incentive and a means to allocate pay, flock performance metrics, specifically feed

conversion, as a proxy to grower effort are imperfect. Feed conversion itself is affected by variables beyond grower effort. AMS is not aware of existing technological innovations that could serve to better isolate grower effort or a measurement that would be exclusively under grower control.

Flock performance metrics serve some purposes in the assessment of grower effort and the allocation of grower payments. AMS's experience in analyzing performance payments suggest that ranking systems can be a useful and reasonably equitable mechanism for pay allocation with proper regulation in magnitude. Performance payments can reward grower effort without being an unlawfully deceptive or unfair practice.

In considering the appropriate form of regulation, AMS considered the variety of grower ranking systems currently in practice and the possible evolution and redesign of those systems, such that the purpose of the regulation would be resistant to circumvention while also providing an appropriate level of flexibility to maintain an incentive structure. As referenced in the proposed rule, a presumptive limitation on performance pay magnitude strikes that balance. As a presumption, enforcement will occur based on an inquiry into specific factual circumstances. Based on currently available information, a bright line standard is likely to be overly rigid and may serve to deprive successful growers of the expected value of their services. Allowing LPDs to provide a rebuttal to justify exceeding the prescribed performance pay magnitude is a desirable feature for growers and LPDs alike because payment systems may reflect different circumstances at different complexes. Again, facts and circumstances matter, in particular around the variability of performance for the birds in question, the housing specifications, etc., as 25 percent may still be an appropriate limit. Whether the LPD took appropriate measures to comply with the duty of fair comparison under § 201.110 or otherwise mitigated other identifiable risks of unfair variability relating to the larger magnitude of the tournament

will also be important. To underscore, AMS expects the presumption will not be easily overcome.

AMS acknowledges that some commenters preferred application of the presumption at the individual settlement level. AMS is concerned that application at the individual level will be difficult to monitor and enforce and could also result in overly rigid limitations on individual performance outcomes in flock settlements. That could dilute or distort grower performance incentives, including through capturing statistical outliers, which could result in restriction of performance payments that reduce aggregate grower revenue in ways that AMS believes are not presently necessary to address unfairness and deception under the tournament. Applying the presumption as an aggregate analysis at the complex-wide level offers several benefits to LPDs and growers. It allows smoothing of outliers from individual settlements and allows LPDs to focus on the design of the incentive system without requiring compliance on a grower-by-grower, individual settlement basis. An application at the complex-wide level will, nevertheless, have sufficient limitation on the available funds for comparison-based performance payments for individuals—owing simply to the constraint on funds for those purposes—so as to achieve the desired goal of right-sizing the magnitude of the tournament for individual growers.

In considering the appropriate threshold at which to institute the presumption, AMS first reviewed a limited sample of existing ranking systems. AMS reviewed one to five years of confidential grower compensation data for four individual broiler complexes that AMS gathered in prior investigations. This sample included small, medium, and large bird sizes and some of the largest broiler LPDs that operate several other complexes across the U.S. Aggregate performance payments at these four complexes were 11.4, 17.4, 20.5, and 25.4 percent of total grower payments. AMS is not aware of any complex with performance payments that are as much as 26 percent of total payments. As noted

above, in the proposed rule, AMS solicited comment regarding a 25 percent limitation on comparison or “performance” payments. Additionally, Wayne-Sanderson Farms, one of the three largest LPDs, recently agreed to a similar performance pay limitation at the 25 percent.³⁶ Governmental commenters noted the 25 percent cap has proven workable for both a major LPD and the growers contracted with Wayne-Sanderson. As numerous LPDs will likely need to modify contracts to achieve compliance under § 201.106(a) of this rule, finding that the industry upper bound of performance pay magnitude approaches 25 percent is also a relevant data point in AMS’s determination that 25 percent is appropriate as the presumptive threshold for this regulation.

With respect to objectively measurable bonus criteria, AMS agrees that comparisons must be fair, and § 201.110 below sets out AMS’s approach to mitigating comparisons based on inappropriate approaches to inputs, production practices, and related matters. AMS is not adopting further specificity with respect to bonus criteria in § 201.106 because AMS has designed this portion of the rule to operate in a simpler, more easily enforceable manner, including § 201.106(a)’s prohibition on deductions to any rate of compensation and § 201.106(b)’s limitation on the magnitude of performance pay overall.

With respect to the importance of pairing the cap with a fair minimum base pay, AMS has adopted transition rules under § 201.106(c) to monitor and guard against unfair changes to aggregate compensation for growers. AMS sets out additional views on rates of return below.

AMS appreciates the commenter’s suggestion regarding the bonus cap model in the turkey industry and the farm bureau suggestion of a 20 percent pay difference

³⁶ *United States v. Cargill Meat Solutions Corp.*, 1:22-cv-01821-ELH (D. Md. July 25, 2022); *United States v. Cargill Meat Solutions Corp., et al.* (2022). Proposed final judgments and competitive impact statement. *Federal Register*. Retrieved from <https://www.federalregister.gov/documents/2022/09/16/2022-20014/united-states-v-cargill-meat-solutions-corp-et-al-proposed-final-judgments-and-competitive-impact>.

between growers. AMS did not consider the turkey industry in this final rule because contracting practices in the turkey industry are more diverse, in part owing to the biological differences in the birds which to some extent mute differences in outcomes, and so this rule would not necessarily be sufficiently tailored for that sector. However, the comment underscores the reasonableness of AMS's approach of a presumptive 25 percent limitation on aggregate performance compensation.

iii. Rate of return

Comment: Grower and grower association commenters expressed concern around ensuring a reasonable rate of return for their labor and investments. Many commenters expressed broad concerns of monopsony power suppressing grower compensation. Some commenters stated the minimum base pay should reflect more competitive conditions, such as geographies where growers have the option to contract with three or more LPDs. Commenters stated that the minimum base pay should be sufficient to allow growers to make a reasonable return over the course of the contract, provided that the grower follows the LPD's required management practices and contract guarantees. One commenter suggested defining reasonable return as, at a minimum, enough net income to compensate poultry growers' labor hours at the state minimum wage rate. Others called for set minimum base pay, minimum flock placements and flock densities combining to allow growers to comfortably make loan payments plus a reasonable return. Commenters called for a more equitable and transparent compensation system that guarantees a reasonable rate of return, provides greater financial security, and addresses the power imbalance between growers and LPDs.

Grower commenters reported being underpaid and struggling to cover production costs, service debt, and earn a livable wage. Commenters highlighted a lack of adjustments for inflation, and penalties for factors outside their control as contributors to insufficient compensation. They assert that the current payment structure often makes

necessary capital improvements financially risky for growers, thereby hindering their ability to reinvest in their operations. Commenters also claimed that the current payment system lacks transparency regarding how performance payments are determined, the minimum price per pound rates, feed quality and ingredient details, breeder flock age and health, and chick hatch times and temperatures. Some commenters urged AMS to include in the final rule a presumption that an LPD is in violation of the P&S Act if the LPD does not offer a minimum base pay rate that is reasonably expected to cover the costs of operation, service debt associated with initial investments and capital improvements, and provide a reasonable rate of return. Commenters also advocated for a fairer system of deductions for condemned birds, arguing that deductions should be based on the actual weight of condemned birds rather than the flock's average weight.

To ensure fairness and sustainability, commenters proposed several solutions to the proposed question regarding whether AMS should prescriptively require grower base pay to earn “reasonable return,” assuming they follow production practices. Many commenters recommended establishing a minimum base pay that: 1) ensures a livable income and covers basic production costs; 2) includes provisions for inflation adjustments to maintain real income over time; 3) allows for debt service, enabling growers to invest in their operations without undue financial strain; and 4) provides an opportunity for a reasonable return on investment, recognizing the inherent risks and capital requirements in poultry growing. Several commenters suggested a shift toward a base pay based on square footage, potentially with a bonus component determined through a tournament system. This approach aims to provide a more stable and predictable income stream for growers. However, one producer expressed concern that square foot pay would lower bird quality and reduce animal welfare.

Commenters also called for increased transparency from LPDs, including more detailed documentation and reporting requirements. This would provide growers with a

clearer understanding of how their pay is calculated and enable better monitoring of potential unfair practices. Finally, commenters emphasized the need for mechanisms that protect growers from debt burdens and provide a greater assurance of a return on their investments. Suggested measures include limiting the financial burden on growers for capital improvements mandated by processors and establishing mechanisms to share the risks associated with market fluctuations or unforeseen events.

AMS response: AMS appreciates the challenges that many growers face in negotiating fair pay, especially given the levels of concentration in many local markets, the take-it-or-leave it form of LPD contracts, and the prevalence of the reports on troubling practices in the poultry industry. AMS aims to promote an industry market structure that can secure payment rates and contract terms for all growers that: 1) ensure a livable income and covers basic production costs; 2) include provisions for inflation adjustments to maintain real income over time; 3) allow for debt service, enabling growers to invest in their operations without undue financial strain; and 4) provide an opportunity for a reasonable return on investment, recognizing the inherent risks and capital requirements in poultry growing. AMS also recognizes the value of basing payment, in many circumstances, on square footage, potentially with a bonus component determined through a tournament system. In many cases, such a compensation structure could create a more stable and predictable income stream for growers because there would be a guaranteed payment rate based on factor that does not change.

This final rule seeks to make targeted reforms based on the information and strategies available to AMS at this time. In this final rule, AMS does not purport to alleviate all potential unfair aspects of the tournament system or of the integrated model of broiler production in concentrated markets. AMS believes that general principles of unfairness prohibit an unlawful exercise of market power or bargaining power that injures growers, including by providing returns that are below a reasonable return. AMS does

not, however, identify a strict framework that prescribes exactly how to ensure competitive compensation. Rather, at present, AMS will apply a case-by-case enforcement approach to protect growers from unfair and unlawful market power or bargaining that denies growers reasonable compensation. In conducting its analysis, AMS expects to rely heavily on the facts and circumstances, including but not limited to:

- Relative levels of market power (including the number of LPDs growers can contract with in a given geography, whether there is meaningful choice in contracting practices among LPDs in a given locality, the extent to which risk or other unfair contract terms are shifted to growers, the extent to which contracts are meaningfully negotiated, etc.), and other differences in bargaining power between growers and relevant LPDs;
- The type and nature of the unfair conduct (*e.g.*, express or tacit collusion via information sharing, the presence of express or implied no-poach agreements, whether the tournament system was being utilized in a manner to prevent growers from negotiating or securing competitive compensation, the LPD's treatment of days out and condemnation within the tournament system, etc.);
- What constitutes competitive pay for growout services, especially in geographies where more LPDs are present;
- The rates of payment under the contract; in particular, whether the base rate a grower can expect to receive for performing fully under the contract can ensure a reasonable return;
- The costs of providing growout services over the contract, including appropriately and reasonably measured labor costs;
- The levels of contractually guaranteed and otherwise relied upon flock placements and density;
- Whether the length of the contract and reliance expectations on renewal are sufficient to assure reasonable return;

- The inclusion of cost-of-living adjustments or opportunities to secure those adjustments in contract renewals; and
- Where additional capital investment is required, factors relevant to additional capital investment, including those set forth in § 201.216 and the information set forth as required under § 201.112.

AMS underscores that many growers face high levels of local market power or bargaining power by LPDs, exacerbated by hold-up concerns arising from high levels of investment and reliance on LPDs for critical inputs. Moreover, growers face limited opportunities to avoid take-it-or-leave-it terms from their LPDs, including cuts to flocks or nonrenewals of contracts. In general, AMS expects this enforcement approach will, in practice, reinforce the principle that an LPD must provide a reasonable opportunity for a grower that delivers under the contract to earn a reasonable return over the life of the contract if they comply generally with the specified production practices.

AMS appreciates the commenters' interest in further enhancing transparency. AMS notes that this final rule increases transparency for growers around rates of compensation (§ 201.106) and additional capital investments (§ 201.112), and also sets more fair standards around, and enhances transparency into, LPD practices relating to input and production practice distribution. It also complements other regulatory initiatives that AMS has already finalized to provide transparency around contracting and input distribution (88 FR 83210, November 28, 2023). AMS intends now to turn its focus to the important task of monitoring the implementation of existing mandates to evaluate the remaining gaps and needs.

AMS also appreciates grower comments around the challenges that debt burdens place on growers and on the importance of more fairly sharing the burden of market fluctuations or unforeseen events. A central purpose of § 201.112 is to enhance the information available to growers and to AMS to ensure the fairness of additional capital

investments, and therefore LPDs' accountability, under § 201.216 and section 202 of the Act. For example, an LPD's failure to ensure the reasonable ability for a grower to recoup the cost of a required (including ostensibly requested but in practice coerced) additional capital investment would, on its own, be dispositive to show a violation of § 201.216. AMS recognizes that growers cannot avoid the unfair exercise of market power. Failing to sufficiently and fairly compensate growers is not a cognizable benefit to growers or to competition. (AMS's approach is discussed below in section V.C.ii., "Additional capital investment unfairness.")

With respect to new housing, as opposed to additional capital investments, AMS has also separately finalized the *Transparency in Poultry Grower Contracting and Tournaments* (Transparency Rule) rule that provides significantly enhanced transparency over the preexisting system.³⁷ As described in the Transparency Rule, these disclosures include returns broken out by quintile and other information delivered in a disclosure document when the grower receives any housing specifications and would be contemplating making additional investments. AMS expects to monitor the implementation of that rule and would, for example, examine circumstances where the disclosures were deceptive or misleading relating to securing the new grower's commitment to invest in housing.

iv. Transition and implementation

Comment: AMS asked what risks growers and/or LPDs might face during any transition to the proposed § 201.106. Concerns about transition and implementation risks for growers and LPDs centered on potential shifts in the market power dynamics and the administrative compliance burdens. Some commenters, especially grower advocates, farmers' coalitions, and legal institutions, were concerned about the potential for LPDs to exploit the new regulations by arbitrarily lowering base pay rates. They argued that this

³⁷ 88 FR 83210, November 28, 2023.

could undermine the intended fairness that the rule aims to achieve and called for explicit prohibitions against such practices.

A governmental commenter suggested that, for the duration of a reasonable transition period, USDA require that current payments remain overall comparable, so that LPDs cannot arbitrarily lower grower base pay or overall compensation during the transition period or impose other unfair contract terms. This commenter also suggested that USDA require that modified contracts have, at a minimum, the same length as the period covered by the grower's initial contract.

Advocacy associations urged USDA to closely monitor the industry's transition and establish fair minimum rates that are not lower than the average pay under the current comparison system. To minimize transition risks to growers, one advocacy association noted that AMS should not require submission of all contracts that are modified to comply with new § 201.106, in order to avoid a bottleneck in contract negotiations. Instead, they recommend that AMS require LPDs to submit representative contracts that show how they are calculating a fair base pay. The commenter also suggested an accountability mechanism rather than a pre-approval process so that LPDs can deliver to AMS the information necessary for the Agency to determine whether contract modifications are happening in compliance with § 201.106 and the Act.

Another advocacy association urged AMS to presume undue buyer power exists whenever an LPD offers a grower in debt a contract that, based on the minimum income possible from the contract's guaranteed flock placements, stocking density, and firm base price, does not give the grower enough income to pay off their debt. The commenter also stated that AMS should include a requirement that LPDs submit to AMS for review any contracts modified or revised to comply with new § 201.106 and should also require all LPDs to submit compensation data for review. This data can be used as a basis for requiring all integrators to offer base prices that rise to a truly competitive level, and that

are consistent with grower cash flow and loan servicing expectations under original contracts.

AMS response: In response to these concerns, AMS is adding paragraph (c) to the final rule, so that if an LPD modifies a contract and reduces aggregate compensation to growers,³⁸ the LPD must submit notice of the change to AMS and include copies of the original contract and new contract, as well as any related Disclosure Documents. AMS can then adequately assess that reductions in aggregate grower compensation does not violate section 202 of the Act. Aggregate compensation enables sufficient flexibility for LPDs to adjust supply and deliveries based on changing market conditions. In any case, AMS regularly conducts compliance reviews of LPDs.

AMS has also considered the concerns that industry stakeholders have presented regarding the importance of LPDs having the ability to adjust payment to maintain a functioning market. This regulation allows for reductions to compensation that do not otherwise violate section 202 of the P&S Act. The LPDs are required to submit the prior contract, the new contract, and any Disclosure Documents related thereto. This is not a time-consuming or costly requirement as this information is already readily available to LPDs. It also does not stifle innovation as it does not impact novel contracting practices so long as they are fair and not deceptive. The regulation does not prevent contracts from being updated; it only requires a minimum level of review to ensure that the changes are not unfair or deceptive.

AMS is not, at this time, specifically requiring that modified contracts have, at a minimum, the same length as the period covered by the grower's initial contract. Instead, AMS is focusing on ensuring the grower compensation in aggregate remain unchanged for the initial period of compliance, as AMS views that factor as being at greater risk of

³⁸ Defined as "less than the prior annual-calendar year's complex-wide average gross payment to the grower."

immediate, unavoidable abuse from LPDs than the length of contract per se.

v. Benefit, burden, and cost

Comment: Several commenters emphasized the need for safeguards against LPDs leveraging their market power or bargaining power to offset any losses incurred due to the rule. They argued that such protections are needed to ensure fair compensation for growers. On the other hand, industry stakeholders were concerned about the administrative burden of compliance. Processor commenters were opposed to submitting revised contracts and compensation data to USDA on the grounds that it is unnecessary and could lead to delays and increased costs and stifle innovation in contract structures. They argued that allowing LPDs to adjust base pay rates, within reason, is necessary to maintain a functioning market. An industry commenter stated the rule would require renegotiation of thousands of grower contracts, a potentially disruptive and costly process. The commenter pointed to the potential for uncertainty, economic risk, and nullification of lawful contracts.

AMS response: AMS acknowledges that this regulation would require renegotiation of many existing grower contracts. Due to sunk capital costs and thin margins, poultry growers are generally at a distinct disadvantage in the face of contract renegotiation and renewal. As explained in this final rule, however, AMS has determined the current structure of many contracts is unfair and deceptive and therefore unlawful under the Act. AMS is providing an extended effective date for the provisions of this final rule to provide additional time for LPDs and growers to modify contracts or otherwise renew under a new, legally compliant system. In addition, AMS recognizes that growers may be at risk of unfairness during any transition period and, accordingly, is adopting a transition requirement for LPDs to submit contracts upon modification or renewal if those contract changes result in decreased grower compensation. This requirement is designed to enable a smooth transition to the new system. AMS review

will not delay contracts, as AMS will not be approving the contracts under § 201.106(c), but rather will be identifying unfair practices and potentially commencing enforcement. AMS's purpose is, as commenters urged, to safeguard growers against LPDs leveraging their market power to offset any costs they incur due to the rule's fairer and less deceptive approach to payment systems.

AMS rejects the view that this rule would stifle innovation in contract structures. It provides a small number of basic safeguards for the protection of growers, but otherwise does not dictate the specific manner in which LPDs compensate growers for their services. AMS is aware of a wide variation of existing contractual approaches to compensation which would remain permissible under this final rule. For example, some contracts compensate on a per pound base rate while others use a square footage contract for base payments or a combination. Performance pay will still be permitted at an appropriate magnitude, and LPDs may continue to use a range of approaches for comparison-based pay, including flock-by-flock comparisons or longer rolling averages as some contracts currently do.

LPDs are also free to adjust base pay rates upwards based on grouping, ranking or comparison, which aligns with some industry views that the tournament system, within reason, is necessary to maintain a functioning market. LPDs can also continue to deduct growers' payment for noncompliance with contractual requirements, provided it is not based on the outcomes of the tournament.

B. Section 201.110

i. Input variability

Comment: Overall, commenters broadly agreed that input variability poses a significant challenge to fair grower compensation within performance-based payment systems. While commenters acknowledged the difficulty of controlling certain inputs such as chick quality, stakeholders disagreed on the degree of control and intentionality

surrounding input variability. Generally, growers pointed to examples of inconsistencies that impacted their performance, including inconsistencies in chick quality and hen age, which suggest a lack of control and potential for unfair outcomes. Industry commenters emphasized the challenges of controlling the inputs, such as chick quality, countering that they also lack control over certain inputs, particularly when ordered in bulk, which would make intentional manipulation difficult. One commenter challenged the assumption that input variability is intentional, controllable, and material, and asserted that USDA lacked evidence to prove the assumptions.

Regarding the impact of input variability on grower performance and fairness, commenters argued that since growers have limited control over key inputs (*e.g.*, chick quality, feed delivery, or disease management), basing payments on performance relative to these inputs is inherently unfair. They emphasized that settlement outcomes under these conditions do not accurately reflect grower management skills or effort. Other commenters expressed concern that excessive variability in inputs such as chick health, feed delivery, and flock pickup within a settlement group creates significant financial risk for growers, especially over multiple flocks.

Industry stakeholders argued that requiring LPDs to control all input variations is impractical and could lead to inflexible systems that ultimately harm growers.

AMS response: AMS has gathered significant evidence from poultry growers that input variability in poultry tournaments can lead to unfair comparisons, and lead to inappropriate burdening of risk onto growers. AMS does not need to find that input and production practice variability is intentional, fully controllable, or material in all instances by the LPD to reach the conclusion, based on academic evidence, regulatory experience, and complaints from growers, that it exists and can and should be mitigated by LPDs. AMS has identified at least the following differences that may affect grower

performance: breed,³⁹ bird sex,⁴⁰ breeder stock age,⁴¹ stocking density,⁴² consistency of feed availability,⁴³ and the type and administration of veterinary medicines.⁴⁴ AMS also notes that chick genetics are currently proprietary and largely controlled by two companies, one of which is owned by one of the nation's largest LPDs.⁴⁵

This rule aims to set conditions on performance-based payment systems in contract poultry growing such that poultry growers are compared based on factors under their control. When poultry companies take appropriate measures, as prescribed in this rule to ensure a fair comparison, then contract poultry growing reduces a significant amount of risk to growers because the LPD provides the inputs.

The purpose of this rule is to establish a framework for fair comparisons to prevent unfair and deceptive practices that reduce pay. To the extent that input variability

³⁹ See, e.g., Muir, W.M. and SE Aggrey. *Poultry Genetics, Breeding, and BioTechnology* (2003).

⁴⁰ See Burke, William, and Peter J. Sharp. "Sex Differences in Body Weight of Chicken Embryos." *Poultry Science* 68.6 (1989): 805-810; and Beg, Mah, et al. *Effects of Separate Sex Growing on Performance and Metabolic Disorders of Broilers*. Diss. Faculty of Animal Science and Veterinary Medicine, Sher-e-Bangla Agricultural University, Dhaka, Bangladesh, 2016.

⁴¹ Breeder stock age: See Washburn, K.W., and R.A. Guill. "Relationship of Embryo Weight as a Percent of Egg Weight to Efficiency of Feed Utilization in the Hatched Chick." *Poultry Science* 53.2 (1974): 766-769; Weatherup, S.T.C., and W.H. Foster. "A Description of the Curve Relating Egg Weight and Age of Hen." *British Poultry Science* 21.6 (1980): 511-519; Wilson, H.R. "Interrelationships of Egg Size, Chick Size, Posthatching Growth and Hatchability." *World's Poultry Science Journal* 47.1 (1991): 5-20; Goodwin, K. "Effect of Hatching Egg Size and Chick Size Upon Subsequent Growth Rate in Chickens." *Poultry Science* 40 (1961): 1408-1409; Morris, R.H., D.F. Hessels, and R.J. Bishop. "The Relationship Between Hatching Egg Weight and Subsequent Performance of Broiler Chickens." *British Poultry Science* 9.4 (1968): 305-315; Peebles, E. David, et al. "Effects of Breeder Age and Dietary Fat on Subsequent Broiler Performance. 1. Growth, Mortality, and Feed Conversion." *Poultry Science* 78.4 (1999): 505-511. AMS notes additionally that research in this and related areas has limitations. It is older and results are mixed. AMS is concerned that publicly available research has stagnated, despite the introduction of new breed strains in the intervening years. Because integrators now own the genetics companies, AMS has additional concerns that research has, in effect, been privatized, creating informational asymmetries. Based on regulatory experience and on public comments, growers believe these factors affect performance.

⁴² Dozier III, W.A., et al. "Stocking Density Effects on Growth Performance and Processing Yields of Heavy Broilers," *Poultry Science* 84 (2005): 1332-1338; Puron, Diego et al. "Broiler performance at different stocking densities." *Journal of Applied Poultry Research* 4.1:55-60 (1995).

⁴³ Dozier III, W.A., et al. "Effects of Early Skip-A-Day Feed Removal on Broiler Live Performance and Carcass Yield." *Journal of Applied Poultry Research* 11.3 (2002): 297-303.

⁴⁴ Treatments may be necessary to mitigate disease within a single poultry house or an entire flock, or to boost the performance of suboptimal progeny from impaired breeder flocks, as described above. These treatments may affect the flock's growth rate or mortality. See Wells, R.G., and C.G. Belyawin. "Egg quality-current problems and recent advances." *Poultry science symposium series*. No. 636.513 W4. 1987. (citing Spackman, D. "The Effects of Disease on Egg Quality.")

⁴⁵ Hendrickson, M. et al, "The Food System: Concentration and Its Impacts," 3, (2020), <https://farmaction.us/concentrationreport/>, ("Globally, just two firms control 99% of turkey genetics, 94% of laying hen genetics, and 91% of broiler genetics, and just three firms control 47% of swine genetics (ETC Group 2013; Shand and Wetter 2019)").

is creating unfairness, the rule requires LPDs to mitigate the impacts of input variability on the comparison. AMS recognizes that LPDs have an incentive to get full economic value of less productive chicks. Yet it is incumbent upon them under the Packers and Stockyards Act—and this rule’s explicit duty of fair comparison—to structure their comparison-based compensation system to make a fair comparison among growers. Input differences should not be a significant variable over time in the determination of grower compensation. As commenters noted, excessive variability in input quality, timing, and flock pickup can cause significant harm to growers, hence the inclusion of explicit duties imposed on LPDs in this rule with respect to the design and operation of comparison-based poultry compensation schemes. Furthermore, LPDs must institute a non-comparison-based system when it is impossible for the LPD to conduct a fair comparison due to extenuating circumstances.

ii. Application, material difference, and non-comparison method

Comment: While there was broad agreement on the importance of fair compensation for all growers, some commenters expressed concern about the rule’s practicality, administrative burdens, and potential confusion regarding the definition of “material differences in performance.” Commenters, especially farmers’ coalitions and advocacy groups, endorsed the duty of fair comparison, viewing it as a key step toward ensuring equitable treatment for growers operating outside of tournament systems. They emphasized the need for transparent, data-driven mechanisms that guarantee fair compensation regardless of payment model.

Commenters both in support of and in opposition to the proposed rule requested further clarity for the definition of “material differences in performance” so that growers know when they have suffered a specific prohibited harm and can confidently request an investigation. Commenters also favored a presumption of unfairness rather than a material threshold for change in pay. One commenter asserted that any material or

numeric threshold for change in pay would be inappropriate, and that AMS should establish the presumption that providing unequal inputs to growers within the same settlement group is material to grower performance, and another commenter advocated for the use of a presumption to provide greater clarity and notify growers of problems to be addressed.

AMS response: The preamble to this final rule explains that “Material differences in performance are differences that meaningfully (from the perspective of the grower) impact grower payments.” AMS chose not to publish a dollar amount because a given change in performance may have disparate impacts on growers, depending on the ratio of performance pay to total pay, the overall size of the grower’s operation, their level of indebtedness, or other factors pertaining to a grower’s financial position.

AMS is not adopting a presumption of unfairness for differences in inputs because there are always differences in inputs in natural systems. The use of a presumption would be overinclusive and unhelpful in guiding LPDs in improving the fairness of their comparisons in relation to inputs, production practices, and related factors set out in the duty of fair comparison. Material change in pay is a more appropriate target because the comparison affects the grower’s pay.

Comment: Commenters stressed the importance of clearly outlining non-comparison methods within production contracts before they become necessary to provide growers with a clear understanding of their rights and options should tournament-based comparisons become unfair or impractical. Both industry stakeholders and advocacy groups acknowledge the need for clearer guidance on determining when fair comparison is no longer feasible and advocated for more specific criteria to guide both LPDs and growers. Commenters also expressed concern that implementation should appropriately address growers’ circumstances.

AMS response: Fair comparison of growers requires that growers do not receive a

distribution of inputs or assignment of production practices that causes material differences in performance from other growers to whom they are being compared. Factors outside of a grower's control should not meaningfully (from the perspective of the grower) impact grower payments. This is a facts and circumstances analysis.

Per § 201.110(a)(3), the non-comparison method must be included in the contract; therefore, growers will know what this method is before it is used. Per § 201.110(b)(1)(v), "Non-comparison," requires that an LPD's written processes explain when the LPD might remove a grower from a ranking group, and how the LPD will compensate growers removed from a ranking group to satisfy the non-comparison compensation method required under § 201.110(a)(3). There are myriad reasons why a grower may need to be removed from a ranking group. For example, there may not be enough comparable growers with which to make a reliable comparison in the current grouping and the LPD may use growers settling in previous periods to make a reliable comparison. Likewise, a specific grower may have received undesirable inputs or an assignment of production practices that materially impacted the grower's performance, necessitating the removal of the grower from the grouping and compensation under a non-comparison compensation method. Under this provision, the LPD must explain how and when the LPD removes a grower from a ranking group because the grower received unfavorable inputs or production practices and how it will fairly compensate such growers through a non-comparison compensation method.

Comment: A common theme across comments was addressing the inherent power imbalance between growers and LPDs, including the need to protect growers from retaliation. Commenters advocated for independent compliance reviews, potentially involving grower feedback, to ensure LPDs comply with the duty of fair comparison. However, some commenters contend that such requirements would create excessive paperwork burdens for LPDs, potentially hindering their ability to address grower needs

effectively.

AMS response: AMS monitors and regulates power imbalances in the poultry industry in accordance with the Act and associated regulations. AMS's regulations at § 201.304 prohibit retaliation for asserting any of the rights granted under the Act or part 201 or asserting contract rights (9 CFR 201.304(b)(2)(vii)). AMS's regulations also prohibit retaliation by LPDs against poultry growers for speaking with government officials for the purposes of seeking redress for grievances brought under the Acts (9 CFR 201.304(b)(2)(i)). Moreover, this regulation aims to prevent injury from specific practices by LPDs – who possess local market power or bargaining power over growers. Out of concern that the compliance review process will divert poultry technicians from their primary responsibility to assist poultry growers with production issues, AMS has simplified the documentation requirements under § 201.110(b)(1). This new streamlined documentation requirement gives LPDs the needed flexibility to efficiently incorporate compliance with this rule into their standard business practices. Additionally, this section was streamlined in part because the Transparency Rule had similar documentation requirements.⁴⁶

Comment: To refine comparison-based payment systems, one commenter suggested using shorter rolling averages for performance comparisons; a short rolling average mitigates the impact of seasonal variations and new breeder flocks on grower pay, and therefore might create a more level playing field and prevent unfair disadvantages stemming from factors outside a grower's control. Another commenter advocated for contract provisions that would automatically adjust grower pay or provide avenues for redress when external factors, such as chick quality, veterinary care access, and feed quality negatively impact performance.

AMS response: AMS agrees that the duty of fair comparison requires integrators

⁴⁶ 88 FR 83210, November 28, 2023.

to use an appropriate time period for comparing growers. Use of an inappropriate time period for the comparison-based compensation may be unfair or deceptive, and therefore constitute a violation of the Act. The final regulatory text indicates that one factor for the Secretary to consider when determining if a fair comparison has been made in the design or operation of a poultry grower ranking system is “whether the designated time period used in the live poultry dealer’s comparison is appropriate, including whether the live poultry dealer uses one or more groupings, rankings, or comparisons of growers to mitigate the effects of any differences in inputs over the designated time period.” Under the duty of fair comparison provision, growers will be compensated through a non-comparison method when a fair comparison-based compensation scheme is impossible.

iii. Appeal, dispute resolution

Comment: An industry stakeholder expressed concern that the language surrounding “reasonable efforts” was not detailed enough and that this could create uncertainty for LPDs, potentially leading to inconsistent application and legal challenges. To provide greater clarity and specificity regarding the definition of “reasonable efforts,” one commenter suggested defining the term through concrete examples of both reasonable and unreasonable behavior to provide clearer expectations for both growers and LPDs. Another commenter proposed specific actions that LPDs should take to demonstrate “reasonable efforts,” including 1) allowing for grower-installed feed scales to verify feed amounts, 2) permitting third-party veterinarian selection for sick flock assessments, 3) providing options for growers to independently assess LPD-controlled inputs, and 4) offering non-comparison compensation without fear of retaliation. Emphasizing grower agency, one commenter recommended empowering growers with the ability to independently verify inputs and performance factors.

An industry commenter noted that, in order to fairly address and resolve a situation, an LPD will *always* depend on the facts and circumstances of each case. The

commenter noted that there are a multitude of factors for each situation, making a set policy or procedure not conducive to the dispute resolution process.

AMS response: As noted above, fairness requires a poultry ranking system that meets a reasonably reliable standard. LPDs must properly adjust the comparison-based compensation systems used in their poultry grower ranking systems to reasonably neutralize the impact of inequitable distribution of inputs and assignment of flock production practices on poultry grower compensation, as well as to reasonably neutralize the impact of communication and dispute resolution challenges that are not effectively and timely addressed.

Reasonableness is intended to be viewed as an objective test that accounts for standard industry practice, growers' contract expectations, basic considerations of equity, and the LPD's ability and willingness to prevent harms to growers resulting from factors outside growers' control. This objective test should also provide some flexibility to LPDs in particular facts and circumstances to achieve distinct goals in management of their operations, provided the LPD's goals are reasonably designed, appropriately documented, and not otherwise unfair or deceptive to growers.

Although "reasonable efforts" follows the typical standard applied for reasonable behavior in the law—what a reasonable person would do under similar circumstances—AMS also recognizes that enough circumstances are recurring in nature that an LPD should in many if not most cases be expected to have a regularized approach to the concern. Ultimately, what constitutes reasonable efforts will depend on the facts and circumstances of each case, with the LPD's duty focused on the fairness of the comparison(s) for the grower.

For example, if a grower raises immediate and urgent concerns about feed quality, such as the delivery of feed meant for older chicks than the grower has, the LPD should resolve this concern as soon as possible to minimize any additional undue damage to the

grower's flock due to lack of proper nutrition. Or if a grower raises concerns about feed consistently being delivered late or in an insufficient quantity, the Agency would examine the LPD's effort to adjust the method of delivery. Failure to do so would likely justify placing the grower into a non-comparison method.

Without a doubt, an LPD is prohibited from retaliating against a grower in any manner for raising concerns as to whether a fair comparison method was used. Whether or not reasonable efforts specifically include LPDs allowing for grower-installed feed scales to verify feed amounts, permitting third-party veterinarian selection for sick flock assessments, or providing options for growers to independently assess LPD-controlled inputs is not something that AMS intends to determine in this rule for all circumstances. However, to the extent that LPDs face repeated grower complaints and concerns regarding these matters and a track record of problems in resolving those complaints, reasonable efforts under particular facts and circumstances could point to the need for solutions such as those, although other less intrusive options may also be available.

Regarding the comment stating that set policies and procedures are not appropriate for how LPDs resolve issues with growers, AMS agrees that every growing operation is different, and LPDs must be careful in designing processes for resolving issues with growers that are context specific. Yet a wide range of problems are commonplace enough that LPDs should have regularized means for dealing with them. To strike an appropriate balance and enable LPD complex staff to retain focus on the important work of helping growers, AMS has changed the documentation requirements under § 201.110(b) to be less specific and, instead, simply require LPDs to describe how they account for similarities and differences in quality or quantity of inputs delivered to growers and how they account for differences in production practices across growers in a poultry grower ranking system.

iv. Benefit, burden, and cost

Comment: Commenters highlighted the perceived need for greater transparency and fairness in grower compensation. While grower advocates believe the rule is necessary to address systemic issues, LPDs expressed concern about potential cost increases and impacts on grower pay. Comments revealed a clear divide between grower advocates and industry representatives. Grower organizations argued that the duty of fair comparison is crucial for addressing the unfair and deceptive practice of shifting costs and risks from LPDs to growers. Advocacy groups suggested including a list of presumptive violations, such as providing unequal inputs within the same settlement group, to strengthen the rule's effectiveness. Several commenters emphasized the importance of robust anti-retaliation protections for growers who report rule violations or seek non-comparison compensation. An industry commenter expressed concern that requiring non-comparison-based pay could lead to lower overall compensation for growers.

AMS response: AMS agrees with commenters that the duty of fair comparison plays a critical role in addressing the unfair and deceptive risk-shifting of costs and risks from LPDs to growers. Regarding non-comparison-based pay, the rule clearly states that when a fair comparison-based system is impossible, the LPD must implement a non-comparison method for calculating pay to ensure that factors outside of the growers' control do not cause harm to growers through decreased compensation for grow-out services. Even where adopted, non-comparison-based pay is not intrinsically likely to reduce average grower pay; the total amounts of pay are entirely dependent on the LPD's choices, and this rule does not ban bonuses for increased productivity or greater investment.

AMS agrees that a presumptive list of violations would assist with enforcement and has included some examples of potential violations in the appropriate section of the preamble of the final rule addressing the duty of fair comparison. Moreover, AMS agrees

that growers cannot be retaliated against for reporting a violation of the duty of fair comparison and have indicated as such in this final rule. AMS included a prohibition against retaliation in the *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act* final rule (89 FR 16092, March 6, 2024). LPDs cannot retaliate against growers for speaking with government officials for the purposes of seeking redresses for grievances brought under the Act.

Comment: Several commenters were concerned about the feasibility of implementing the documentation requirements for the new duty of fair comparison. Growers emphasized the need to access detailed, house-specific data on bird weights, feed consumption, and other key metrics. Some other commenters recommended additional requirements pertaining to LPD-controlled factors and assessing compliance, and one commenter recommended USDA to require LPDs to equally distribute inputs and adjust performance-based pay to account for differences in inputs and treatment. An industry commenter argued that requiring LPDs to control all variations in inputs, as implied in § 201.110(b)(1)(i), would be overly prescriptive and impractical given the scale, speed, and complexity of input delivery. The commenters argued that this could lead to inflexible systems that would ultimately harm growers. Other commenters criticized the provision for being vague, unfounded and lacking necessary explanation.

AMS response: AMS finds that comparison-based pay using factors outside growers' control constitutes an unfair practice under section 202(a) of the Act. While it is true that inputs cannot be delivered on a 100 percent equal basis to all growers all the time, that does not mean that LPDs cannot construct payment systems that appropriately account for and mitigate the impact of input and flock production variability on grower compensation. The LPD does not need to control all variations in inputs; instead, the rule as proposed and finalized here merely requires the LPD to account for this variation in the design of a comparison-based payment system. AMS has been careful to specifically

not require, nor expect, that identical inputs are delivered to all growers.

Also, the compliance reviews have been removed from the final rule because of the speed and complexity of the poultry growing process. Instead, AMS will incorporate audits of records pertaining to the duty of fair comparison into its regular audits of LPDs to lessen the compliance burden of this rule.

AMS expects the duty of fair comparison to substantially prevent unfair and deceptive practices when comparison-based pay is linked to input or flock production variation. This provision is written with sufficient specificity to tackle the problem at hand, while also allowing LPDs enough flexibility to design and operate a comparison-based compensation system that causes minimal disruption to their business operations. In fact, several LPD comments indicated they already have processes in place for addressing situations where a comparison-based pay system is not appropriate. This rule is codifying what industry stakeholders recognize as a best practice to create a level playing field and uphold the purpose of the tournament system in contract poultry growing. AMS has created new § 201.110(b)(1)(iii), “League composition,” which requires written documentation regarding how LPDs determine groupings of growers for settlement. AMS has also created new § 201.110(b)(1)(iv), “Evaluation period,” requiring LPDs to have a reasonable time period over which they shall evaluate the duty of fair comparison, and new § 201.110(b)(1)(v), “Non-comparison,” which requires LPDs to specify when they may remove growers from a ranking group and how they will compensate such growers to satisfy the non-comparison compensation method requirement under § 201.110(a)(3). This is meant to account for fluctuations across flocks while also ensuring that poultry growers do not face material harm resulting from input quality or timing variation.

Comment: Some commenters asserted that the proposed documentation requirements were burdensome and potentially litigious. One commenter argued that

AMS lacked authority to require LPDs to conduct and document self-audits to evaluate P&S Act compliance.

AMS response: As explained above in section IV., “Provisions of the Final Rule,” AMS agrees that some of the proposed documentation requirements can be streamlined. In the final rule, AMS is focused on only the most important documentation requirements that would assist AMS in reviewing LPDs’ compliance with the duty of fair comparison. Requirements for policies and procedures are not new or particularly controversial and are used widely across in the financial regulatory context to ensure firms are appropriately managing risks that cannot be entirely eliminated through regulation or otherwise. The situation is similar in the operation of broiler growing arrangements, where LPDs need to distribute inputs, production practices, and manage the needs of growers. To the extent that an LPD improves its management practices through maintaining policies and procedures, that should reduce litigation risk from unfair comparisons.

AMS is removing the provision requiring self-audits and will incorporate inspection of documentation required under § 201.110(b) into its regular compliance process. The compliance process undertaken by AMS to ensure compliance with the Act is routine, flexible, and comprehensive, thereby making it the ideal mechanism by which the provisions of this section shall be enforced. AMS regulatory staff already perform regular compliance audits of LPDs, so they are well positioned to review documentation describing the design and operation of LPDs’ poultry grower ranking systems and ensure that it complies with the duty of fair comparison.

v. Alternatives

Comment: Several stakeholders offered alternative approaches to address unfair compensation practices in the poultry industry. An advocacy group for growers proposed exploring non-comparison-based compensation models, such as contracts based on square footage, to mitigate the inherent issues of tournament systems. Another group

advocated for a complete ban on tournament systems, based on the need for more stable and predictable grower income that is decoupled from relative performance within a group.

A number of commenters expressed concerns about LPDs manipulating input distribution (*e.g.*, chick quality, feed) as a form of retaliation against growers who challenge them or refuse to make capital investments. One commenter recommended explicitly defining unequal inputs within a settlement group as an unfair practice under the Act. Another commenter argued there are no simpler alternatives to directly addressing unfair comparisons, and that focusing on alternative compensation models or banning tournament systems wouldn't fully address the root issue of unequal bargaining power and the potential for exploitation within the poultry industry.

AMS response: AMS is not at this time adopting the alternative approaches to address unfair compensation practices in the poultry industry because it believes that the final rule's approaches are more effective at addressing the identified concerns around unfairness and deception given the available evidence. While AMS recognizes that non-comparison-based compensation models, such as contracts based on square footage, are popular with growers and mitigate the inherent issues of tournament systems, they have other limitations around recognizing skill, effort, and investment. AMS is not at this time, based on the available evidence, able to say that tournaments should be banned in all circumstances and replaced with those non-comparison methods, especially when AMS believes that the approaches set forth in this final rule, including prohibiting deductions and setting a presumption of 25 percent limitation on tournament magnitude, along with a clearer duty of fair comparison, offer a more narrowly tailored approach. If the approaches set forth in this final rule do not yield sufficient change in the treatment of growers, AMS will evaluate whether those facts necessitate other actions.

AMS acknowledges concerns about LPDs manipulating input distribution (*e.g.*,

chick quality, feed) as a form of retaliation against growers who challenge them or refuse to make capital investments. In a previous final rule, *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act* (89 FR 16092, March 6, 2024), AMS specifically set out a range of circumstances where retaliation is prohibited (9 CFR 201.304(b)). Moreover, new § 201.110, which includes requirements for maintaining and complying with policies and procedures relating to input distribution, is designed to better protect growers against precisely those kinds of abuses. Were an LPD to adopt policies and procedures that permitted inputs to be distributed in a retaliatory manner and compared growers on that basis, it would be in violation of the duty of fair comparison. And, if the LPD failed to comply with its policies and procedure requiring the equitable distribution of inputs and compared growers on that basis, that would also be in violation. AMS underscores that these principles (of pay not being affected by unfair input distribution) apply regardless of whether a tournament is present. Indeed, as AMS inquired in the proposed rule and affirms here, a practice (including, but not limited to, intentional, arbitrary, or punitive distribution) of unequal, dissimilar, or inappropriate inputs or flock production practices would be an unfair practice under the Act under any payment system that relies upon grower performance relative to inputs or production practices provided by the LPD (such as feed efficiency) irrespective of whether the payment system was a tournament.

C. Section 201.112

i. Additional capital investment disclosure document

Comment: Commenters including several farmers' coalitions supported the proposed additional capital investment disclosure requirements, asserting they would increase transparency and reduce deception. Several farmers' coalitions indicated the proposed transparency requirements should provide lenders with more consistent information for justifying investment viability, help prevent producers from being misled

to make unviable investments, deter LPDs from making unnecessary upgrade requests, and may increase incentive pay for additional capital investments. However, industry associations and LPDs stated that it is outside USDA's statutory authority under the Act to require disclosures for additional capital investment requests. One commenter asserted that section 401 of the Act only allows AMS to require LPDs to maintain business records for AMS's benefit, not to require disclosure of records to growers, and that under section 401 AMS can only prescribe the manner and form in which regulated entities must keep transaction records if the Secretary finds that the records "do not fully and correctly disclose all transactions involved in the dealer's business." Another commenter asserted that AMS has failed to establish that disclosures are always necessary to avoid an unfair or deceptive practice or device.

AMS response: The Agency believes that the additional disclosure information will help mitigate the information asymmetry between LPDs and poultry growers when entering into an additional capital investment agreement. When LPDs ask contract poultry growers to make additional capital investments but fail to be transparent regarding the purpose, risks, financial incentives and rates of return, those growers cannot make an informed business decision. Any failure to disclose material information essential to making critical business decisions is deceptive and also inhibits growers from identifying unfair practices in their incipency, and so violates the Act's prohibition in section 202(a) against unfair and deceptive practices. Section 407 of the Act specifically authorizes the Secretary to implement regulations to carry out the provisions of the Act. This provision is one instance of this authority. Accordingly, AMS disagrees with the notion that the Agency lacks statutory authority to promulgate the additional capital investment disclosure requirements.

In this regulation, AMS enables growers to better detect the risks in contracting because the LPDs' contracts will now show the grower the real value of the LPDs' offer,

which they obscure in tournament contracts. Preventing deception and stopping unfairness in its incipiency enhances competition among dealers by enabling growers to compare offers and reasonably assess entry into the business. Preventing unfairness and deception improves how markets function by forcing LPDs to compete for growers' services based on the merits of the producer's offer and prevents likely injuries to competition. Preventing deception enables growers to better assess their performance vis-à-vis other growers. Ultimately, the conduct at issue is squarely within the purposes of the Act. Where conduct "prevents an honest give and take in the market," it "deprives market participants of the benefits of competition" and "impedes . . . a well-functioning market."⁴⁷ In its report on the 1958 amendments to the Packers and Stockyards Act, the U.S. House of Representatives explained that the statute promotes both "fair competition and fair trade practices" and is designed to guard "against [producers] receiving less than the true market value of their livestock."⁴⁸

Moreover, other agencies that enforce laws prohibiting unfairness and deception often have used disclosure to prevent deception. For example, the FTC enforces prohibitions against unfair practices, unfair methods of competition, and deceptive practices arising under the FTC Act.⁴⁹ Effective disclosure is well-established as a cure for deceptive practices that arise from information gaps in the marketplace, as exemplified by AMS's existing disclosure requirements under §§ 201.100 and 102, the

⁴⁷ Federal Trade Commission, "FTC Policy Statement on Unfairness" (1980), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>. Last viewed October 9, 2024.

⁴⁸ H.R. Rep. No. 85-1048 (1957), reprinted in 1958 U.S.C.C.A.N. 5212, 5213.

⁴⁹ Letter from FTC Chair Lina Khan to AMS, "Poultry Grower Tournament Systems: Fairness and Related Concerns," Docket No. AMS-FTPP-22-046, at <https://www.regulations.gov/comment/AMSFTPP-22-0046-0143>; Michael Kades, "Protecting livestock producers and chicken growers," Washington Center for Equitable Growth (May 2022). Federal Trade Commission, Policy Statement on Deception, (1983), <https://www.ftc.gov/system/files/documents/public-statements/410531/831014deceptionstmt.pdf>. 15 U.S.C. 45(n); Fed. Trade Comm'n, Policy Statement on Unfairness, (1980), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>; *Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act*, 9 (2022), <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>.

FTC's franchisor-to-franchisee disclosure requirements, and a range of other mandated disclosures by Federal and State regulators. Although disclosure will not remedy an unfair practice, robust disclosure can help identify such practices, enabling remediation of unfairness at earlier stages, and so help stop harms in their incipency. AMS believes that the parallels between the FTC's section 5 authority on deceptive and unfair practices greatly outweigh any differences between the statutes because the language of both statutes is similar,⁵⁰ and it is generally recognized that Congress wrote the Act with broader application than the original FTC Act.⁵¹ It is plain from the statutory language Congress wrote—and in the floor debates and Congressional reports—that the Act empowered the Secretary to prevent unfair and deceptive practices, and not merely enforce existing antitrust law.⁵²

AMS emphasizes that disclosure under new § 201.112 is not, and is not intended to be, a remedy to unfairness in and of itself; rather, disclosure provides AMS and growers with information necessary to enforce their rights under existing § 201.216, “Additional capital investments criteria,” and the P&S Act more broadly, when terms are unfair. This rule is meant to both cure deception and to identify unfairness in its incipency to make enforcement under § 201.106 possible.

A commenter grounded opposition to the additional capital investment disclosure requirement in section 401 of the Act and argued that section 401 requires dealers to maintain records for AMS’s benefit, not for the benefit of growers. The commenter also argued that AMS is not authorized to control the content of the records required under

⁵⁰ 15 U.S.C. 45(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

⁵¹ FTC comment, submitted to Regulations.gov on September 10, 2024, posted on September 11, 2024. <https://www.regulations.gov/document/AMS-FTPP-21-0046-12413>.

⁵²The House of Representatives’ report on the P&S Act stated that the P&S Act was the “most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the Interstate Commerce Act.” The Conference Report on the P&S Act stated that: “Congress intends to exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits . . .” See, Shively, J. and Roberts, J., “Competition Under the Packers and Stockyards Act: What Now?” 15 Drake Journal of Agricultural Law 419, 422-423 (2010); and Current Legislation, 22 Columbia Law Review 68, 69 (1922).

section 401. AMS disagrees. Section 202 of the Act prohibits unfair and deceptive practices. The disclosures required in this rule seek to identify or prevent those harms. Section 401 complements these goals to the extent that disclosure is based on recordkeeping. Section 401 statutorily requires LPDs to maintain complete records of all their business transactions. Moreover, LPD obligations to retain information do not affect AMS's ability to require the LPD to share the information to prevent unfair and deceptive practices under section 202(a) and (b) of the Act. Growers have informed the Agency that LPDs systematically withhold information that the LPDs possess concerning the design, purposes, impacts, and other aspects of the contracts the LPDs make regarding additional capital investments. This regulation targets material omissions under section 202, and the commenter's assertions regarding section 401 ignore how additional capital investment requests fit into the business relationship between LPDs and growers. When an LPD asks a grower to make an additional capital investment, that is fundamentally a request to modify the contract that the grower must consider under circumstances where the LPD has all the information on its benefits, and the grower has none. Therefore, when the LPD requests that the grower spend money to advance the LPD's business interests, the grower may incorrectly infer that an additional capital investment must also be in the grower's interest. The regulation is remedial in purpose and effect, exactly as Congress intended the Secretary to regulate when the Act passed in 1921, and when Congress amended that statute in 1987.⁵³

Regarding the comment that asserted AMS has not proven that disclosures are always necessary to avoid an unfair or deceptive act or practice, Congress did not require that regulation be "always" necessary. AMS is not required to adduce individualized evidence that the disclosure was necessary to every grower – the regulation simply must be necessary to prevent deception or identify unfairness for some growers. As a factual

⁵³ Pub. L. 100-173, 101 Stat. 918.

matter, AMS concludes that the unequal bargaining terms between growers and LPDs requires LPDs to disclose key information regarding additional capital investment requests to mitigate asymmetric information gaps that result in unfair and deceptive practices. Furthermore, transparency in the market requires disclosure of this information when LPDs request an additional capital investment in order to prevent deceptive practices.

Comment: One commenter commented on the rule explaining that AMS lacks the authority under “Section 410” to “require dealers to make a variety of “disclosures” to growers.”

AMS Response: Section 410 of the cited material, entitled “Final date for making payment to cash seller or poultry grower” deals with (a) “Delivery of full amount due,” (b) “Delay or attempt to delay collection of funds as ‘unfair practice,’” and (c) “Definition of cash sale.” Section 410 makes clear that Congress expected the Secretary to protect growers from receiving less than full payment. The mechanism for reducing or delaying that payment is immaterial.

The Congressional purpose of the Act was to stop unfair practices in their incipency.⁵⁴ When an LPD fails to make available the required disclosures here, the unfair practice of reducing pay, banned by section 410, becomes undetectable because the terms surrounding payment are not clearly expressed. In other words, without having the necessary foundational terms, as per the required disclosure, there is no way for aggrieved party or for USDA to see a reduction of pay as there has been no set baseline. Congress expected USDA to take a proactive approach to prevent this sort of harm, which hurts both the grower and the market, because it destroys the ability of growers to

⁵⁴ See *In Re: Corn State Meat Co., Inc.*; Terrance P. (Terry) Prince, Jr. & James L. Wiggs., 45 Agric. Dec. 995, 1023 (U.S.D.A. May 8, 1986); c.f. *In Re: Danny Cobb & Crockett Livestock Sales Co., Inc.*, 48 Agric. Dec. 234, 234 (U.S.D.A. Feb. 13, 1989) (finding bonds protect against incipient violations); *In Re: Paul Rodman & David Rodman*, 47 Agric. Dec. 885, 903-04 (U.S.D.A. May 27, 1988) (finding there is a duty to prevent all unlawful acts under the P&S Act, including the potential losses from failing to maintain a custodial account).

continue in the business and reduces the supply of growers willing to contract. Thus, among the other authorities in the Act, USDA also believes this regulation implements provisions of section 410 of the Act.

Comment: Several advocacy organizations suggested additional disclosure of cost and liability burden for environmental compliance.

AMS response: AMS appreciates these comments and understands the importance of properly allocating cost and liability burden for environmental compliance in the poultry industry. However, AMS did not consider that in the proposed rule, and P&S Act regulations in general do not impact the environment.⁵⁵ To the extent that the costs of environmental compliance are grower variable costs under particular poultry growing arrangements, they should be disclosed by the LPD under the requirement to disclose information relating to grower variable costs (9 CFR 201.102(d)(3)). Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: One commenter suggested that AMS make additional capital investment requests and disclosures public to other growers and track the frequency of additional capital investment requests and grower complaints of coercion, retaliation, or arbitrariness.

AMS response: This rule is not designed to make private business arrangements and agreements public information. Furthermore, AMS is not contemplating such a shift as the dissemination of private business arrangements and agreements would require additional regulatory provisions, justifications, and safeguards that do not fall under the purview of this rule. Rather, this rule is designed to help poultry growers understand why they are being requested to make additional capital investments, how entering into those contracts will impact their pay, how long it will take to complete additional capital

⁵⁵ See 7 CFR 1b.4 (Listing the USDA agencies and agency units found to have no individual or cumulative effect on the human environment.).

investments, potential conflicts of interest with LPD personnel or their family members, required vendors/manufacturers, and expected returns from the investment. This information will help growers make effective business decisions, and, when shared with AMS, identify circumstances that may be unfair.

With respect to AMS tracking the frequency of additional capital investment requests and grower complaints of coercion, retaliation, or arbitrariness, AMS agrees that market monitoring is important and invites growers to contact AMS at *farmerfairness.gov* or call 1-833-DIAL-PSD (1-833-342-5773) when they have concerns regarding additional capital investments they encounter and especially if they feel they are being subject to coercion, retaliation, or arbitrariness.

Comment: An advocacy association suggested that all additional capital investments should be subject to the same disclosures and prohibitions.

AMS response: The requirement to provide the disclosure will be triggered when the LPD requests the grower make an additional capital investment. There is no threshold below which this disclosure requirement does not apply. Nor are there any exclusions or exemptions for additional capital investment disclosures for other reasons.

Additional capital investment prohibitions, however, will be considered on a facts-and-circumstances basis under the criteria set forth in § 201.216 of AMS's regulations and generally under section 202 of the Act. AMS does not in this rule identify specific prohibitions. To the extent that AMS identified an additional capital investment practice that was unfair, AMS would seek to stop the practice through an enforcement action and communicate its intent to stop such practices in similar circumstances.

Comment: Several commenters suggested that LPDs should be required to make all additional capital investment contracts guaranteed for the duration of the loan required to pay for the additional capital investment.

AMS response: AMS acknowledges the concerns of the commenters and

advocacy groups. If an LPD requests additional capital investments without guaranteeing that the grower will have a contract that is sufficient to recoup the costs of the investment or loan, such conduct could violate section 202 of the P&S Act, including by being unfair under section 202(a). AMS will monitor these practices and enforce on a case-by-case basis.

Comment: Several advocacy organizations supported the inclusion of LPDs' motives for the additional capital investment request in the Disclosure Document.

AMS response: AMS agrees that it is important for growers to know why an LPD requests an additional capital investment. As proposed, AMS included in § 201.112(b)(1) language requiring the LPD to disclose the purpose of the additional capital investment to both the LPD and the grower. Although AMS underscores that the inquiry should be focused on objective purposes and desired outcomes rather than a potentially vague concept of motives, the paragraph (b)(1) disclosures would mandate the full and complete presentation of any purposes of the additional capital investment. Partial disclosure of anything less than the LPD's full range of purposes would not be considered compliance with the provision because growers need to understand the full range of risks they are taking on, including to be able to identify potential sources of unfairness.

The provision also requires a summary of all research or other supporting material that the LPD has relied upon in justifying the additional capital investment. This requirement seeks to elicit the basis of the additional capital investment and permit the grower the ability to better understand, as well as evaluate, the reliability of that basis.

Overall, AMS has included this provision around purpose, research, and supporting material because alleviating some of the information asymmetry between LPDs and growers through the disclosure of purposes and motivations for an additional capital investment will help poultry growers make better business decisions. Furthermore, the requirement for information regarding purposes and motivations will help poultry

growers know if that particular additional capital investment request is for experimental or research purposes, and thus appreciate the degree of risk the grower is taking on in the additional capital investment. AMS did not make any changes to the regulation as proposed in response to this comment.

Comment: Farmers' coalitions indicated a clear disclosure of financial incentives is essential to a grower's cashflow modeling. Advocacy associations requested further requirements for the analysis of projected returns. These suggested requirements include (1) a review of the projected returns by a disinterested third party and (2) the use of a standardized projected return form.

AMS response: The Agency agrees with the comment that clear disclosure of financial incentives is essential. Under the final rule, LPDs must disclose all financial incentives and compensation for the grower associated with the additional capital investment (§ 201.112(b)(2)), along with any financial benefits that the LPD or any of its officers, directors, decision-making employees (as discussed above), or close family members receive from the use of an LPD-required manufacturer or vendor in connection with an additional capital investment (§ 201.112(b)(5)). AMS added the requirement regarding financial benefits accrued to an LPD or its affiliates as a result of an additional capital investment in the final rule to provide greater transparency regarding the financial components of an additional capital investment. For the time being, AMS is making no further changes to § 201.112.

Comment: Several commenters suggested AMS should require the use of plain language in disclosure documents, especially the descriptions of financial terms. Advocacy organizations stressed the importance of standardizing disclosure documents (e.g., the format for reporting projected returns and delivery expectations). Industry commenters requested that AMS clarify certain aspects of the disclosure document, including the description of "relevant" information and of the summary justifying an

additional capital investment.

AMS response: Section 201.112(b) requires that the Disclosure Document present disclosures in a “clear, concise, and understandable manner.” The Agency acknowledges the potential benefits of standardizing Disclosure Documents but is not requiring a specific form for this required disclosure.

AMS appreciates the commenters’ interest in additional clarity. However, AMS declines to adopt more specific terms in the regulatory text because specificity reduces the LPDs’ and growers’ contracting flexibility. The nature and circumstances of additional capital investment varies. Some additional capital investments may be oriented on technology designed to enhance the efficient use of inputs or to deliver more uniform growout of birds. Other additional capital investments may be oriented towards delivering particular production practices that consumers seek, such as no antibiotics use. In those examples, the purpose and construction of the additional capital investments are quite different. Rigid specificity in the disclosure requirements may create confusion or even limit the disclosures’ effectiveness. AMS’s purposes for the disclosure of this information in § 201.112 is to help poultry growers understand how the additional capital investment is intended to affect their operation and the risks and opportunities they may be taking on as a whole. AMS values comprehensive coverage rather than standardization.

With respect to the term “relevant,” AMS agrees that its inclusion in paragraphs (b)(1) through (3) is superfluous to meaning of the sentences as drafted. Accordingly, AMS is removing it in this final rule and is revising paragraph (b)(1) slightly from “any research or other supporting material” to “all research and other supporting material” to be consistent with the phrasing in paragraphs (b)(2) and (3). There is no change in the intended meaning.

Comment: Some commenters requested that translations of the Disclosure

Document be made available in languages other than English.

AMS response: AMS appreciates this comment and acknowledges that disclosure has a basis in understanding; after all, the proposal included a requirement that the disclosure be “clear, concise, and understandable.” Language can be a barrier to effective disclosure. To mitigate the barriers to this disclosure, we have added paragraph § 201.112(c), which requires the LPD to “make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Capital Improvement Disclosure Document.” AMS takes note of the Civil Rights Impact Analysis located in section VI.G. of this rule that highlights the disproportionate impact of the rule on Asian-Pacific Island persons. Some commenters also indicated a need to ensure growers who are not native speakers of English can understand the disclosures. As noted by multiple commenters, non-native speakers of English are engaged in poultry growing. For example, in the early 2000s, large numbers of first-generation immigrant Hmong people, many of whom had been farmers in their native Laos, moved from urban areas in California, Minnesota, and North Carolina to the Ozark region in and around southwest Missouri and started growing poultry. Pew Research Center studies show that the English proficiency of the Hmong population in the U.S. in 2019 was only 68 percent and, among foreign-born Hmong, English proficiency is just 43 percent.⁵⁶ Data supports the concerns expressed by commenters regarding providing poultry growers information in a manner growers are able to understand. AMS agrees that providing documents in the language growers best understand ensures fairness and reduces the risk of deception. Therefore, AMS added new language to the final rule to require that LPDs must make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist

⁵⁶ Abby Budimen, “Hmong in the U.S. Fact Sheet,” *Pew Research Center's Social & Demographic Trends Project* (May 24, 2022), available at <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-hmong-in-the-u-s/>.

the grower in translating the Disclosure Document. Historically, many growers have been immigrants who may not be fully proficient in English; hence, this rule's goal of preventing deception would not be fully accomplished without LPDs providing reasonable assistance to help growers understand the disclosures in their most competent language upon its delivery. Notably, the translation requirements under § 201.102(g)(4) would apply to disclosures made under § 201.112 if the latter is applicable to the LPD and incorporates what is otherwise required under § 201.102(d)(2)(i) and (ii) in a single disclosure that meets the requirements of both § 201.112 and § 201.102(d)(2)(i) and (ii).

ii. Additional capital investment unfairness

Comment: Growers stated the disclosure provisions should prioritize preventing harm to growers rather than focusing on enforcement after the fact. They further asserted that full transparency from poultry companies is crucial to ensure a level playing field. Several commenters were concerned that the proposed rule did not address the power imbalances that exist when negotiating additional capital investments. This imbalance creates an inherent pressure for producers to comply with LPD requests; even “optional” or “voluntary” terms in a producer's contract may amount to an unfair burden on producers given their fear of retaliation. Advocacy organizations and other commenters requested further provisions to protect growers from unfairness, excessive debt, and retaliation.

AMS response: AMS appreciates and agrees with the comments that preventing harm to growers is preferable to enforcement after the fact. Indeed, the purpose of this disclosure rule is to help equalize the negotiating powers between poultry growers and LPDs. There is an asymmetric power imbalance between LPDs and poultry growers when deciding to undertake an additional capital investment and the goal of the new regulation is to equalize the footing of these parties prior to agreeing to an additional capital investment. To better enable AMS and growers to protect against unfairness and

deception, the rule requires that LPDs disclose and record more information regarding the additional capital investments they request from broiler growers. The disclosures must occur before growers take on the financial burden and risks of the additional capital investment. The provision of such information is not, in and of itself, the cure for unfairness, but rather a key tool for AMS and growers to halt abusive practices by arming them with the ability to identify those challenges sooner. Indeed, disclosure has historically been one of the most powerful tools for preventing harms to growers by bringing practices to light early, and also subjecting those practices to the clarifying light of transparency.

AMS further underscores that leveling the playing field for growers is one of the main purposes of this provision. This rule is designed to reduce deception, strengthen poultry growers' negotiating position, and aid in their ability to identify and address unfair practices. The Agency believes that this disclosure requirement for requested additional capital investments will reduce information asymmetry between LPDs and poultry growers, thus helping poultry growers make more informed business decisions about additional capital investments. Reducing information asymmetry, by definition, helps mitigate power imbalances.

However, AMS also acknowledges that this rule does not solve all challenges that growers may face arising from power imbalances between LPDs and growers, especially in concentrated local markets and in the context of hold-up risks and dependency arising from vertical contracting arrangements. To that end, AMS underscores its commitment to vigorous enforcement of § 201.216, which sets out criteria that AMS utilizes in identifying and enforcing against unfair additional capital investment practices. When the cost of the required additional capital investments cannot reasonably be expected to be recouped by the poultry grower, that failure is likely to be dispositive that the investment is unfair (§ 201.216(f)). AMS agrees with the commenter's perspective on the importance

of protecting growers from unfairness, excessive debt, and retaliation (discussed more fully below in the next comment response). Indeed, AMS is adopting this disclosure rule to enhance growers' and AMS's ability to identify and take swift action against unfair practices and the risk of unfair additional capital investment under existing § 201.216. That regulation sets forth criteria for whether additional capital investments would be an unfair practice or other violation of the Act. These criteria include whether the grower can decide against the additional capital investments; whether the additional capital investments were a result of coercion, retaliation, or threats by the LPD; and whether the additional capital investments can result in reasonable recoupment, or adequate compensation for the additional capital investments, among other non-exhaustive criteria. However, AMS has found that the presence of the criteria alone is insufficient to effectively address problems stemming from additional capital investments. AMS and growers lack the data necessary to analyze whether an additional capital investment violates the criteria. Moreover, if an additional capital investment is unfair, the grower has both investment and debt, and the additional capital investment is impossible to unwind. Technical specifications can make switching costly (where even possible), and alternative uses at similar compensation rates are nearly nonexistent.

Comment: Several commenters requested additional protection against retaliation for growers who refuse additional capital investment requests. Some commenters expressed concern regarding retaliation if additional capital investment requests are refused. One commenter requested AMS monitor complaints of coercion in relation to additional capital investment request refusals.

AMS response: AMS agrees that retaliation is likely to harm competition and growers. AMS's regulations at § 201.304 recognize that retaliation for asserting any of the rights granted under the Act or part 201, or asserting contract rights (9 CFR 201.304(b)(2)(vii)), violates the Act. LPDs also violate the Act if they retaliate against

poultry growers for speaking with government officials for the purposes of seeking redress for grievances brought under the Acts (9 CFR 201.304(b)(2)(i)). AMS fully agrees that without those existing retaliation protections, poultry growers are in a weak position to refuse additional capital investment requests making the disclosure requirement ineffective.

AMS regularly reviews LPDs for P&S Act compliance, and AMS expects to review Disclosure Documents for compliance. Growers who experience coercion should contact AMS regarding possible violations of the Act. AMS also notes that existing § 201.216 would help address these problems. The regulation sets forth criteria for whether additional capital investments would be an unfair practice or other violation of the Act. These criteria include whether the growers can choose to decline additional capital investments; whether the additional capital investments were a result of coercion, retaliation, or threats by the LPD; and whether the additional capital investments can result in reasonable recoupment, or adequate compensation for the additional capital investments, among other non-exhaustive criteria. AMS did not make any changes to the regulations as proposed in response to this comment.

Comment: Many commenters emphasized the need for grower protection against debt and assurance of return on investments. Advocacy organizations and others also suggested adding a requirement that LPDs shall not mandate additional capital investments unless the cost can be reasonably recouped by the grower. Advocacy organizations indicated that projected recoupment should only be evaluated based on non-performance (base) pay. Many commenters also suggested contracts should be guaranteed to match the duration of loans or ensure a reasonable rate of return to recover additional capital investment costs. Advocacy organizations suggested growers should reserve the right to renew contracts until additional capital investment debt is fully serviced.

AMS response: Under § 201.112(b)(2) and (3), LPDs would be required to disclose all relevant financial incentives and compensation associated with an additional capital investment and establish a schedule of expected grower construction for new additional capital investments. Financial incentives would include all incentives relating to the additional capital investment, including explicit incentive payment additions to base pay rates or performance compensation amounts, as well as what assumptions and risks undergird or may put at risk those incentives. Clearly disclosing financial incentives would assist the grower in assessing the relative risks of non-recoupment, as the reliability of those incentives may vary based on the duration of the contract and whether other growers are likely to incorporate the additional capital investment technology in a way that would make recoupment through performance pay less reliable. Clearly disclosing expected grower construction schedules and other repayment schedules also would assist the grower in assessing incentives and risks relating to borrowing, construction, and payment timing. Similarly, the requirement under § 201.112(b)(4) and (5) for LPDs to clearly disclose their expectations regarding housing specifications and required or approved manufacturers or vendors will position growers to better analyze the business risk in undertaking an additional capital investment. An important goal of this rule is to give the poultry grower adequate information so that they may make an informed decision, identify risks and opportunities based on their knowledge of their own costs and earning opportunities, including as disclosed in existing regulations such as § 201.102.

AMS remains committed to protecting growers to the maximum extent possible from practices that prevent growers from fully recouping their additional capital investment. An LPD's failure to provide a reasonable opportunity for a grower to recoup the cost of a required (including ostensibly requested but in practice coerced) additional capital investments would be expected to violate § 201.216. AMS recognizes that

growers cannot avoid the unfair exercise of market power and failing to sufficiently and fairly compensate growers is not a cognizable benefit to growers or to competition. Any reasonable recoupment analysis is fact-specific, but it principally relies on the following criteria: (1) the information required to be disclosed under § 201.112; (2) whether the contract term, including sufficient flock placements and density, extends at least as long as the projected timeline for returns set forth in that analysis; and (3) whether basic returns would cover the costs of the additional capital investment for the reasonable grower in the complex that performs under the contract. AMS is not adopting a requirement that projected recoupment only be evaluated based on non-performance (base) pay. The actual purpose of performance pay can vary greatly across different LPDs and even between complexes.

AMS recognizes the grower concerns that give rise to those comments, but at this time intends to take a case-by-case approach to enforcement in part because the range of grower situations require any unfairness analysis to be tailored to the particular facts and circumstances.

As noted in the paragraph above, contract term and renewals opportunities are relevant considerations in any recoupment or rate of return analysis owing to the heavy reliance interest that the grower has in the broiler growing arrangement, but AMS declines at this time to set forth a rule for all cases. AMS may revisit this determination following implementation of this rule and additional familiarity with the success or limitations of its current case-by-case enforcement approach.

Comment: Some commenters suggested growers should be ensured leniency for delays in construction schedules due to labor and supply shortages outside their control.

AMS response: AMS acknowledges this comment regarding leniency for construction schedules, and the disclosure of the construction schedule under § 201.112(b)(3) is designed to help growers identify their risks in implementing an

additional capital investment. However, as a disclosure requirement, it is intended to aid poultry growers by obligating that LPDs share relevant information regarding an additional capital investment request, so that the growers can make better decisions. It is also designed to help growers address potential unfairness relating to additional capital investment. To the extent that growers conclude that an LPD's failure to provide leniency on construction schedules caused an unavoidable harm, the grower may consider reporting the matter to AMS for investigation into whether the LPD has committed an unfair practice.

Comment: Some commenters indicated that LPDs should not be allowed to require growers to use certain equipment or vendors, especially when those LPDs hold any amount of financial interest in those equipment companies or specifically required vendors.

AMS response: AMS appreciates the concerns that this comment raises around grower freedom to operate and especially regarding conflicts of interest around additional capital investment. The Agency recognizes that growers rely on construction schedules, housing specification requirements, and approved manufacturers or vendors when implementing an additional capital investment. In this final rule, AMS is enhancing the disclosure of required equipment and vendors in § 201.112(b)(5) with an additional conflict of interest provision requiring the disclosure of "all financial benefits, if any, that the live poultry dealer or any officer, director, decision-making employee, or close family member of any such person, receives from the use of the required or approved manufacturer or vendor."

In the proposed rule, AMS asked, "Should proposed § 201.112(b)(5), which requires LPDs to disclose required or approved manufacturers or vendors, also require the disclosure of any material financial benefits that the LPD, or any officer, director, employee or family member of any such person, receives from the use of the required or

approved vendor? If so, please explain why for each party recommended to be covered, including examples and explanation where available.”⁵⁷ In adopting this provision, which is similar to a disclosure that the Federal Trade Commission requires under its Franchise Rule (16 CFR 436.5(h)), AMS’s goal is to help enable a grower to identify certain risks relating to the additional capital investment and potentially unfair or otherwise impermissible additional capital investment practices under § 201.116. For example, the disclosure should help growers identify conflicts of interest, favoritism, kickbacks, or financial benefits that may call into question the purposes of the additional capital investment. This should help combat the incentive problem inherent where one party has the decision-making power (LPDs) and another bears the costs (growers). LPDs are incentivized to seek out manufacturers and vendors that offer them the best incentives, not necessarily the manufacturers and vendors that offer the best deal for growers. This problem has been reported to AMS over the years to exist even at the level of complex managers who may have discretion over certain aspects of additional capital investment implementation.

Disclosure of a relationship between an LPD and its equipment or vendors does not mean that the relationship is lawful. An LPD’s choice of vendor may be unfair or even anticompetitive in violation of the Act, such as contracting in bad faith or engaging in anticompetitive tying. But, at this time, AMS has designed this regulation to protect growers from unfairness and deception—for example by omissions or conflicts of interests—and not to specifically ban an LPD’s choice of vendor.

iii. Benefit, burden, and cost

Comment: A number of stakeholders commented on the rule stating that it is similar to the Transparency Rule and that much of the information being requested in this rule is already provided to the poultry growers and that this rule is therefore frivolous. An

⁵⁷ 89 FR 49002, 49025, June 10, 2024.

industry commenter suggested there is sufficient regulation regarding additional capital investment issues.

AMS response: AMS recognizes the value of the Transparency Rule, including in helping growers understand financial opportunities relating to contract modifications and additional capital investment. However, the Transparency Rule does not require the disclosure of information specific to the additional capital investment request, nor does it prohibit certain practices relating to base pay and unfair comparisons which this final rule does. LPDs possess information about the expected purposes, processes, and outcomes relating to additional capital investments that growers do not have and cannot obtain independently. Therefore, LPDs exert substantial control over growers' ability to evaluate the economic and financial feasibility of an additional capital investment while possessing the power to impose all additional capital investment costs on growers. Growers lack the bargaining power to demand the information they need to make decisions for their financial benefit. The inability to access this information frustrates growers' and AMS's ability to identify and therefore halt unfair practices in a timely manner. AMS has found transaction records around the financial incentives and the financial analysis insufficient to evaluate the compliance of additional capital investments under the Act generally. Therefore, even with the additional information that AMS and poultry dealers receive because of the Transparency Rule, this additional capital investment disclosure requirement is meant to ascertain different information than the information that results from compliance with the Transparency Rule.

AMS also disagrees with the position that there is sufficient regulation on this issue overall. Although § 201.216 sets out criteria around unfair additional capital investment, AMS has found § 201.216 challenging to implement in practice without sufficient real-time transparency into additional capital investment programs as they occur. As noted above, this is the first rule that addresses the information divide between

poultry growers and LPDs regarding additional capital investment requests. Previous rules, namely the Transparency Rule, have required different kinds of information, such as settlement sheets, summaries of the LPD's litigation history with broiler growers and its bankruptcy filings over the past 5 years, whereas this rule covers only additional capital investment requests and related materials.

Comment: Some commenters were concerned about unnecessary additional capital investment requests. Farmers' coalitions proffered that transparency requirements would result in fewer unnecessary additional capital investment requests.

AMS response: The extent to which additional transparency may reduce the amount of additional capital investment requests that are either unnecessary or that do not add clear value to farms is not a determination that AMS can make. This final rule is a transparency rule to address deceptive conduct, but it is also designed to assist growers in identifying potential unfairness in additional capital investments. An additional capital investment with a speculative purpose or one not grounded in research and reasonable estimates—a concern that growers have reported to AMS regarding additional capital investments—would be more apparent if AMS and growers are able to review an LPD's representations about the purpose of an additional capital investment, the research associated with it, and an LPD's expectation of costs, construction schedules, and approved vendors for the additional capital investment. AMS emphasizes that disclosure under new § 201.112 is not, and is not intended to be, a remedy to unfairness in and of itself; rather, disclosure provides AMS and growers with information necessary to enforce their rights under existing § 201.216, “Additional capital investments criteria,” and the P&S Act more broadly, when terms are unfair. Without sufficient, simple, and clear disclosures, growers cannot assess the benefits or risks of making the investment. Indeed, given the role of performance in determining compensation under the tournament, growers often cannot determine whether a program presented as voluntary is,

for all practical purposes, mandatory without understanding the purposes, processes, and outcomes. Unfair practices, which can encompass additional capital investments, are illegal under section 202(a) of the Act, even if fully disclosed.⁵⁸ AMS did not make any changes to the rule as proposed in response to these comments.

D. Other Comments About the Proposed Rule

Comment: One processor pointed to a study prepared for the National Chicken Council that captured live chicken production statistics from 2021.⁵⁹ The survey results indicated that “current poultry grower contracting relationships are mutually beneficial, successful, and profitable for both growers and integrators.” The survey found that among growers polled, despite options to work with different integrators, most growers have been with their current integrator for over five years and that the default rates on loans for poultry growers and integrators are low. Overall, the commenter argued that the current poultry grower compensation system works well, resulting in a highly efficient market and lower prices for consumers.

AMS response: The comment indicates that current poultry grower contracting relationships are mutually beneficial to growers and integrators and utilizes survey results showing how long current farmers have been with their company and loan default rates to demonstrate this. This rule addresses specific components of the broiler growing compensation system that AMS has received multiple complaints and comments about and that the Agency has determined constitute unfair or deceptive acts or practices. The rule does not prohibit incentive payments, which some commenters would like to retain and suggest are a beneficial part of the tournament system. The comment, however, does not necessarily measure if growers support or oppose specific provisions of this rule. Other reasons may explain the duration farmers have been with their current dealer or

⁵⁸ See, e.g., 9 CFR 201.216, “Additional capital investments criteria.”

⁵⁹ Elam, Thomas, “Live Chicken Production Trends,” March 2022, Live-Chicken-Production-FARMECON-LLC-2022-revision-FINAL.pdf (nationalchickencouncil.org).

experience low rates of default. AMS notes that growers may not switch because of barriers to switching: even when growers have other competitor LPDs, the competitor may not be recruiting or may require LPD-specific equipment changes, among other reasons. The commenter says that, according to a survey of farmers associated with member companies of the organization submitting the comment, a small percentage of farmers depart due to contract terminations. The described methodology does not say if the survey represents all growers, including dissatisfied growers or ex-growers. This methodological consideration aside, the survey results do not address specific provisions of the rule.

The comment also cites data showing higher median incomes for broiler growers and lower loan deficiency and charge-off rates for chicken farmers compared to other types of farming operations to indicate the mutual benefits of the current poultry contracting system. While such comparisons provide some insight into the financial condition of poultry growers, they do not capture the full picture. For example, poultry growers carry the highest debt to asset ratios of all agricultural commodity operations.⁶⁰ Additionally, the income variability for broiler growers is much higher than that for all agricultural producers or U.S. households.⁶¹

Comment: Industry associations commented on the rule, explaining that AMS

⁶⁰ Giri, Anil and Subedi, Dipak, Farm Businesses Well-Positioned Financially Despite High Interest Rates, U.S. Department of Agriculture, Economic Research Service (2024), <https://www.ers.usda.gov/amber-waves/2024/july/farm-businesses-well-positioned-financially-despite-high-interest-rates/> (In 2022, poultry farms carried the highest average debt-to-asset ratio in 2022: 26.7 (6 times that for all farm businesses), 28.7 (2.6x), and 17.4 (1.3x) percent for small, midsize, and large family farm businesses, respectively; while all farm businesses carried average debt-to-asset ratios of 4.2, 10.8, and 13.1 percent, respectively).

⁶¹ Whitt, Christine, USDA Economic Research Service, Fees paid to growers for raising broiler chickens varied widely in 2020, (2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=104642> (Median income does not tell the whole story. The range of household incomes earned by contract broiler growers is wider than other groups. The bottom 20 percent of contract broiler growers earns \$170,871 less than those in the top 20 percent, compared to \$123,094 for all farm households, and \$114,084 for all U.S. households. The wider range reflects, in part, the financial risks associated with contract broiler production); MacDonald, James M. 2014, Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, USDA Economic Research Service, https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=1829.6.

only has the authority to prohibit conduct with an anticompetitive effect.

AMS response: Section 202(a) of the Act prohibits any unfair practice or device. As noted earlier, in section 407 of the Act Congress granted to the Secretary the authority to write regulations to effectuate the Act's purposes. Under the Act, this authority includes issuing regulations to, among other things, define the obligations that the Agency is charged with enforcing. AMS believes this includes the power to prevent LPDs from engaging in unfair, unjustly discriminatory or deceptive practices or devices in their contracts.

No court has held the Secretary does not have this rulemaking authority. *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1227 (10th Cir. 2007), for example, recognized that the Secretary had the authority to promulgate rules relevant to that case, but that USDA had not done so.⁶² *Been* quoted, with approval, *Excel Corp. v. United States Department of Agriculture*, which held the Department's implementing regulation on grading prohibited a practice that was harmful to competition but the court did not require evidence of harm to competition in case itself.⁶³ Further, the Supreme Court, in *Mahon v. Stowers*, 416 U.S. 100, 112 (1974), recognized that USDA has the authority to issue substantive regulations.

Congress designed the P&S Act to provide broader protections than existing antitrust laws, such as the Clayton and Sherman Acts, in response to specific challenges in agricultural markets. More specifically, Congress intended to regulate practices that would violate those two antitrust laws and practices that would be unfair under the FTC Act, as well as the "special mischiefs and injuries inherent in livestock and poultry traffic."⁶⁴ AMS rejects the comments that the statute or case law limits violations of the Act to conduct that causes an anticompetitive effect, as that term is used in the antitrust

⁶² See *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1227 (10th Cir. 2007).

⁶³ *Id.* at 1230 citing *Excel Corp. v. U.S. Dept. of Agriculture*, 397 F.3d 1285, 1293 (10th Cir. 2005) ("Congress and the USDA are the arbiters of what practices will *impede competition*.").

⁶⁴ See *Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988); *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968).

laws. Such an approach would abrogate the scope of the plain meaning of section 202 of the Act.

The existence of the P&S Act is proof that existing antitrust laws were not sufficient in protecting livestock producers and ensuring fair agricultural markets. It is well established that, to meet the needs of livestock producers more effectively, the Act provides broader protections than existing antitrust laws.⁶⁵ The statutory text, case law, and legislative history make plain that the Act's protections extend beyond antitrust laws.⁶⁶ Accordingly, it has been the Agency's longstanding position that because the Act addresses more and different types of harmful conduct than antitrust laws, the Agency has authority over a plethora of market behaviors, and is not limited to conduct with an anticompetitive effect.⁶⁷ Additionally, as discussed elsewhere in this document, evidence of anticompetitive injury is not required under this rule to establish violations of section 202(a) and (b).

Market abuses such as unfair or deceptive business practices by regulated entities are illegal under the Act. Addressing the harmful conduct this rule aims to prevent is squarely within the authority of the Secretary and accords with Congressional intent. Moreover, the Secretary, exercising authority to define the scope of section 202(a) and (b), has determined that the prohibited practices are likely to prevent producers from

⁶⁵ See, e.g., *Bruhn's Freezer Meats of Chicago, Inc. v. U. S. Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971)(citing cases); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (“The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen.”).

⁶⁶ 61 Cong. Rec. 1801 (1921), statement of Rep. Haugen; see also *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961): “The legislative history shows Congress understood the sections of the [Act] under consideration were broader in scope than the antecedent legislation.” (citing 61 Cong. Rec. 1805 (1921)). If the antitrust laws were sufficient, then DOJ’s 1920 settlement with the major packers would have been sufficient; Congress understood the words “unfair practices” to have an obviously broader effect on regulating competition than antitrust injury.

⁶⁷ Luke Herrine, “Cutthroat Business,” U. of Alabama Legal Studies Research Paper Forthcoming, Aug. 2024, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4936628; Michael Kades, “Protecting livestock producers and chicken growers,” Washington Center for Equitable Growth (May 2022); Peter C. Carstensen, “The Packers and Stockyards Act: A History of Failure to Date,” *The CPI Antitrust Journal* (2) (2010), available at <https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf>; Herbert Hovenkamp, “Does the Packers and Stockyards Act Require Antitrust Harm?” (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at https://scholarship.law.upenn.edu/faculty_scholarship/1862.

earning the full value of their services and push some producers out of the market caused by coercive or deceptive practices by LPDs.

Comment: One commenter said that AMS lacks the statutory authority to promulgate rules that have significant economic or political repercussions due to the major questions doctrine. The commenter expressed the idea that, in light of the U.S. Supreme Court decision in *West Virginia v. EPA*, 597 U.S. 697 (2022), AMS may not expand its regulatory framework to change or undermine currently used poultry growing compensation systems because it lacks clear Congressional authorization.

AMS response: AMS disagrees that the major questions doctrine applies to this rule. The Supreme Court has held that, “in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.”⁶⁸ Under such circumstances, courts may conclude that Congress does not “typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme.”⁶⁹ The major questions doctrine thus applies to some “significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”⁷⁰ This final rule does not fall within this category for two independent reasons: USDA is not construing an ambiguous statute, but rather is applying a statute that explicitly confers upon it the power to make necessary regulations in the context of a scheme that comprehensively regulates unfair practices in certain industries; and, even if the relevant statutory authorities are ambiguous—and they are not—this final rule does not represent the type of “transformative expansion” of the Agency’s regulatory authority that animates the major question doctrine.

⁶⁸ *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 723 (2022).

⁶⁹ *Id.* at 723 (citation and quotation marks omitted).

⁷⁰ *Id.* at 724.

First, the major questions doctrine applies only when there is ambiguity over the power conferred. Here, there is none. Congress prohibited unfair, deceptive, discriminatory, and other practices in section 202 of the Act. Further, it explicitly gave power to the Secretary to comprehensively regulate unfair practices in meatpacking and broiler production. The Secretary has the power to enforce the provisions of the Act, including sections 202 and 410.⁷¹ And separately, pursuant to section 407 of the Act, the Secretary was provided broad authority to “make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter.” The broad language here reflects Congress’ effort to grant the Secretary the flexibility necessary to prevent the P&S Act from becoming obsolete.⁷² Congress was clear in the authority it had granted, and that authority includes issuing regulations and orders relating to the Act and its remedial purposes—including, as here, the power of the Agency to construe the relevant provisions of the Act so as to provide clarity in enforcement. The Secretary has extensive power to regulate, and therefore has the authority to issue regulations such as this one. So, unlike cases where there has been some heretofore unforeseen “unheralded power,” there is no reason to believe that Congress understated the breadth of the authority it granted to the Agency to issue regulations construing the Act.

Second, this final rule does not constitute the type of “transformative expansion” of Agency authorities that animates the major question doctrine. The rule codifies USDA’s interpretation of section 202 consistent with much of the caselaw: the P&S Act is a remedial statute with a purpose that is broader than the antitrust acts.⁷³ The Agency

⁷¹ See 7 U.S.C. 193(a) (“Whenever the Secretary has reason to believe that any packer or swine contractor has violated or is violating any provision of this subchapter” he may take appropriate enforcement actions as set out in the statute).

⁷² See *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”).

⁷³ See, e.g., *Bruhn's Freezer Meats of Chicago, Inc. v. U. S. Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971)(citing cases); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (“The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen.”).

has used its section 228 authority for the issuance of a great variety of regulations to specify obligations for bonding, registration, accounting, recordkeeping, ownership, public communications, disclosures, limitations on commissions, credit sales, weighing, payment practices and other responsibilities under the statute – so this is not a newfound substantive power; and, in any event, this is not the type of consequential rule to which the major questions doctrine would otherwise apply.

As discussed above, Congress enacted the P&S Act after many years of concern about farmers and ranchers being cheated and mistreated. Congress believed that existing antitrust and market regulatory laws, including the Sherman Act and Federal Trade Commission Act, did not sufficiently protect farmers and ranchers.

Section 407 of the Act (7 U.S.C. 228) gives the Secretary authority to “make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act.” The House of Representatives’ report on the Act stated that it was the “most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.”⁷⁴ The Conference Report on the Act stated that, “Congress intends to exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits. . . .”⁷⁵ Congress considered this a power beyond the authority of the FTC and the Interstate Commerce Commission. The Supreme Court said of sections 407 and 202 of the P&S Act that Congress gave: “authority [to] the Secretary of Agriculture to promulgate appropriate rules and regulations to carry out the provisions of the Act.” And, “Enforcement of [section 202 of the Act] is the responsibility of the Secretary of Agriculture, who is given authority to hold hearings and enter binding orders.”⁷⁶ The major questions doctrine is an extraordinary application of statutory interpretation,

⁷⁴ House Report No. 67-77, at 2 (1921).

⁷⁵ House Report No. 67-324, at 3 (1921).

⁷⁶ *Mahon v. Stowers*, 416 U.S. 100, 107 (1974).

because it has the potential to reverse an act of Congress, and, therefore, the Supreme Court has already noted that the doctrine does not apply generally. It has so far only applied in cases where the regulation would have been a questionable application of regulations with billions of dollars of effects, from regulating tobacco packaging, a nation-wide moratorium on eviction, and setting limits on the carbon dioxide emissions from millions of small sources.⁷⁷ Here, however, the rule does not meet these standards. The Department has consistently interpreted unfair practices—and thus applied the Act—to protect producer welfare and advance fair-trade practices in the livestock, meat, and poultry industries in accordance with Congressional intent upon passage of the Act. The Department's policy on unfair practices has not changed throughout the course of its enforcement of the Act.

The final rule continues this policy approach of protecting producer welfare and advancing fair trade practices in the poultry industry. This final rule advances these goals by prohibiting certain payment practices under poultry grower ranking systems, requires LPDs to adopt policies and procedures regarding their processes for operating a fair ranking system for broiler growers, and requires LPDs to provide certain information to broiler growers when the LPD requests or requires the grower to make additional capital investments. These regulations will increase transparency and address deception and unfairness in broiler grower payments, tournament operations, and capital improvement systems. The Act advances fair trade and competitive markets for the broiler industry.

Notably, commentators generally appear to assert that the 2008 Farm Bill, and the decade of rulemaking that followed, either limits the Department's general authority to issues rules, or shows that the Department did not have that authority. This is not an accurate version of events. Starting in 1997, a series of OIG and GAO reports were highly critical of USDA's failure to pursue unfair practices and cases of antitrust injury in

⁷⁷ *West Virginia*, 597 U.S. at 722.

meatpacking under the P&S Act. At a Senate hearing in March of 2006, Senator Chambliss noted, “[t]his act is a critical law that assures farmers and ranchers that business transactions are conducted under the principles of fair competition, open and honest trade practices, and prompt payments to producers.” These criticisms culminated in an April 2007 hearing in the House of Representatives where advocates requested, *inter alia*, that the Secretary be required to issue rules on undue preferences and advantages, because regulation was perceived “to ensure that small and mid-sized farmers and ranchers are not forced to accept volume-based price discrimination.” The thrust of the 2008 Farm Bill was not that the Secretary did not have the power to regulate, but that Congress demanded that power be used.

Comment: Producers were both in opposition to and in support of the tournament system. Industry associations and processors generally supported the tournament system, claiming the tournament system incentivizes and rewards high performance, resulting in market efficiency, and also removes costs and economic risk from growers by providing inputs. Industry stakeholders asserted the rule undermines the tournament system, leading to inefficiencies and potentially higher prices. Commenters cited unintended consequences including increased production costs passed on to consumers; barriers to entry for small farmers, leading to further industry consolidation; and shift in production to countries with less stringent regulations. Additionally, industry commenters claimed that capping performance-based payments might create an undesirable redistribution of income from high-performing to lower-performing growers. Lastly, the industry anticipates substantial legal and administrative costs associated with compliance, including contract amendments and legal counsel. Some producers and an industry trade organization claimed the tournament system promotes animal welfare.

Farmers’ coalitions, advocacy associations, and many individual commenters were largely opposed to the tournament system, expressing that the tournament system

shifts economic risks to growers, locks them into inescapable cycles of debt, and enables retaliation. Some commenters were concerned that the tournament system appeared to pit farmers against each other, limiting knowledge sharing. Other commenters felt the tournament system is unfair due to the grower's lack of control over production variables.

AMS response: It is important to note that AMS is not banning the tournament system. Rather, AMS is prohibiting those parts of tournament systems that are unfair practices and ensuring that those agreements serve the competitive operation of the market in a fair and non-deceptive manner. Additionally, increased transparency through this final rule should improve confidence in the tournament system rather than undermine it.

In theory, the tournament system insulates growers from variation in the cost of feed and other inputs, encourages growers to perform to the best of their ability, and rewards better-performing growers. In practice, however, the tournament system also raises a number of fairness concerns for growers. If an LPD treats individual growers in a tournament differently, for example providing a grower with inferior inputs, the grower's skill does not determine their compensation.

Information asymmetry in contracting arrangements is another cause for concern. LPDs have information related decision-making that impacts grower compensation, including the methods for calculating grower payment. These methods are often intended to limit total grower compensation while maximizing production efficiency. LPDs also have information relating to the factors that are under their control and the influence of performance elements on grower compensation. LPDs have internal knowledge about the types of additional capital investments that they typically require, which growers may not anticipate. Moreover, without a guaranteed base pay rate, the complexity of the tournament system makes it difficult for growers to clearly understand what the minimum amount is that they could actually receive in payment. If the comparison-factor (*i.e.*, the

bonus or deduction) is a large percentage of the total compensation, that variance in total could put the growers at significant financial risk. Tournament pay systems are also not an effective incentive system when factors outside of the grower's control determine the grower's performance.

Finally, LPDs have substantial bargaining power, and as a result, LPDs can require growers to make additional capital investments that will increase the grower's debt, and subsequently increase the grower's reliance on the LPD's contract. Such a dynamic can unfairly impose risk on the grower (for example by creating a difference in the term of the grower's loan and the grower's contract). Another concern is the variation in the quality of inputs (*e.g.*, feed or chicks) supplied by the LPD, which can impact the performance of the grower's flock. Similarly, LPDs determine the production practices on growers' farms (*e.g.*, density of bird placement, age at harvest, and weight at harvest), which greatly impact grower compensation. These factors can result in the grower's becoming financially dependent on LPDs, therefore losing the power to negotiate, and to move to different LPDs if the terms of the growing contract are not ideal.

AMS is not aware of any evidence that tournament systems promote animal welfare, nor did the commentors provide specific examples explaining the connection beyond the general assertion that performance payments through a tournament encourage grower effort. The tournament systems control how poultry growers are compensated for their output, but the quality of inputs or production practices on farms, and even the quality of the housing and equipment, is determined by the LPD. These requirements may have the effect of improving animal welfare, but they may well also have the opposite effect. Moreover, AMS in this rule does not prohibit performance payments nor ban the tournament. Rather, the rule sets standards around the reasonable design of payment systems and scope of the operation of tournaments. These standards provide ample opportunity for LPDs to incentivize grower effort, while minimizing the

downsides of the current payment systems and tournament operations as they have been reported to AMS by growers.

Comment: An industry representative stated that the proposed duty of fair comparison creates the untenable situation of extending P&S Act liability to a situation without determining whether the outcome was unfair, much less whether competition was harmed overall. The commenter cited an example in which a grower might receive a payment that aligns with the contract terms, meets the grower's expectations, and is entirely fair when viewed objectively, but the LPD does not follow written policy; in this case, under the proposed rule, the commenter asserts that the LPD would potentially be liable for an unfair practice.

AMS response: The comment appears to suggest that the regulation bans reasonable conduct. It does not.

The duty of fair comparison provision (§ 201.110(a)) establishes a violation of the Act for either failure to design or failure to operate the comparison system in a *fair* manner. Failing in that responsibility is not contract compliance; it is bad faith and failure to make the full payment to the grower.

In the first instance, AMS might bring an enforcement action for an LPD's failure to design the ranking system in a manner that would deliver a fair comparison; such an action would be based upon the processes set forth in the documentation required under paragraph (b) of § 201.110. In the second instance, AMS might bring an enforcement action based upon an LPD's failure to operate the ranking system in a manner consistent with the duty of fair comparison. Such a failure could be because the LPD was not following the documented processes or because in practice the documented processes did not deliver a fair comparison.

The requirement to design the ranking system in a manner consistent with the duty of fair comparison is intended to prevent injury before it occurs, consistent with

P&S precedent and the Act's remedial purpose. USDA, through the P&S Act, has broad authority to ensure fair practices prevail in the poultry industry, and AMS concludes this includes preventing LPDs from designing a poultry grower ranking system that can be expected to produce an unfair comparison of growers. AMS did not make any revisions to the rule as proposed in response to this comment.

Comment: Some commenters asserted that the proposed rule's disclosure requirements violate the First Amendment because they restrict and prescribe what LPDs can say to their contract growers through their contracts.

AMS response: The P&S Act prohibits unfairness and deception, and this final rule addresses harms caused by unfair and deceptive practices. While some commercial speech may be protected under the First Amendment, withholding material facts from a contracting party has never been protected speech. The rule does not restrict information that LPDs may provide to growers, rather it encourages full disclosure of material information to the grower. A disclosure requirement can be justified either because without the disclosure there is a risk of deception or there is another substantial government interest at issue. This rule's disclosure requirements meet both justifications; absent the disclosures there is a risk of deception by regulated entities and the government is otherwise advancing its interest in a fair marketplace for poultry. To this end, AMS has narrowly tailored the required disclosures to protect the growers from the types of deception and unfair practices that many growers themselves have commented occurs in LPD contract performance and negotiation and which the Act seeks to prevent.

With respect to compelled speech, AMS believes that the provision of additional factual information, related specifically to the growing arrangement, to growers is consistent with Congressional intent to benefit competition in the industry and provides growers with information needed to make informed business decisions. AMS concludes that alleviating the asymmetric information problems in these contracts enables growers

to identify the practices relating to additional capital investments that can lead to potential underpayment or other unfair and deceptive practices under the Act.

Additionally, the Agency believes that the additional transparency and equalization of information asymmetry is critical for the longevity of the poultry business because it would allow poultry growers to accumulate a history of previous contracts, additional capital investment requests, and other information, which is good for long-term market conditions Congress designed the Act to promote. The First Amendment does not protect corporations from practices that deceive, and this final rule requires LPDs to share factual and uncontroversial information related to additional capital investments, contracts, and schedules with their growers to prevent deception and unfair practices. The information shared should achieve contracts that are both equitable and rely on facts, which is also consistent with the Act's prohibition on unfair and deceptive practices.

Comment: One commenter supported the proposal for the rule to be effective 180 days after publication in the *Federal Register*, unless it disrupts contract renewals or seasonal production pauses. One industry representative suggested that the 180-day implementation period is the minimum timeframe necessary for compliance, and another expressed concern that short effective dates create challenges for managing grower relationships and suggested AMS develop outreach and educational programs. Two advocacy groups suggested shorter effective dates, one at 60 days and one at 30 days. One trade association requested a 2-year implementation period.

AMS response: AMS agrees with commenters that the final rule should provide sufficient time to implement any changes it requires, and broadly with the comment that 180 days is sufficient time for compliance with the rule. However, out of an abundance of caution, AMS is setting the effective date for this rule at July 1, 2026, which is approximately 18 months following publication in the *Federal Register*. LPDs will need to amend contracts in some instances, create records processes, format the incorporation

of new information in existing documents, and create Disclosure Documents using the new format. Eighteen months provides more than the length of five flocks to prepare for implementation of the rule. AMS will have resources available to answer questions as appropriate. Additionally, based in part on the experience of recent settlements between DOJ and a large poultry company, AMS believes this period will provide sufficient time for LPDs to update their compliance systems and policies and procedures and comments complying with the rule. AMS's approach has been to address the regulatory needs of the poultry industry systematically and as swiftly as possible. And while the 2-year period suggested by a commenter would unnecessarily delay implementation, thus denying growers the benefit of the rule and exposing them to continued uncertainty, AMS acknowledges additional time beyond 180 days will help facilitate an effective transition. Accordingly, AMS is extending the effective date to July 1, 2026, which is approximately 18 months post publication.

AMS agrees that it should conduct outreach to growers and LPDs regarding these changes, implementation, and enforcement. Over the course of this rulemaking, AMS has published informational materials, including a fact sheet and a video webinar, to help the public understand the proposed rule. AMS intends to conduct further education and outreach following the finalization of the rule.

VI. Regulatory Analysis

A. Executive Orders 12866, 13563, and 14094

AMS is issuing this final rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Order 12866, as supplemented by Executive Order 13563, directs direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 further emphasizes the

importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 amended Executive Order 12866 and directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means.

This rulemaking has been determined to be “significant” under Executive Order 12866, as supplemented by Executive Order 13563 and amended by Executive Order 14094, and, therefore, has been accordingly reviewed by the Office of Management and Budget (OMB). As a required part of the regulatory process, Agricultural Marketing Service (AMS) prepared an economic analysis of the costs and benefits of §§ 201.106, 110, 112, and 390.

B. Regulatory Impact Analysis

AMS prepared an economic analysis of the costs and benefits of the final §§ 201.106, 110, and 112 as a required part of the regulatory process.

As described previously elsewhere in this final rule, the organization and structure of broiler production is characterized by a high degree of vertical integration, market power in regional markets, substantial investment in production capital that is specific to a single production purpose, nearly universal use of production contracts, and use of complex grower compensation systems based on relative performance. Important factors that affect grower performance, including inputs (chicks, feed, medication, etc.) and some production practices (placement density, age and weight at harvest, etc.) are controlled by the LPD. In addition, the percentage of poultry producing farms considered to be in “extreme financial stress” (defined as term debt coverage ratio less than one and a debt-to-asset ratio greater than 55 percent) is among the highest of all types of commodity production operations.⁷⁸ Market failures caused by asymmetric information, incomplete

⁷⁸ Nigel Key, Christopher Burns, and Greg Lyons, “Financial Conditions in the U.S. Agricultural Sector: Historical Comparisons,” EIB-211, U.S. Department of Agriculture, Economic Research Service (2019), <https://www.ers.usda.gov/webdocs/publications/95238/eib-211.pdf?v=4876.5>.

contracts, and hold-up in poultry contracting motivate specific interventions as discussed in this final rule.

Comments From the Proposed Rule and Changes to the Final Rule

After consideration of public comments, AMS decided to adopt the proposed rule as a final rule with several modifications. Live poultry dealers (LPDs) commented that the regulation would be particularly challenging if the period of time allowed for regulated entities to comply with the provisions is too short. In addition, they stated that a shortened period for implementing changes would require greater expenditures of resources to make required modifications and communicate with growers. To allow sufficient time for regulated entities to comply with the final rule and avoid excess implementation costs, AMS is setting July 1, 2026, as the effective date for this rule, which is approximately 18 months following publication in the *Federal Register*. This extended time frame will not impact the amount or timing for estimated costs of the final rule; regulated entities are expected to incur first year costs during the 12 months preceding the effective date.

Industry trade organizations and LPDs commented that the full cost of implementing the proposed rule would be far greater than estimated by AMS. The commenters asserted that AMS greatly underestimated the costs that will be required for employing teams with highly specialized legal and technical expertise to implement the proposed rule by modifying or replacing grower contracts and communicating changes to growers. Commenters suggested that AMS did not adequately consider the total number of hours needed, but none provided quantified estimates. LPDs also commented that hourly rates paid to specialized industry professionals. Commenters also suggested that implementation of the rule would require LPDs to hire and train additional staff and pull resources away from other important activities.

AMS consulted subject matter experts who are familiar with LPDs, integrators,

and broiler complex operations. These experts were auditors and supervisors with many years of experience at AMS in auditing LPDs for compliance with the Act. The final rule provides an extended period of approximately 18 months following publication in the *Federal Register* before the effective date, to permit sufficient time for implementation. Hourly rates used in cost analysis for the proposed rule were based on averages for legal, management, administrative, and information technology labor categories specifically within the agricultural sector as published and annually updated by the U.S. Bureau of Labor Statistics.⁷⁹ Although the largest corporations likely employ lawyers and other specialists at hourly rates much higher than the National average, contract development and review efforts at those companies are spread across many complexes. AMS expects that average hourly rates provide an appropriate benchmark for estimating industry average costs. AMS revisited the estimated hours to implement all provisions of the final rule based on comments that costs were underestimated. After further discussion with subject matter experts, AMS added a modest amount of time to account for the cost of IT work in preparing § 201.112 disclosures. AMS subject matter experts who are familiar with the operations of LPDs, integrators, and broiler complexes through their experience conducting regulatory reviews of LPDs confirmed that all other costs of the proposed rule are accurate estimates and accordingly, AMS made no other changes to hourly costs or estimated numbers of hours for implementation of the rule based on this comment.

AMS received numerous comments from growers, grower groups, and advocate commenters in support of additional limitations on grower risk from excessive variability in compensation. Based on these comments, AMS has added provision § 201.106(b), which establishes a presumption that a regulated entity is in violation of the Act when aggregate gross annual payments based upon a grouping, ranking, or comparison of

⁷⁹ See U.S. Bureau of Labor Statistics, May 2023 National Occupational Employment and Wage Estimates, May 2023. <https://www.bls.gov/oes/special.requests/oesm23all.zip>.

growers (performance pay) exceed 25 percent of total gross payments (including performance and all other types of grower pay). AMS again consulted its internal subject matter experts and added costs for LPDs to implement and monitor this new provision, which are discussed and quantified as direct costs. Other expected additional benefits and indirect costs resulting from this new provision cannot be quantified and are discussed separately.

AMS also solicited comment in the proposed rule on whether there was a need to protect growers against the risk that LPDs might unfairly reduce broiler grower total compensation during a transition period after implementation of the final rule. Comments on the proposed rule reflected support for adding such protections. Based on comments received, AMS added § 201.106(c), which will require LPDs to submit copies of the prior and modified contracts and disclosures to AMS if average gross grower payments at a complex show year-over-year decline following a contract modification in any of the three calendar years commencing with and including the effective date of the rule. AMS will review the information provided by LPDs to identify any potentially unfair practices related to broiler grower compensation. AMS consulted with its internal subject matter experts and added direct administrative costs for LPDs to provide information in compliance with this provision during the three-year period. AMS is not able to quantify the potential benefits and the potential indirect costs to LPDs of this provision – these will also be discussed separately.

AMS received comments suggesting that some of the detailed documentation requirements under proposed § 201.110(b) were similar to existing documentation requirements and might create unnecessarily burdensome and complex paperwork that could burden service technicians at broiler complexes and keep them from other important responsibilities such as assisting growers. In response to these comments, AMS made several changes to § 201.110(b) in the final rule that included consolidating and

streamlining the documentation requirements and removing some detailed requirements delineated under subparagraphs in the proposed rule.⁸⁰ AMS expects that these adjustments to final § 201.110(b) will add clarity and minimize potential confusion about the documentation requirements, thereby making them more effective, and that these changes will reduce recordkeeping requirements by some amount. However, based on consultation with its internal subject matter experts, AMS chose to attempt to avoid underestimating costs and did not reduce the total recordkeeping requirements or the time cost of the information collection for LPDs. Accordingly, these changes did not affect the estimation of costs or benefits in the final rule.

The proposed rule included § 201.110(b)(2), “Compliance review,” which required LPDs to conduct a bi-annual review of the processes set out in § 201.110(b)(1). AMS removed this requirement in response to comments that self-audits would be burdensome for LPDs, and that elimination of this requirement would not substantially diminish effective compliance with § 201.110. Compliance will be enforced through regular AMS review of the policies and procedures, as newly enhanced documentation, which LPDs are required to establish and maintain under § 201.110(b). Accordingly, removal of § 201.110(b)(2) eliminated the burden of compliance review on LPDs and reduced costs from the proposed to the final rule by the cost estimate in the proposed rule for that provision.

Based on comments received, AMS added a provision at § 201.112(c) to require that the LPD make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Capital Improvement Disclosure Document. Reasonable efforts include, but are not limited to,

⁸⁰ As described in the preamble section III., “Summary of the Proposed Rule and Changes in the Final Rule,” these changes to proposed § 201.110(b) included simplifying 17 combined paragraphs and subparagraphs in proposed § 201.110(b)(1), “Policies and procedures,” into six simple paragraphs in final § 201.110(b)(1) and removing proposed § 201.110(b)(2), “Compliance review,” and redesignating § 201.110(b)(3), “Record retention,” as paragraph (b)(2).

providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the poultry grower's geographic area. Reasonable efforts, depending on the facts and circumstances (such as convenience, expense, and timeliness of the translation), may also include allowing the grower access to a computer-generated translation of the Disclosure Document and additional time to review any translated Disclosure Document.

A similar requirement was established for LPDs in § 201.102(g)(4) of the “Transparency in Poultry Grower Contracting and Tournaments” final rule.⁸¹ As LPDs already have all necessary information to make reasonable efforts to assist growers in translating disclosure documents and have made it available to growers who request the information, AMS did not add any time to its cost estimates for LPDs to comply with this new requirement.

The following analysis describes the anticipated impacts of the final rule. The value of broiler production in the U.S. for 2023 was approximately \$50.6 billion.⁸² Our analysis finds that the total direct cost of final §§ 201.106, 110, and 112 will be greatest in the first year at \$26.0 million or 0.051 percent of revenues. The broiler industry is a mature industry, and margins are likely relatively low. If profit margins are 1 to 5 percent of revenues, then first-year direct costs would be 1.0 to 5.1 percent of margins. The total direct costs are low in relation to total industry size, but they do not include any potential costs from changes in supply or demand caused by final §§ 201.106, 110, and 112. The final rule is also expected to provide many benefits of importance to broiler growers that could not be quantified. These include the value to broiler growers of improved fairness, reduced income variability, and reduced risk of fraud and deception. As a result of many

⁸¹ 88 FR 83210, 83301 (Nov. 28, 2023).

⁸² USDA-NASS. Poultry - Production and Value 2023 Summary (April 2024).

factors that AMS is unable to measure due to insufficient data or which cannot be predicted with reasonable certainty, AMS is unable to quantify benefits or indirect costs and therefore cannot make a determination about the sign or magnitude of net benefits to the industry from final §§ 201.106, 110, and 112.

Regulatory Alternatives Considered

AMS expects final §§ 201.106, 110, and 112 to mitigate costs associated with asymmetric information and LPD unfairness and deception by establishing a duty of fair comparison for LPDs in poultry grower ranking system administration, requiring LPDs to establish and document processes, requiring LPDs to adopt transparent methods of presenting grower compensation in broiler grower contracts, limiting excess income variability, and requiring LPDs to provide important information to broiler growers. Final § 201.106 will prohibit the LPD from using a grower's grouping, ranking, or comparison to other growers to reduce a rate of compensation disclosed in a broiler growing arrangement, establishes a presumption of violation when performance compensation for growers at a complex exceeds 25 percent of total compensation, and implements a three-year transition pay period with additional grower protections. Final § 201.110 will require LPDs to provide a fair comparison among growers when basing compensation upon a grouping or ranking of growers delivering during a specified period of time and to document how they comply with that duty. Final § 201.112 will require LPDs to produce and distribute disclosures when they request growers to make additional capital investments.

AMS considered four alternatives to final §§ 201.106, 110, and 112, with the second and preferred alternative being the final rule. The first alternative is the “do nothing” approach or maintaining the *status quo*. All regulations under the Packers and Stockyards Act would remain unchanged. This first alternative forms the baseline against which AMS will compare the second alternative, final §§ 201.106, 110, and 112.

AMS considered a third alternative that would leave all requirements in final §§ 201.106, 110, and 112 the same, but entirely exempt LPDs that meet the criteria to be classified as small businesses by the Small Business Administration.⁸³ This third alternative would exempt smaller LPDs. However, since larger LPDs do most of the contracting (as quantified later in this analysis), most poultry growers would still receive the benefits of new protections under final §§ 201.106, 110, and 112. AMS considered a fourth alternative, which would be to adopt proposed §§ 201.106, 110, and 112 – this alternative also includes all small and large LPDs. Below, AMS provides estimates and comparisons of the costs and benefits of the alternatives and an explanation for why the Agency selected final §§ 201.106, 110, and 112 as the preferred alternative.

Benefits of Final §§ 201.106, 110, and 112

AMS expects that final §§ 201.106, 110, and 112 will provide benefits to growers by reducing the risk of potential fraud, deception, and reduced payment for grower services by LPDs during the first three years of the final rule, improving clarity in grower payment systems, limiting excess variation in grower compensation, protecting growers against unfair reductions in compensation by LPDs during implementation of the rule, establishing a duty for fair comparison in the administration of broiler grower ranking systems, and making more information available to growers. These benefits are difficult to quantify. They depend on the extent to which the interventions will mitigate some existing unfairness and deception that results from incomplete contracts, inadequate and asymmetric information, and hold-up problems in an environment where LPDs are able to exert market power or bargaining power. Some of the benefits may vary based on the extent of competitive choice for growers in local markets. For example, in more competitive markets, increased transparency might benefit growers by empowering them

⁸³ The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS). Live poultry dealers, NAICS 311615, are considered small businesses by SBA if they have fewer than 1,250 employees (13 CFR 121.201).

to negotiate better terms with LPDs. In less competitive markets, increased transparency might assist growers in identifying potential unfairness from low compensation or abusive practices and allow them to seek assistance from AMS in more quickly remedying these problems. The size of benefits will be directly related to the extent to which the final rule will mitigate or reduce these practices. AMS is unable to quantify the benefits and will present a qualitative discussion of the potential types of benefits that growers would receive from final §§ 201.106, 110, and 112. The following discussion of unquantified benefits will proceed by final rule section.

Benefits of Final § 201.106

Section 201.106(a) prohibits LPDs from reducing a grower's rate of compensation based upon a grouping, ranking, or comparison of growers. The practice of discounting or reducing disclosed contract "rates" creates problems for growers in assessing and comparing broiler production contracts. Growers commonly expect that based on ordinary efforts, they will be able to obtain at least the average rate of pay for growers in a settlement group, which is typically known as the "base" pay. If growers are evaluating the expected value of these contracts based upon "base" or "average" pay rates, downside risk, which affects half of the settlement pool per flock, would be ignored. These are the types of problems that create income expectations that are unlikely to be met for a large segment of broiler growers. Growers thus cannot effectively evaluate their risks on a settlement payment by settlement payment basis, through presentation of base pay rate at the mid-point. Growers are harmed when they incur costs as a result of entering a contract with an LPD and the actual revenue and the range of payment outcomes realized are below those the grower was led to believe they would receive when reviewing the contract based on reasonably expected efforts within the control of the grower. In addition, competition in the market for broiler grower services is harmed when such deception and unfairness prevent growers from comparing competing

offers from LPDs for the services of growers.

Final § 201.106(a) applies to LPDs that calculate grower compensation based upon a grouping, ranking, or comparison of growers delivering poultry during a specified period. LPDs using such a system are prohibited from using that grouping, ranking, or comparison to reduce a rate of compensation disclosed in a broiler growing arrangement. Final § 201.106(a) requires that any performance or incentive payments made to broiler growers under a poultry ranking system must be in addition to a disclosed rate of compensation (*i.e.*, any adjustments to rates of pay must be non-negative). Growers will benefit from increased certainty about the lowest possible revenue outcome under the growing arrangement. Greater certainty about minimum rate for their service can lead to improved financial planning and ability to manage financial risk. More transparent methods of presenting payments and compensation systems would also facilitate comparisons between alternative LPDs and benefit growers who may be evaluating offers or considering agreements from more than one LPD.

In accordance with final § 201.106(a), LPDs will be expected to redefine grower payment calculation systems as appropriate to express all payments in the form of bonuses added to a stated pay rate. AMS expects that existing schedules of grower payments can be recreated such that they conform to this final rule change, assuming that no additional modifications are needed to comply with final § 201.106(b). Existing LPD methods of grower payment calculation can be expressed in an alternative format that includes only bonus adjustments added to an existing minimum rate.⁸⁴ AMS is aware that several of the largest LPDs currently have existing payment systems that express all ranking bonuses as positive adjustments added to a stated pay rate and would conform to this requirement.

⁸⁴ All contracts that AMS has previously reviewed include provisions for a minimum grower payment that is greater than zero.

Changes to presentation of grower compensation rates as required by final § 201.106(a) are not expected to change the basic structure of grower compensation schedules for relative performance payments. The benefits that will accrue to growers from the changes will result from increased clarity as growers will be better informed of minimum compensation outcomes that can occur under the broiler growing arrangement. Growers in some circumstances may, therefore, be able to negotiate more appropriate compensation systems for themselves, in the form of higher base rates, for example. There is no expectation, however, that aggregate payments to growers will increase. Clearer presentation of grower compensation methods will benefit growers by improving grower understanding of potential revenue outcomes, thereby reducing problems of inadequate and asymmetric information and improving the clarity of defined terms to address incompleteness in contracting.

Final § 201.106(b) will establish a presumption that an LPD is in violation of the Act if more than 25 percent of total compensation paid to all growers in a complex on an annual basis is based on performance. If a complex is in violation of this provision, in order to comply an LPD may either raise grower base pay, reduce grower performance pay, shift some performance pay to mechanisms not covered by the provision, or a combination of all of these. Although other alternatives would be possible, AMS expects that the most likely outcome will be for LPDs to restructure compensation systems while keeping total grower compensation at approximately the same level. In this case, a grower compensation structure that includes less comparison-based performance pay would limit the range of potential compensation outcomes that an individual grower might observe and reduce risk from income variability.

Benefits of § 201.106(b) will accrue to broiler growers in the form of reduced income variability. For a given level of total income, growers would be likely to benefit if they receive a larger percentage of expected compensation based on fixed non-

performance pay – which may include minimum base pay, fixed incentive payments for equipment standards and housing, fixed bonuses for adherence to clearly defined management practices, or other fixed targets – and a smaller percentage of compensation that is variable based on a grouping, ranking, or comparison to other growers, which makes up most forms of performance pay at present in the industry.

When income is variable, growers will likely see trade-offs in the value to them of reducing income variability compared to mean incomes. Risk neutral growers will be made better off if they value any increase they receive in less variable pay not based on performance more than they value any decrease they experience in the expected value of performance-based pay. However, a risk averse grower would value a one dollar increase in less variable but more certain compensation more than they would value a one dollar decrease in the expected value of performance-based compensation that involves risk. Overall, individual growers are likely to benefit if the value to them of any increase they receive in less variable income – from compensation that is not based on performance – is greater than the value to them of any decrease they experience in the expected value of more variable performance-based compensation.

The magnitude of benefits to growers that will result from § 201.106(b) depends on several factors that cannot be predicted with any reasonable degree of confidence. These factors include uncertainty about the number of complexes that will modify grower compensation structures in response to § 201.106(b), the manner in which such modifications would be implemented, and the number of growers at affected complexes that would be impacted by any changes. AMS is unable to analyze comprehensive grower data for all broiler complexes and cannot predict with certainty how regulated entities will respond to this provision. For this reason, potential benefits of § 201.106(b) are discussed qualitatively and not quantified.

AMS does not have sufficient data to make an industry-wide inference on the

number complexes that will need to reduce performance payments relative to total payments or the magnitude of any reductions that will be required. AMS reviewed one to five years of confidential grower compensation data for four individual broiler complexes that AMS gathered in prior investigations. This sample included small, medium, and large bird sizes and some of the largest broiler LPDs that operate several other complexes across the U.S. Aggregate performance payments at these four complexes were 11.4, 17.4, 20.5, and 25.4 percent of total grower payments. AMS is not aware of any complex with performance payments that are as much as 26 percent of total payments, and it is possible that no complex will need to reduce performance payments relative to total payments by a substantial amount to comply with final § 201.106(b).

To the extent that the complexes AMS reviewed are representative of the other complexes owned by the same firms, two or possibly three of the firms would likely already be in compliance with final § 201.106(b). In addition, the terms of a 2022 consent agreement between Wayne-Sanderson Farms, USDA, and the U.S. Department of Justice informed final § 201.106(b). In the Wayne-Sanderson Farms consent, performance payments that Wayne-Sanderson Farms pays to broiler growers was limited to 25 percent of total payments. Section 201.106 establishes a presumption that poultry growing arrangements with variable pay greater than 25 percent is presumptively unfair. It is unlikely that the unfairness presumption will have any effect on these firms, which combined account for up to 35 percent of the complexes. It is possible that other firms already limit performance payments to less than 25 percent of total payments, but AMS does not have sufficient information to confirm this with a reasonable degree of confidence.

Growers will benefit directly from changes in variability of compensation as a result of § 201.106(b) only at complexes where LPDs modify existing compensation structures to comply with the 25 percent presumption of unfairness. However, growers

will also benefit from ongoing protection to the extent that this provision causes LPDs to forego future changes that would increase performance-based compensation beyond 25 percent of total compensation.

For a given level of grower performance-based compensation at a complex, the presumption of unfairness also indirectly limits reductions to grower base pay rates. A reduction in the base pay rate will reduce the total amount of grower compensation not based on performance and must be accompanied by a proportional decrease in performance-based compensation to maintain an equivalent percentage. The presumptive limitation therefore provides an incentive for LPDs to maintain or increase existing levels of base grower compensation. This provides another benefit to growers: it serves as a backstop against the potential harm to growers that would occur if LPDs were to substantially and unfairly lower base pay rates when modifying pay structures to comply with § 201.106(a).

The distributional effects of final § 201.106(b) are likely to be unequal across individual growers: not all growers will benefit or benefit equally from this provision. Current contracting practices can vary widely between complexes even of the same LPD. As previously noted, AMS expects that the most likely outcome at complexes where grower compensation structure modifications occur will be for LPDs to keep total grower compensation at approximately the same level and reduce the percentage of compensation based on performance payments. This would change the distribution of total compensation among growers at the complex. Depending heavily upon the strategy for compliance chosen by the LPD, AMS would expect these changes to result in benefits to some growers, welfare transfers between some growers, and no change in welfare for some growers. At some complexes, AMS would expect that some amount of welfare transfer from higher performing growers to lower performing growers would result from payment structure modifications implemented to comply with the 25 percent presumption

of unfairness. AMS expects some complexes to shift some performance pay to non-comparison methods, such as fixed metric performance, or to other innovative systems. Another possibility is that modifications could result in LPDs terminating or not renewing some marginally performing growers. This will be most likely to occur if LPDs seek to reduce the overall variation in grower performance at a complex as a means to comply or if payment structure modifications include increases in minimum grower payments that exceed the marginal value of services provided by some growers. Some LPDs may seek to utilize technology to more greatly standardize outcomes, thus reducing the need to utilize higher magnitudes of performance payment. AMS underscores that actual outcomes will depend upon how LPDs respond at different complexes owing to local factors on the ground.

Performance-based compensation structures based on a grouping, ranking, or comparison of growers determine individual grower compensation using relative performance metrics that typically include feed efficiency and chick livability. Some aspects of performance can be controlled or influenced by the grower through effort and management, and to some extent investment (subject to the concerns highlighted by this rule), in the broiler operation. Other determinants of grower performance depend on actions of the LPD or other factors outside the control of the grower. Section 201.110 of this rulemaking addresses factors under control of the LPD by establishing a duty of fair comparison. As discussed elsewhere, this provision is expected to benefit producers by reducing unfair impacts on growers attributable to these factors. Nonetheless, the influence of factors controlled by LPDs on grower compensation will not and cannot be eliminated without eliminating performance-based methods of compensation. Natural variation and randomness will persist for certain production factors that influence relative performance, such as breed, sex, age of breeding flock, health at placement, and the performance of other growers, even if the LPD strictly adheres to the duty of fair

comparison in the distribution of them. These factors therefore will continue to be important in determining compensation in a performance-based pay system. Provision § 201.106(b) benefits growers by establishing a presumption of unfairness based on the magnitude of performance-based compensation, thereby also limiting the share of income that will be affected by risk factors out of their control.

Growers are vulnerable to hold-up in the broiler contracting relationship: once a grower makes a housing and equipment investment to grow broilers for an LPD, that capital cannot be repurposed and the grower's choices become limited. In addition, many broiler operations operate in areas where they can potentially contract with only a very small number of integrators, which severely limits the grower's ability to switch integrators. Data cited in the preamble of this final rule (MacDonald 2014) shows that more than half of broiler growers have only one or two LPDs (integrators) in their local areas. As a result, growers lack bargaining power to protect their existing level of compensation when LPDs change contract terms. In requiring LPDs to provide the prior and modified contracts and required disclosures when contract modification or renewal results in lower year over year gross annual average grower payments at a complex, § 201.106(c) facilitates AMS intervention in unfair treatment. During a three-year transition period, LPDs will report changes to existing grower payment systems that reduce average compensation for growers at a complex.

Benefits of Final § 201.110

Market power gives LPDs a considerable bargaining advantage relative to growers in poultry contracting arrangements. As a result, growers lack negotiating power to demand, among other things, transparency around, and completeness in, and reasonable performance under contracts that would likely reduce the potential for deception and unfairness. The interventions aim to reduce potential adverse impacts of market power by establishing a duty of fair comparison that would provide protections to

growers that they do not have bargaining leverage to demand. Currently, most broiler production contracts are incomplete in that they fail to clearly state important terms and provisions related to input distribution and flock production practices, how grower compensation will be handled in certain variable circumstances, settlement grouping procedures, and other aspects of broiler grower ranking system administration. LPDs commonly seek to disclaim under these contracts what should be express or implied duties and warranties around the usability or appropriateness of inputs or production practices and other aspects of broiler grower ranking system administrations. LPDs frequently offer broiler contracts to growers on a take it or leave it basis, providing growers with little insight as to methods the LPD will use to compare growers for purposes of determining compensation, including whether growers will be compared to other growers provided with similar inputs and assigned similar production practices. Moreover, during performance, growers have little to no ability to demand LPDs actually perform as could be reasonably expected under the contracts, including promptly addressing problems that may emerge during ordinary operations.

Even under a reasonable level of transparency around specific input differences, growers are often unable to make sufficient modifications to their individual efforts to manage risks to how payments are affected under a poultry grower ranking system. Nor can they avoid harms from disputes that may arise under the poultry growing arrangement. Growers reasonably assume that they will be fairly compared to other growers under a broiler grower ranking system. They are deceived if LPDs do not make a good faith effort to ensure fair comparison among participating growers when operating broiler grower ranking systems. Given the extent of LPD control over grower outcomes through the distribution of inputs such as feed and chicks or production practices such as placement density, target weight, etc., growers are forced to rely heavily on LPD good faith efforts in performing fair comparisons under broiler growing arrangements.

Consistent delivery of fair comparison requires LPDs to incur monitoring costs and take corrective actions when operating poultry grower ranking systems. In fact, many LPDs implicitly acknowledge a responsibility to fairly compare growers when they use procedures to identify and correct imbalances and provide remedies when factors beyond the growers' control affect grower payments. These include, for example, provisions to remove a grower from a broiler grower ranking system pool and to pay that grower according to another metric (such as a multi-flock average) if the LPD discovers that inputs provided to the grower were inferior—such as sick chicks. Another example would be a policy of the LPD to avoid providing a grower with inferior inputs on consecutive flocks—such as chicks from excessively young layer flocks that are considered to be lower performing, at least when using the broiler grower ranking system to determine performance pay in those circumstances. Although such policies are not uncommon, they are not currently required to be universally employed or uniformly applied by LPDs. LPDs may have legitimate business interests in providing certain growers, sometimes higher skilled growers in fact, with lower performing inputs. Yet care needs to be taken to ensure that any comparison-based method for determining performance pay be established under circumstances that do not permit or enable the LPD to intentionally disadvantage one or more growers in the ranking system.

Growers also have no means by which to ensure that LPDs consistently carry out their responsibility under the contract or to enforce it. Further, the benefits of monitoring and correcting for unfair grower outcomes accrue to growers and not to the LPD. Therefore, LPDs have insufficient incentive to uphold their end of the bargain, especially in markets where growers have few options of alternative LPDs with whom they could contract. LPDs can therefore opportunistically minimize their costs of delivering a fair comparison at the expense of growers and, as a result, fail to deliver on their obligation for good faith and fair dealing under the contract.

Final § 201.110 addresses these problems by establishing a duty for LPDs to provide a fair comparison among growers when basing compensation on a grouping or ranking of growers delivering poultry during a specified period and requiring LPDs to document how they comply with that duty. The fair comparison requirement in final § 201.110(a) ensures that LPDs will not compare growers to other growers who have been supplied with inputs or assigned production practices that result in material differences in performance metrics used in payment calculations. Duty of fair comparison also requires that LPDs compare growers over appropriate time periods and use appropriate non-comparison payment methods. Final § 201.110(b) establishes documentation requirements in the form of processes, commonly known as policies and procedures, to facilitate LPD effective broiler grower ranking system operation under that duty, effective recordkeeping of transactions, and facilitates AMS supervision and enforcement. These provisions will benefit growers by reducing deception and unfairness in the operation of poultry grower ranking systems.

Expressly requiring LPDs to implement written processes that promote fair comparison of growers, whether through more consistent allocation of inputs and production practices or adjustments to methods and formulas, will foster more transparent, accurate, and reliable broiler grower ranking systems, and hold LPDs accountable for divergences from lawful action. Growers will benefit from this regulation because they will be less vulnerable to intentional harm due to deception, retaliation, or bad faith by LPDs. An LPD, AMS, or enforcement body can more easily evaluate grower complaints of intentional harm—for example, LPD employees targeting growers by providing inferior inputs—when they are able to consider whether the LPD has complied with its own stated policies and procedures for ensuring fair comparison. Ongoing monitoring of the broiler grower ranking system by LPDs to fulfill the duty of fair comparison required by final § 201.110(a) will also provide safeguards to prevent

growers from being substantially disadvantaged by unintentional or inadvertent outcomes. For example, an LPD will be compelled to take prescribed corrective action if it discovers that a particular grower has randomly received an unusual share of inferior inputs over multiple flocks. Procedures designed to ensure fair comparison will include monitoring to prevent natural variation in input quality and LPD-determined flock production practices among growers within a single settlement group from being allowed to persist as a pattern that disadvantages a particular grower over multiple settlement groups. By establishing a basic duty for LPDs to deliver fair comparison of growers, final § 201.110 is structured to provide LPDs flexibility in fulfilling that duty within the context of individual circumstances and complex production processes.

Benefits of § 201.110 deriving from the value to growers of fairness and equity are important. AMS is unable to quantify these benefits. However, as a result of this provision, compensation for individual growers will more closely match the level of individual grower effort, skill, and investment relative to other growers under a poultry grower compensation system that guarantees fair comparison. This provision will benefit growers by removing some of the unfairness in the distribution of grower compensation within poultry ranking payment systems. When LPDs fulfill a duty to ensure fair comparisons, no individual grower will receive consistently poor inputs while other growers with whom that grower is compared receive consistently good inputs. The expected benefits of ensuring fair comparisons among growers are highlighted by the consistent widespread reports of harm to individual growers resulting from existing unfair comparisons.⁸⁵ A reduction in the occurrence of such harms could potentially lead to reduced grower turnover.

Provisions included in final § 201.110(b)(1)(vi) will also require LPDs to

⁸⁵ Section II of this final rule, “Background,” documents decades of grower comments to USDA that highlight concerns of persistent unfairness resulting from unfair comparisons in broiler grower tournaments.

maintain written processes for communication and resolution of grower concerns with the design or operation of a system that is consistent with the duty of fair comparison. These processes should address timely resolution of such disputes. Providing an effective method of dispute resolution has the potential to help resolve disagreements involving personality conflicts which can lead to avoidable inefficiencies.

Benefits of Final § 201.112

LPDs encourage and often require broiler growers to make additional capital investments in assets that are specific to producing poultry for that LPD. Growers cannot exert bargaining power to demand essential information that would inform such investments. As a result, LPDs can induce growers to make additional investment decisions that do not benefit growers when they do not supply sufficient information for evaluation of requested upgrades. Such investments can cause financial harm to growers and increase the extent of their investments in capital that is specific to poultry production for nearby LPDs (thereby also increasing grower hold-up exposure) while still benefiting those LPDs. Moreover, broiler growers bear all the costs and risks of additional capital improvement investment. LPDs do not own the farm-based production capital and therefore do not share in these risks, although they frequently dictate grower investments. Because poultry production capital is largely owned by growers, LPDs have limited incentive to carefully consider how much required additional capital investments will improve individual grower production efficiency and whether they are likely to lead to financial success or failure. This misalignment of incentives is consistent with grower complaints that LPDs sometimes require costly investments that are unnecessary or in some cases merely cosmetic.⁸⁶ When a broiler considers a new investment, the broiler

⁸⁶ AMS sought feedback on proposed rulemaking in a 2022 ANPR (87 FR 34814, June 8, 2022). Some commenters noted that LPDs often supply insufficient information with respect to requested or required upgrades and deceptively induce growers to make costly additional capital investments. One commenter, for example, asserted that LPDs demand costly upgrades that some growers have reported to be arbitrary and apparently untethered to any reasonable assurance of increased compensation.

grower considers gains in productivity relative to the cost of the investment. However, when LPDs do not bear investment cost, they have incentive to maximize only their benefits and encourage growers to over-invest in poultry-specific production capital to the point of negative returns for the grower.

AMS has sought to address similar concerns through prior action. Finalized in 2011, § 201.216 sets out criteria for when the Secretary will find additional capital investment violated the Act (76 FR 76874, December 9, 2011). However, AMS's experience since has found that the rule is insufficient to help growers or the Agency to identify problematic additional capital investment in time to act. Accordingly, the Agency in this final rule has prioritized disclosure of critical information to growers in a timely manner, to enable growers and the Agency to have ready access to the necessary information to conduct analyses under § 201.216 and under the Act generally, including to stop additional capital investment that cause unavoidable harms. AMS also is adopting final § 201.112 to prevent deception of growers related to additional capital investment, as the information being required is critical to their decision-making around the additional capital investment, whether or not the additional capital investment gives rise to unavoidable harms separate and apart from the failure to disclose.

LPDs prevent growers from making fully informed decisions and understanding the true extent of over-investment when they withhold important information about additional capital improvement investments. An increase in grower investment leads to increased grower dependency on LPDs to generate returns on that investment through poultry contracting. The presence of few or no other poultry contracting options in a grower region further focuses dependence on a single LPD. The use of incentive payments by LPDs to compensate growers for additional capital investment can help to align investment incentives. For these arrangements to work properly, growers must clearly understand the parameters of the investment and the breakdown of payment

components and financial incentives offered by the LPD.

Final § 201.112 will require LPDs to provide a Capital Improvement Disclosure Document when requesting an additional capital investment over the identified threshold of \$12,500 (as defined in § 201.2(n)). This disclosure will provide information to existing growers contemplating additional capital investments about the goal or purpose of the investment, grower financial incentives, construction schedules, description of changes to housing specifications, approved manufacturers or vendors, and analysis of projected returns including the assumptions, risks, and uncertainties upon which those projections are based (paragraphs (b)(1) through (6)). As such, the Capital Improvement Disclosure Document will clearly state the intended and expected outcome of LPD additional investment requirements.

Requiring LPDs to provide this information to growers will reduce asymmetric information that contributes to inefficient investment and resource allocation decisions, where such choice exists by growers. LPDs providing this additional information related to grower requirements reduces the cost to growers of identifying and qualifying manufacturers and vendors when making capital improvements. To the extent that disclosures assist growers in understanding the purpose of additional capital investments, those growers will be more likely to realize any potential benefits from the additional capital investment. For example, growers will be able to tailor additional capital investments to their particular operation so as to be better positioned to implement the additional capital investment and produce intended production improvements. The clarity provided by additional capital investment disclosure will reduce the likelihood of costly errors caused by miscommunication and misunderstanding and increase the likelihood that growers will be able to correctly implement additional capital investments. Final § 201.112 will generate economic benefits by addressing certain limitations on market functioning arising in part from asymmetric information. Growers operating with better

information are less likely to be deceived or unfairly misled by LPDs when additional capital improvement investments are required.

Even where growers may not be able to avoid or negotiate around these terms, growers may be better able to effectuate their rights under the Act, and AMS would benefit from earlier identification of potentially unfair practices. To the extent this occurs, by addressing asymmetric information this section of the final rule will help alleviate additional hold-up of growers by LPDs. Even in cases where grower refusal may still result in other adverse consequences, growers may still be better off by preventing additional financial loss and increased specific investment and dependence on the LPD. Financial projections and other analyses of additional capital improvement investments developed by LPDs along with more complete information about investment purpose, expected benefit, and grower performance will be superior to analysis based on limited grower information.

Final § 201.112(c) will benefit growers who require translation assistance by requiring LPDs to make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist growers in translating the Capital Improvement Disclosure Document.

Summary of Benefits of Final §§ 201.106, 110, and 112

AMS expects that the final rule would provide substantial benefits to the industry and address issues of extreme importance to broiler growers. However, these benefits are unquantified. AMS cannot measure any impact or shift in total industry supply or any corresponding indirect effects on industry supply and demand, including price and quantity effects.

Estimation of Costs of the Final Regulations

AMS estimates cost for three alternatives. The first is the final §§ 201.106, 110, and 112, which is the preferred alternative. The second alternative is the same as final §§

201.106, 110, and 112 with a complete exemption for LPDs that are considered small businesses by the Small Business Administration.⁸⁷ All LPDs are also included in the third alternative, which is adoption of the proposed §§ 201.106, 110, and 112. All three alternatives are compared against a baseline of *status quo*, which has no costs or benefits.

The direct costs of final §§ 201.106, 110, and 112 primarily consist of the time required for LPDs to: (1) modify and monitor grower contracts to determine compensation in a manner consistent with final § 201.106; (2) develop, document, and comply with policies and procedures for ensuring that growers are fairly compared to other growers in poultry grower ranking systems; and (3) gather and document information pertaining to grower additional capital investments and distribute it among the growers. The costs of the final rules will fall on LPDs as they modify existing contracts and compensation systems, develop and comply with new policies, and collect and disseminate required information. Costs will also fall on poultry growers based on the value of the time they put into reviewing the disclosures. Though poultry growers are expected to incur costs in reviewing information, they will be the primary beneficiaries of the information, which may be reflected in their ability to make more informed decisions (where they may have more than one or two integrators as options in certain geographic areas). Further, growers will be able to better identify additional capital investment programs that are unfair, which either AMS or growers can challenge as a violation of the Packers and Stockyards Act. This may result in a more efficient allocation of capital within the poultry growing industry.

There were 42 LPDs in the broiler chicken market that filed a fiscal year 2023 Annual Report with AMS, and their reports indicate that they had 20,014 contracts with

⁸⁷ The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS). Live poultry dealers, NAICS 311615, are considered small businesses by SBA if they have fewer than 1,250 employees.

poultry growers during fiscal year 2023.⁸⁸ Of these, 21 LPDs are considered small businesses according to SBA classification, and these have a total of 1,208 grower contracts. Small LPDs are expected to differ from large LPDs in structure and complexity, particularly with regard to the number of contract types used, management, use of legal services, and divisions of labor. Where noted below, some components of cost estimates are calculated separately for large and small LPDs to reflect these differences.⁸⁹

AMS expects the direct costs of the final rule will be small in relation to overall production costs and will not measurably alter poultry supply. AMS also expects that neither LPDs nor poultry growers will measurably change any production practices that will impact the overall supply of poultry as a result of these direct costs.

Expected direct costs are estimated as the value of the time required to develop and implement new broiler grower contracts and grower payment systems to comply with requirements of final § 201.106; develop, implement, and maintain compliance with processes reasonably designed by the LPD to deliver fair comparisons among broiler growers in the operation of broiler contract tournament systems as required by final § 201.110; and produce and distribute disclosures when LPDs request or require growers to make additional capital investments as required by final § 201.112, as well as the time required to create and maintain any necessary additional records. Grower payment systems required by final § 201.106(a) are substantively similar to many current payment systems already in use and will therefore not require large adjustments for most LPDs. AMS does not have sufficient data to predict whether the presumption of unfairness based on 25 percent performance-based grower pay will cause any LPDs to make

⁸⁸All live poultry dealers are required to annually file PSD form 3002 “Annual Report of Live Poultry Dealers,” OMB control number 0581-0308. The annual report form is available to public at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

⁸⁹ Unless otherwise noted, estimated cost or hours estimates for small and large live poultry dealers are the same.

substantial changes to grower compensation structures. The policies and procedures that LPDs would be required to develop in response to final § 201.110 are expected to result in formalization, in many cases, of existing practices LPDs are currently following, albeit sporadically or inconsistently. Nearly all of the information and records required for disclosure to growers under final § 201.112 are already kept by and/or available to LPDs.

Although LPDs will need to take several actions to comply with new requirements under final §§ 201.106, 110, and 112, these provisions are not expected to require LPDs to substantially change their existing business practices. The exception to this would occur if some LPDs currently exceed the 25 percent presumption of unfairness on performance-based grower compensation set by § 201.106(b) and will be unable to comply without substantial changes. The changes to comply would result in indirect costs. Non-quantifiable potential indirect costs to LPDs who exceed the 25 percent presumption of unfairness on performance-based grower compensation will be discussed separately within this section. AMS expects total direct costs of adjustments, contract modifications, records creation, and compliance under the final rule to be small relative to the overall size of the industry.

AMS also estimates the amount of time that growers would take to review the information provided to them by LPDs. Estimates of the amount of time required by LPDs to modify existing contracts, develop and comply with new policies, and collect and distribute required information, and for growers to review the information were provided by AMS subject matter experts. These experts were supervisors and auditors with many years of experience with AMS in auditing LPDs for compliance with the Packers and Stockyards Act. Estimates for the value of time are U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics estimates released May 2023

and costs are therefore expressed in 2023 dollars.⁹⁰ Throughout the discussion that follows, “first year” costs refers to costs that are estimated to be incurred during the 12 months immediately preceding the effective date of the rule.

Direct Costs of Final § 201.106 – Preferred Alternative

Under final § 201.106(a), LPDs will be required to redefine grower payment calculation systems as appropriate to express all payments in the form of bonuses added to a stated pay rate. AMS expects that existing schedules of grower payments can be recreated such that they comply with this final rule change. Existing LPD methods of grower payment calculation can be expressed in an alternative format that includes only bonus adjustments added to from an existing minimum pay rate. AMS expects that most LPDs will be required to make one-time changes to existing grower contracts and develop new payment systems that are consistent with these provisions. This process will also include producing and filing grower documents and communicating information about the new contract and payment system to growers and staff at each complex.

AMS estimates that the aggregate one-time costs to LPDs of updating grower contracts and developing new grower payment systems, including modifying information systems to include new calculations as well as filing, and reporting to comply with final § 201.106(a), will require 17,664 legal hours,⁹¹ 57,750 management hours, 7,360 administrative hours, and 7,360 information technology hours, costing a total of \$9,106,000⁹² in the first year.⁹³

⁹⁰ See U.S. Bureau of Labor Statistics, *May 2023 National Occupational Employment and Wage Estimates*, May 2023. <https://www.bls.gov/oes/special.requests/oesm23all.zip>.

⁹¹ Small live poultry dealers are estimated to require 50% as many legal hours as large live poultry dealers on a per company basis for one-time cost of developing § 201.106 one-time changes to grower contracts and payment systems.

⁹² 17,664 legal hours × \$139.96 per hour + 57,750 management hours × \$96.40 per hour + 7,360 administrative hours × \$49.36 per hour + 7,360 information technology hours × \$95.58 per hour = \$9,106,112.

⁹³ Average hourly wage rates used to estimate dealer costs include a 41.79% markup for benefits and are as follows: Management - \$96.40, Legal - \$139.96, Administrative - \$49.36, and Information Technology - \$95.58. Hourly wage rates were established using the following BLS classifications for each labor category as follows (NAICS Code – OCC code – OCC Title): Management (3116 – 11-1020 –

Once LPDs have incurred a one-time cost of developing, documenting, and communicating new contracts and a new system of grower payments, AMS does not expect additional ongoing costs of implementing final § 201.106(a). Once in place, new provisions and modifications resulting from this one-time update are not expected to lead to an increase in costs associated with the ongoing maintenance and updating of grower contracts that would occur in the normal course of business.

Final § 201.106(b) establishes a presumption of unfairness when, for a given complex, aggregate payments based upon a grouping, ranking, or comparison of growers (performance pay) exceed 25 percent of gross payment to growers on an annual basis. LPDs will need to analyze grower compensation structures at the complex-level and calculate annual performance-based grower compensation as a percentage of total compensation to ensure compliance with the 25 percent presumption established by final § 201.106(b). LPDs may choose to re-design and modify existing compensation structures where greater than 25 percent of the total grower compensation is based on performance pay. These LPDs may choose to create processes for monitoring compliance on an ongoing basis. Modifications to grower compensation structures will need to be incorporated into broiler contracts and communicated to growers.

AMS estimates that the aggregate one-time costs to LPDs of examining and evaluating existing grower compensation structures and making modifications as required to ensure ongoing compliance with final § 201.106(b), will require 7,360 legal hours, 52,500 management hours, 7,306 administrative hours, and 14,720 information technology hours, costing a total of \$7,861,000 in the first year.⁹⁴

General and Operations Managers) for live poultry dealers' managers, Legal (3110 – 23-1011 – Lawyers) for attorneys for live poultry dealers and for growers, Administrative (3116 – 43-6011 – Executive Secretaries and Executive Administrative Assistants) for live poultry dealers' administrative assistants, and Information Technology (3116 – 11-3020 – Computer and Information Systems Managers) for information technology managers.

⁹⁴ 7,360 legal hours × \$139.96 per hour + 52,500 management hours × \$96.40 per hour + 7,360 administrative hours × \$49.36 per hour + 14,720 information technology hours × \$95.58 per hour = \$7,861,333.

LPDs will implement and maintain processes for monitoring ongoing compliance with § 201.106(b). AMS expects these annual ongoing costs to require in aggregate 736 legal hours, 5,250 management hours, 736 administrative hours, and 1,472 information technology hours for an aggregate annual cost of \$786,000.⁹⁵

Final § 201.106(c) requires that for each of the three calendar years commencing with and including the effective date for § 201.106, LPDs must submit to USDA a copy of the prior and modified contracts and associated disclosures if any contract modification or renewal results in less than the prior annual-calendar year's complex-wide average gross payment to the grower. LPDs will be required to monitor changes in average annual gross payments to growers at the complex and, if necessary, provide documentation.

AMS does not expect any costs to LPDs in the first year in response to § 201.106(c). For each of the three calendar years following the effective date, LPDs will monitor grower compensation and submit any necessary documentation on an annual basis. AMS expects these annual ongoing costs to require in aggregate 736 legal hours, 5,250 management hours, 736 administrative hours, and 1,472 information technology hours for an aggregate annual cost of \$786,000.⁹⁶

Final § 201.106 concerns potential changes to the method of payment calculation and compensation structure used in grower tournament settlement systems. LPDs will provide new contracts that include these updated provisions for review by broiler growers. AMS expects that the first time a grower receives a new contract containing these modifications, he or she will require about 4 hours to review and consider all new

⁹⁵ 736 legal hours × \$139.96 per hour + 5,250 management hours × \$96.40 per hour + 736 administrative hours × \$49.36 per hour + 1,472 information technology hours × \$95.58 per hour = \$786,133.

⁹⁶ 736 legal hours × \$139.96 per hour + 5,250 management hours × \$96.40 per hour + 736 administrative hours × \$49.36 per hour + 1,472 information technology hours × \$95.58 per hour = \$786,133.

terms and provisions. At \$62.13 per hour,⁹⁷ the total one-time cost for all broiler growers to review the new contract is \$4,974,000.⁹⁸ AMS expects that the updated contract provisions and payment systems developed by LPDs pursuant to § 201.106 will not contribute to additional ongoing contract review time by growers beyond an initial one-time review. Therefore, no ongoing future costs of grower contract review have been included for § 201.106. The ten-year aggregate total costs of final § 201.106 to LPDs are estimated to be \$26,401,000, the ten-year aggregated total costs of final § 201.106 to poultry growers are estimated to be \$4,974,000, and the combined ten-year aggregate total costs of final § 201.106 to LPDs and poultry growers are estimated to be \$31,375,000.

Unquantified Indirect Costs of § 201.106 – Preferred Alternative

Many factors will affect the costs to LPDs of changing existing compensation structures to comply with a 25 percent presumption as defined in § 201.106(b). The scope of comprehensive data that would be required for AMS to accurately measure and quantify these costs makes collection of sufficient data infeasible if such exists. Further, the nature of these costs will depend on future choices made by industry participants that cannot be predicted with reasonable certainty. The potential indirect costs—other than those direct administrative costs which are quantified separately—will be discussed qualitatively in this section.

If LPDs substantively modify existing structures of grower compensation to reduce performance-based compensation to less than 25 percent of total grower compensation, additional costs must be considered. The likelihood and magnitude of these additional indirect costs will depend on the number of complexes that will modify

⁹⁷ The average hourly wage rate of \$62.13 per hour used to estimate costs for a poultry grower includes a 41.79% markup for benefits. The wage rate was established using BLS classification (1152 – 11-0000 – Management Occupations).

⁹⁸ 4 hours to review each disclosure x \$62.13 per hour x 20,014 contracts = \$4,973,879.

existing compensation structures as a result of § 201.106(b), the extent of those modifications, and resulting cost increases.

As discussed in the benefits section, AMS does not have sufficient data to make an inference on the number complexes that will reduce performance payments relative to total payments or the magnitude of any reductions that will be required. As previously discussed, at four complexes, aggregate performance payments were 11.4, 17.4, 20.5, and 25.4 percent of total grower payments. AMS is not aware of any complex with performance payments that are as much as 26 percent of total payments, and it is possible that no complex will reduce performance payments relative to total payments by a substantial amount to avoid the presumption of unfairness established in final § 201.106(b).

To the extent that the complexes AMS reviewed are representative of the other complexes owned by the same firms, two or possibly three of the firms would likely already be in compliance with final § 201.106(b). And due to the Wayne-Sanderson Farms consent agreement with U.S. Department of Justice, it is unlikely that the regulation will have an effect on Wayne-Sanderson's existing contracts. Therefore, it is unlikely that the presumption of unfairness on performance payments will have any effect on these firms, which combined account for up to 35 percent of broiler complexes. It is possible that at other firms, performance payment makes up less than 25 percent of total payments as well, but AMS does not have sufficient information to confirm this with a reasonable degree of confidence.

Conceptually, where firms modify existing grower compensation structures at a complex in response to this rule, if reductions in performance-based payments relative to total payments adversely affect grower performance incentives and cause growers to produce broilers less efficiently, that could result in increased production costs for the firms. In general, the "tournament" system of broiler grower compensation bases

payments to individual growers on their performance relative to other growers.

Performance payments provide an incentive for growers to optimize factors under their control, such as effort and management, and to some extent investment (subject to the concerns around investments highlighted by this rule), to improve their own relative performance efficiency and increase income. The strength of individual performance incentives is related to the size of expected (potential) grower performance payments, which will be limited by the total amount of performance-based pay distributed among all growers. The effectiveness of incentives is also limited by the extent to which the grower can control performance. Decreasing the relative size of performance payments available to all growers at a complex might, at or above a certain level, in theory, therefore weaken performance incentives of individual growers and could result in reduced overall grower efficiency in broiler production.

AMS has no reason to believe that the 25 percent presumption adopted in this final rule would significantly change incentives. As noted above, the third largest LPD is already in compliance with the provision and some LPDs do not use the tournament system. No evidence was produced by commenters regarding the level of tournament compensation needed to optimize grower performance. Other factors, including inputs and production practices, the level of prudence and professionalism of growers, their risks of termination, and non-comparison performance payments can, for example, provide incentives for growers. Additionally, LPDs already closely monitor grower performance with a range of information they already have. Finally, the concern arises only if both the 25 percent presumption would affect incentives and if an LPD could not otherwise overcome the presumption.

AMS cannot rule out the possibility that incentives may be affected, and AMS is unable to predict specific effects with certainty. Were production efficiency in some manner to be reduced, economic principles suggest that cost of production would

increase, causing an inward shift of a firm's marginal cost curve and that those costs could be passed on to consumers. Increases in cost structures could, under that same hypothetical, affect demand for broiler growing services in certain areas, for example possibly resulting in LPDs terminating some marginal growers. As noted above, based on the regulatory record and the Agency's expert judgment based on the information and data available to AMS during the rulemaking process, AMS does not view these outcomes as likely to any material degree.

Furthermore, LPDs have tools to incentivize grower effort that would partially or entirely avoid the risks outlined above. LPDs may shift some performance pay to non-comparison methods, such as fixed metric performance or to other innovative systems, which could retain the incentives where necessary and appropriate. Other LPDs, however, may believe that the performance incentive delivered by the tournament is misplaced given the particularities of their business model or the type of bird being grown at a complex (*e.g.*, growout of "no antibiotics ever" may require different incentives and management than commoditized product). Depending on the needs of the complex, LPDs may seek to utilize technology, training, or other approaches to improve outcomes, thus reducing the need to utilize higher magnitudes of performance payments.

LPDs currently use many variations of relative performance compensation systems at broiler complexes and some LPDs do not use tournament performance compensation systems. This suggests that that setting comparison pay above 25 percent is not the only way to optimize incentives for all complexes, growers, or circumstances. AMS does not have data for every payment structure currently in use. Limited data analysis from the small sample of complexes described above shows that performance compensation at a number of complexes is less than 25 percent of total pay. This suggests that regulated entities can optimize incentives without setting comparison performance pay above 25 percent. Ultimately, AMS does not expect that LPDs will choose to

abandon the tournament compensation system entirely as a result of this regulation and does not expect materially adverse effects on production efficiency.

Final § 201.106(c) requires that within a three-year transition period following the effective date, LPDs must provide the prior and modified contracts and grower disclosures if complex-wide average gross payment to growers falls below the level of the prior calendar year. AMS considered that LPDs could face additional costs if they were prevented from lowering grower compensation for a three-year period and were not able to adjust payment structures to meet challenging and unforeseen industry conditions in the broiler industry. For example, a sharp decline in broiler demand or other type of event disrupts the broiler industry could potentially create conditions in which aggregate average grower compensation at a complex temporarily falls below its level in the prior year.

In analyzing information submitted by LPDs, AMS will consider all relevant factors, including industry conditions, when investigating unfairness. As a result, AMS expects that LPDs will be constrained only from unfair reductions in grower compensation and will not be prevented from adjustments to grower compensation that reflect legitimate business operations, such as responding to a decline in broiler demand or higher feed costs. In addition, the tendency for base levels of year over year inflation to naturally erode real grower compensation will also attenuate the need for nominal decreases. Given the restructuring of how payment calculation methods and compensation structures will be presented to growers as LPDs comply with § 201.106(a), review and analysis of documentation by AMS under this provision will focus on the unfair reductions in compensation resulting from contract modification which this provision is intended to prevent. Therefore, AMS does not expect additional costs for LPDs as a result of § 201.106(c) beyond the direct administrative costs of assessing and monitoring revised payment systems for potential reductions in grower compensation and

providing documentation when required as explicitly described in the previous section.

Direct Costs of Final § 201.110 – Preferred Alternative

Final § 201.110 will require LPDs to develop, maintain and comply with a set of policies and procedures that ensure the operation of a poultry grower ranking system that is consistent with the duty of fair comparison among growers, including describing processes for supplying or assigning inputs and production practices, communication and cooperation, and facilitating the conduct of ongoing compliance reviews with those processes.

Final § 201.110(a) and (b)(1)(i) through (v) describe objectives and minimum requirements for written documentation of processes, including how LPDs will operate poultry grower ranking systems that are consistent with the duty of fair comparison. Information obtained during previous AMS investigations suggests that LPDs may already have some informal policies and practices or perhaps even some contract provisions in place to address and attempt to remedy situations in which growers have been inadvertently disadvantaged by such factors. For example, AMS is aware of situations where an LPD has removed a grower that received an unreasonable share of lower quality inputs from the grower pool and paid them by another method that would not penalize relative performance (*e.g.*, a five-flock average). Under final § 201.110(a) and (b)(1)(i) through (v), all LPDs will be required to develop formal written processes that meet specific criteria outlined in the regulation.

AMS estimates that the one-time aggregate cost of developing new policies and procedures in response to final § 201.110(a) and (b)(1)(i) through (v) for LPDs will require 4,128 legal hours, 28,500 management hours, 1,472 administrative hours, and 1,472 information technology hours, costing a total of \$3,539,000 in the first year.⁹⁹ Due

⁹⁹ 4,128 legal hours × \$139.96 per hour + 28,500 management hours × \$96.40 per hour + 1,472 administrative hours × \$49.36 per hour + 1,472 information technology hours × \$95.58 per hour = \$3,538,507.

to differences in their structure, estimates for small LPDs were calculated with the expectation that they would employ relatively fewer legal (attorney) hours that are offset by a larger share of management hours.¹⁰⁰

LPDs will implement, monitor, and comply with new written processes for the design and operation of a poultry grower ranking system that is consistent with the duty of fair comparison; they will also maintain and update these written processes. AMS expects these annual ongoing costs to require in aggregate 1,400 legal hours,¹⁰¹ 28,336 management hours which include renewing and updating written processes at the corporate level as well as monitoring activities conducted by managers at each complex to ensure ongoing compliance, 736 administrative hours, and 736 information technology hours for an aggregate annual cost of \$3,034,000.¹⁰²

Final § 201.110(b)(1)(vi) requires that the written processes developed must include a description of how LPDs communicate and cooperate to resolve grower concerns in a timely fashion. AMS expects that the aggregate one-time cost to LPDs of setting up communications and cooperation protocol and implementing them in the first year will require 840 legal hours, 546 management hours, 168 administrative hours, and 336 information technology hours¹⁰³ for an aggregate one-time cost of \$211,000.¹⁰⁴

Final § 201.110(b)(2) states the length of time for retaining the records relevant to an LPD's compliance with final § 201.110(b)(1) and (2). AMS considered record

¹⁰⁰ Small live poultry dealers are estimated to require 33% as many legal hours and 133% as many management hours as large live poultry dealers on a per-complex basis for one-time cost of developing § 201.110 tournament fairness policies and procedures.

¹⁰¹ Small live poultry dealers are estimated to require 50% as many legal hours as large live poultry dealers on a per-complex basis in ongoing compliance and maintenance of § 201.110 tournament fairness policies and procedures.

¹⁰² 1,400 legal hours × \$139.96 per hour + 28,336 management hours × \$96.40 per hour + 736 administrative hours × \$49.36 per hour + 736 information technology hours × \$95.58 per hour = \$3,034,210.

¹⁰³ Small live poultry dealers are estimated to require 50% as many legal hours and 125% as many management hours, and 50% as many information technology hours as large live poultry dealers on a per company basis for one-time cost of developing § 201.110 communication, cooperation, and dispute resolution policies and procedures.

¹⁰⁴ 840 legal hours × \$139.96 per hour + 546 management hours × \$96.40 per hour + 168 administrative hours × \$49.36 per hour + 336 information technology hours × \$95.58 per hour = \$210,608.

retention when estimating costs for final § 201.110(b)(1) and final § 201.110(b)(2) does not impose any costs independently.

AMS expects the ongoing annual costs after the first year of implementing written processes regarding communication, cooperation, and dispute resolution policies and procedures described in final § 201.110(b)(1)(vi) to require, in aggregate, 336 legal hours, 168 management hours, 84 administrative hours, and 84 information technology hours for an aggregate annual cost of \$75,000.¹⁰⁵

Written processes developed by LPDs are for internal use, to be complied with and maintained, to be provided to AMS, and as part of ongoing compliance monitoring. Under final § 201.110, LPDs are not required to provide additional disclosures to contract growers. Therefore, final § 201.110 will not impose any additional one-time or ongoing costs on growers to review additional disclosures, and total grower costs of final § 201.110 are zero.

The ten-year total costs of final § 201.110 to all 42 live broiler poultry dealers are estimated to be \$31,736,000. Since expected grower costs for this section are zero, these also represent the total aggregate costs of § 201.110.

Direct Costs of Final § 201.112 – Preferred Alternative

The new provisions in final § 201.112 will require LPDs to provide a Capital Improvement Disclosure Document any time the LPD requests existing broiler chicken growers to make an additional capital investment (\$12,500 or more per structure excluding maintenance or repair). The Capital Improvement Disclosure Document must include information about the goal or purpose of the investment, financial incentives and compensation for the grower associated with the additional capital investment, all schedules and deadlines for the investment, a description of changes to housing

¹⁰⁵ 336 legal hours × \$139.96 per hour + 168 management hours × \$96.40 per hour + 84 administrative hours × \$49.36 per hour + 84 information technology hours × \$95.58 per hour = \$75,397.

specifications, and analysis of projected returns.

Final § 201.112 will require LPDs to create a Capital Improvement Disclosure Document when new capital investments are required of growers. Based on information provided by subject matter experts, AMS estimates that capital upgrades will be required at 5 percent of complexes each year, triggering creation of a new disclosure document for approximately 5 percent of growers annually. Therefore, AMS estimates the annual cost of creating disclosures for additional requested grower capital investment will require 74 legal hours, 368 management hours, 74 administrative hours, and 92 information technology hours to create and provide a Capital Improvement Disclosure Document for all growers requiring additional capital improvement upgrades, for an aggregate annual cost of \$58,000.¹⁰⁶

With the exception of acknowledging receipt, the final rule will not impose any requirement on poultry growers to review the information provided by LPDs, but to benefit from the Capital Improvement Disclosure Document, growers will need to review the information provided. For final § 201.112, AMS expects that growers will take about four hours to review these documents when they are disclosed as part of a capital improvement request or requirement by the LPD. LPDs will be required to provide disclosures to growers for any of 20,014 contracts for which additional capital investment requests are made.¹⁰⁷ AMS expects that LPDs will make additional capital investment requests for an average of 5 percent of grower contracts annually. At an estimated 4 hours of grower review time per disclosure at \$62.13 per hour, growers' aggregate annual costs will be \$249,000¹⁰⁸ for reviewing documents required by § 201.112 in the first year and in each successive year.

¹⁰⁶ 74 legal hours × \$139.96 per hour + 368 management hours × \$96.40 per hour + 74 administrative hours × \$49.36 per hour + 92 information technology hours × \$95.58 per hour = \$58,203.

¹⁰⁷ Live poultry dealers reported a combined total of 20,014 contracts for their fiscal year 2023.

¹⁰⁸ 4 hours to review each disclosure × \$62.13 per hour × 20,014 contracts × 5 percent of growers that require significant housing upgrades = \$248,694.

The ten-year aggregate total costs of final § 201.112 to LPDs are estimated to be \$582,000, the ten-year aggregated total costs of final § 201.112 to poultry growers are estimated to be \$2,487,000, and the combined ten-year aggregate total costs of final § 201.112 to LPDs and poultry growers are estimated to be \$3,069,000.

Unquantified Indirect Costs of § 201.112 – Preferred Alternative

If AMS enforcement of final § 201.112 has the effect of preventing broiler growers from making unprofitable additional capital investments (those for which individual grower returns do not exceed costs), then such decisions to forgo investment will likely result in fewer benefits for LPDs, and more for growers. Because LPDs benefit from any productivity gain created by grower investments, whether or not the investment is profitable for the grower in the long-run, LPDs will not receive these benefits if additional information provided under this provision causes growers to avoid additional capital investments that they deem to be unprofitable and inefficient for their operation. AMS is not able to quantify these lost benefits to LPDs. They represent costs to LPDs, but these costs are at least partly offset by gains (or avoided losses) for growers. In addition, to the degree that an additional capital investment requires over-investment, eliminating it benefits society. Over-investment occurs when the cost of the investment exceeds the total value it generates (in terms of increased grower productivity, production cost efficiency, etc.) and the investment resources would be more productively employed in other ways. The benefits to growers and society of avoiding such investments would exceed the losses to LPDs.

Combined Costs of Final §§ 201.106, 110, and 112 – Preferred Alternative

Combined costs to LPDs for final §§ 201.106, 110, and 112 are expected to be \$20,775,000 in the first year, \$4,740,000 in years two through four, and \$3,954,000 in subsequent years thereafter. Information collection costs are also reported in the Paperwork Reduction Act section as the combined costs to LPDs for compliance with the

reporting and recordkeeping requirements of final §§ 201.106, 110, and 112. The combined costs for poultry growers are expected to be \$5,223,000 in the first year and \$249,000 in subsequent years.

The ten-year aggregate combined costs of final §§ 201.106, 110, and 112 to LPDs are estimated to be \$58,719,000 and the present value of the ten-year total costs to be \$54,230,000 discounted at a two percent rate. The annualized aggregate combined costs of the present value (PV) of ten-year costs to LPDs discounted at a two percent rate are expected to be \$6,037,000.

The ten-year aggregate combined costs of final §§ 201.106, 110, and 112 to poultry growers are estimated to be \$7,461,000 and the present value of the ten-year total costs to be \$7,110,000 discounted at a three percent rate. The annualized aggregate combined costs of the PV of ten-year costs to poultry growers discounted at a three percent rate are expected to be \$792,000.

The ten-year aggregate combined costs of final §§ 201.106, 110, and 112 to LPDs and poultry growers are estimated to be \$66,179,000 and the present value of the ten-year aggregate combined costs to be \$61,341,000 discounted at a two percent rate. The annualized aggregate costs of the PV of ten-year costs to LPDs and poultry growers discounted at a two percent rate are expected to be \$6,829,000. The cost estimates of final §§ 201.106, 110, and 112 presented above appear in the following table.

Table 1: Estimated Costs of Final §§ 201.106, 110, and 112 – Preferred Alternative

Preferred Alternative	Expected Costs*		
	Live Poultry Dealers	Poultry Growers	Industry Total
§ 201.106			
First-Year	\$16,968,000	\$4,974,000	\$21,941,000
Ten-Year Total	\$26,401,000	\$4,974,000	\$31,375,000
PV of Ten-Year Discounted at 2%	\$25,148,000	\$4,876,000	\$30,025,000
Ten-Year Annualized at 2%	\$2,800,000	\$543,000	\$3,343,000
§ 201.110			
First-Year	\$3,749,000	\$0	\$3,749,000

Ten-Year Total	\$31,736,000	\$0	\$31,736,000
PV of Ten-Year Discounted at 2%	\$28,559,000	\$0	\$28,559,000
Ten-Year Annualized at 2%	\$3,179,000	\$0	\$3,179,000
§ 201.112			
First-Year	\$58,000	\$249,000	\$307,000
Ten-Year Total	\$582,000	\$2,487,000	\$3,069,000
PV of Ten-Year Discounted at 2%	\$523,000	\$2,234,000	\$2,757,000
Ten-Year Annualized at 2%	\$58,000	\$249,000	\$307,000
§§ 201.106, 110, and 112			
First-Year	\$20,775,000	\$5,223,000	\$25,997,000
Ten-Year Total	\$58,719,000	\$7,461,000	\$66,179,000
PV of Ten-Year Discounted at 2%	\$54,230,000	\$7,110,000	\$61,341,000
Ten-Year Annualized at 2%	\$6,037,000	\$792,000	\$6,829,000

*Rows may not sum to Total Costs due to rounding.

Estimated Costs-and Expected Benefits of Final §§ 201.106, 110, and 112 – Preferred Alternative

The value of broiler production in the U.S. for 2023 was approximately \$50.6 billion.¹⁰⁹ Total direct costs of final §§ 201.106, 110, and 112 are estimated to be greatest in the first year at \$26.0 million, or 0.051 percent of revenues. A relatively small improvement in efficiency from improved allocation of capital and labor resources in the industry would more than outweigh the direct costs of this final rule. A reduction in information asymmetry (resulting in more useful information provided to growers), grower uncertainty and risk of potential adverse outcomes, and retaliatory and deceptive practices by LPDs will lead to benefits resulting from the final rule. The size of benefits will be directly related to the extent of these reductions. AMS expects that the final rule will provide substantial benefits the industry and address issues of extreme importance to broiler growers. However, these benefits are not quantifiable. Benefits and costs are summarized below for each provision of the rule.

Final § 201.106(a) benefits broiler growers by requiring LPDs to implement payment structures that increase clarity and certainty about the lowest possible revenue

¹⁰⁹ USDA-NASS. Poultry - Production and Value 2023 Summary (April 2024).

outcomes under a growing arrangement. LPDs are expected to incur one-time direct costs of developing, documenting, and communicating new contracts and a new system of grower payments and no additional ongoing costs. Since most LPDs currently employ payment structures that allow for both bonuses and discounts, AMS expects these costs to be realized by LPDs at most complexes and the corresponding benefits to be realized by the vast majority of broiler growers.

Final § 201.106(b) establishes a presumption of unfairness when the amount of total grower compensation based on relative performance exceeds 25 percent and thereby protects growers from excess income variability. Some growers at complexes where LPDs modify compensation structures to reduce the percentage of grower pay based on relative performance may benefit from reductions in the variability of their income. The distribution of benefits is likely to be unequal, such that increases in compensation for some growers may correspond with decreases in performance-based compensation for other growers.

In addition to direct costs to LPDs of implementing the rule, § 201.106(b) could result in additional indirect costs to broiler industry stakeholders (including LPDs, consumers, and growers) if LPDs modify existing compensation structures in ways that adversely affect grower incentives and lead to increased production costs. The magnitude of benefits and costs resulting from § 201.106(b) will depend on two important factors that cannot be measured or predicted with a reasonable degree of certainty: the number of broiler complexes that will modify existing compensation structures as a result of final § 201.106(b) and the manner in which those change will be implemented by LPDs. If few or no complexes make substantial modifications to existing compensation structures as a result of § 201.106(b), the resulting benefits to growers of reduced income variability and the indirect costs to the broiler industry will be small. All broiler growers will nonetheless benefit from ongoing protection against future increases in performance-

based pay variability and reductions in base pay amounts.

Growers will benefit from additional protections under § 201.106(c) that require LPDs to submit prior and modified contracts if contract modifications result in reduced average grower compensation during a three-year transition period. This requirement will facilitate AMS monitoring and intervention, when necessary, to protect growers from unfair treatment. AMS does not expect indirect costs to broiler industry stakeholders. AMS expects the benefits of § 201.106(c) will accrue to all broiler growers and the direct costs of implementation over the three-year transition period will apply to all LPDs.

By requiring that LPDs design and operate poultry grower ranking systems to provide a fair comparison among growers, final § 201.110 will benefit broiler growers through increased fairness and reduced deception. All broiler growers will benefit to the degree that this provision improves fairness and reduces deception within poultry grower ranking systems. The direct costs of implementing and maintaining compliance with § 201.110 will be incurred by all LPDs, and AMS does not expect any other indirect costs of this provision.

Disclosures concerning additional capital investments required by final § 201.112 will provide broiler growers with better information to make financial decisions and reduce the likelihood the LPDs can deceive or mislead growers. Growers will also benefit to the extent that this requirement provides information that facilitates improved identification and enforcement of violations under § 201.116. LPDs will incur direct costs of preparing and distributing disclosures when additional capital investments are requested by the LPD. The provision could also cause some transfer of benefits from LPDs to growers if the provision causes growers to avoid making unprofitable investments that would have benefited the LPD more than the grower.

Net total costs and benefits to the industry from final §§ 201.106, 110, and 112 cannot be quantified. Thus, AMS cannot measure any impact or shift in total industry

supply or any corresponding indirect effects on industry supply and demand, including price and quantity effects.

Estimated Costs and Expected Benefits of the Small Business Exemption

Alternative

AMS estimated costs for an alternative to the preferred option for the final rule. It would be the same as final §§ 201.106, 110, and 112, with the exception that the alternative would exempt LPDs that fall under the SBA definition of small businesses from all provisions of the two final rules. In the preferred alternative, the requirements in final §§ 201.106, 110, and 112 would apply to all LPDs, including those classified as small businesses.

The costs associated with this alternative are similar, but smaller than the preferred option. According to PSD records, small LPDs make up 50.0 percent of all LPDs, but have only 6.0 percent of poultry growing contracts. The estimation of the costs of the small business exemption alternative will follow the same format as the preferred alternative.

Costs of Final § 201.106 – Small Business Exemption Alternative

AMS estimates that the aggregate one-time costs to LPDs of updating grower contracts and developing new grower payment systems, including modifying information systems to include new calculations as well as filing, and reporting to comply with final § 201.106(a), will require 15,936 legal hours, 54,780 management hours, 6,640 administrative hours, and 6,640 information technology hours, costing a total of \$8,474,000 in the first year under the small business exemption alternative. Once LPDs have incurred a one-time cost of developing, documenting, and communicating new contracts and a new system of grower payments, AMS does not expect additional ongoing costs of implementing final § 201.106(a) under the small business exemption alternative.

AMS estimates that the aggregate one-time costs to LPDs of examining and evaluating existing grower compensation structures and making modifications as required to ensure ongoing compliance with final § 201.106(b), will require 6,640 legal hours, 49,800 management hours, 6,640 administrative hours, and 13,280 information technology hours, costing a total of \$7,327,000 in the first year under the small business exemption alternative.

LPDs will monitor, maintain and comply with the processes for examining excessive variability. AMS expects these annual ongoing costs to require in aggregate 664 legal hours, 4,980 management hours, 664 administrative hours, and 1,328 information technology hours for an aggregate annual cost of \$733,000 under the small business exemption alternative.

AMS does not expect any cost in the first year to set up and implement a plan in response to § 201.106(c). For each of the three calendar years following the effective date for § 201.106, AMS expects these annual ongoing costs to require in aggregate 664 legal hours, 4,980 management hours, 664 administrative hours, and 1,328 information technology hours for an aggregate annual cost of \$733,000 under the small business exemption alternative.

For final § 201.106(a), AMS expects that growers will take about 4 hours to review new contract terms and provisions when they are provided in the first year. At \$62.13 per hour, the total one-time cost for all broiler growers to review the new contract under the small business exemption alternative is \$4,674,000.¹¹⁰ AMS expects that the updated contract provisions and payment systems developed by LPDs pursuant to final § 201.106 (a) would not contribute to additional ongoing contract review time by growers beyond an initial one-time review. Therefore, no ongoing future costs of grower contract review are included.

¹¹⁰ 4 hours to review each disclosure x \$62.13 per hour x 18,806 contracts = \$4,673,667.

The ten-year aggregate total costs to LPDs of final § 201.106 under the small business exemption alternative are estimated to be \$24,593,000, the ten-year aggregate total costs to broiler growers of final § 201.106 for the small business exemption alternative are estimated to be \$4,674,000, and the first-year and ten-year aggregate total costs to LPDs and poultry growers of final § 201.106 for the small business exemption alternative are estimated to be \$29,267,000.

Unquantified Indirect Costs of § 201.106 – Small Business Exemption Alternative

AMS expects that indirect costs resulting from § 201.106(b) and (c) for the small business exemption alternative will be nearly identical to those discussed for the preferred alternative, with the only difference being the number of complexes potentially affected. In particular, small LPDs would be exempt from the presumption of unfairness under § 201.106(b) and will not incur indirect costs from modifying grower compensation structures to reduce the percentage of performance-based compensation for a complex below the presumptively unfair 25 percent of total compensation. The 10 percent of complexes that would be exempted from the regulation under this alternative are small by definition. AMS does not have access to data that would suggest whether these small LPD complexes are any more or less likely to require modifications to existing grower compensation structures that result in indirect costs than other complexes. Indirect costs for the small business exemption alternative could only be equal to or less than the preferred alternative but cannot be quantified for the same reasons.

Direct Costs of Final § 201.110 – Small Business Exemption Alternative

AMS estimates that the one-time aggregate cost of developing new policies and procedures in response to final § 201.110(a) and (b)(1)(i) through (v) for LPDs will require 3,984 legal hours, 24,900 management hours, 1,328 administrative hours, and 1,328 information technology hours, costing a total of \$3,150,000 in the first year for the

small business exemption alternative.

After new written processes have been developed, LPDs would be required to implement, monitor, and comply and to maintain and update them. AMS expects these annual ongoing costs for the small business exemption alternative to require in aggregate 1,328 legal hours, 25,564 management hours which include renewal and updating of written processes at the corporate level as well as monitoring activities conducted by managers at each complex to ensure ongoing compliance, 664 administrative hours, and 664 information technology hours for an aggregate annual cost of \$2,746,000.¹¹¹

Final § 201.110(b)(1)(vi) requires that the written processes developed must include a description for how the LPD would resolve a grower's concerns with the LPD's design or operation of a poultry grower ranking system that is consistent with the duty of fair comparison that is required by this section, including the timeliness of the resolution. AMS expects that the aggregate one-time cost to LPDs of setting up communications and complaint resolution processes as described in § 201.110(b)(1)(vi) for the small business exemption alternative will require 504 legal hours, 252 management hours, 84 administrative hours, and 210 information technology hours for an aggregate one-time cost of \$119,000.¹¹²

Costs associated with final § 201.110(b)(2), "Record retention," are included in cost estimates for final § 201.110(b)(1). AMS expects that this section does not incur any additional costs.

AMS expects the ongoing annual costs of implementing communications and complaint resolution processes as described in § 201.110(b)(1)(vi) to require, for the small business exemption alternative, in aggregate, 168 legal hours, 84 management

¹¹¹ 1,328 legal hours × \$139.96 per hour + 25,564 management hours × \$96.40 per hour + 664 administrative hours × \$49.36 per hour + 664 information technology hours × \$95.58 per hour = \$2,746,477.

¹¹² 504 legal hours × \$139.96 per hour + 252 management hours × \$96.40 per hour + 84 administrative hours × \$49.36 per hour + 210 information technology hours × \$95.58 per hour = \$119,051.

hours, 42 administrative hours, and 42 information technology hours for an aggregate annual cost of \$38,000.¹¹³ Because final § 201.110 does not require LPDs to provide additional disclosures to contract growers, final § 201.110 would not impose any additional one-time or ongoing costs on growers to review additional disclosures, and total grower costs of final § 201.110 are also zero under the small business exemption alternative.

The ten-year total costs of final § 201.110 to the 50.0 percent of live broiler poultry dealers impacted under the small business exemption alternative are estimated to be \$28,327,000. Since expected grower costs for this section are zero, these also represent the total aggregate costs of final § 201.110.

Direct Costs of final § 201.112 – Small Business Exemption Alternative

Final § 201.112 would require LPDs to create a Capital Improvement Disclosure Document when new capital investments are requested of growers. Based on information provided by subject matter experts, AMS estimates a five percent annual average probability that capital improvement upgrades will be required for growers at a complex, which would trigger creation of a new Disclosure Document. Therefore, AMS estimates the annual ongoing cost of creating Capital Improvement Disclosure Documents for the small business exemption alternative will require 66 legal hours, 332 management hours, 66 administrative hours, and 83 information technology hours to create and provide Capital Improvement Disclosure Documents for all growers requiring additional capital improvement upgrades, for an aggregate annual cost of \$53,000 for the small business exemption alternative.¹¹⁴

For final § 201.112, AMS expects that growers would take about four hours to

¹¹³ 168 legal hours × \$139.96 per hour + 84 management hours × \$96.40 per hour + 42 administrative hours × \$49.36 per hour + 42 information technology hours × \$95.58 per hour = \$37,698.

¹¹⁴ 66 legal hours × \$139.96 per hour + 332 management hours × \$96.40 per hour + 66 administrative hours × \$49.36 per hour + 83 information technology hours × \$95.58 per hour = \$52,509.

review these documents when they are disclosed as part of a capital improvement request or requirement by the LPD. For the small business exemption alternative, LPDs would be required to provide disclosures to growers for any of the 18,806 contracts for which additional capital investment requests are made.¹¹⁵ AMS expects that LPDs will make additional capital investment requests for an average of five percent of grower contracts annually. Given that growers require an estimated 4 hours at \$62.13 per hour, growers' aggregate annual costs would be \$234,000 for reviewing documents required by final § 201.112 in the first year and in each successive year for the small business exemption alternative.¹¹⁶

The ten-year aggregate total costs of final § 201.112 under the small business exemption alternative for LPDs are estimated to be \$525,000, and the ten-year aggregated total costs to poultry growers of final § 201.112 under the small business exemption alternative are estimated to be \$2,337,000. The combined first-year aggregate total costs to LPDs and poultry growers of final § 201.112 under the small business exemption alternative are estimated to be \$286,000, and the ten-year aggregate total costs are estimated to be \$2,862,000.

Combined Costs of Final §§ 201.106, 110, and 112 – Small Business Exemption Alternative

Aggregate combined costs to LPDs for final §§ 201.106, 110, and 112 for the small business exemption alternative are expected to be \$19,123,000 in the first year, and \$4,302,000 in subsequent years. The combined costs for poultry growers are expected to be \$4,907,000 in the first year, \$234,000 in subsequent years.

The aggregate ten-year combined quantified costs to LPDs of final §§ 201.106,

¹¹⁵ Live poultry dealers that exceed SBA classification criteria for small businesses reported a combined 18,806 poultry contracts in their Annual Reports to AMS.

¹¹⁶ 4 hours to review each disclosure x \$62.13 per hour x 18,806 contracts x 5 percent of growers that require significant housing upgrades = \$233,683.

110, and 112 for the small business exemption alternative are estimated to be \$53,445,000 and the present value of the ten-year combined costs \$49,382,000 discounted at a two percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs discounted at a two percent rate are expected to be \$5,498,000.

The aggregate ten-year combined costs to poultry growers of final §§ 201.106, 110, and 112 for the small business exemption alternative are estimated to be \$7,011,000 and the present value of the ten-year combined costs are estimated to be \$6,681,000 discounted at a two percent rate. The aggregate annualized costs of the PV of ten-year costs to poultry growers discounted at a two percent rate are expected to be \$744,000.

The aggregate combined costs of final §§ 201.106, 110, and 112 under the small business exemption alternative for LPDs and poultry growers are estimated to be \$24,030,000 in the first year and \$4,536,000 in subsequent years. The aggregate ten-year combined costs to LPDs and poultry growers of final §§ 201.106, 110, and 112 for the small business exemption alternative are estimated to be \$60,456,000 and the present value of the ten-year combined costs are estimated to be \$56,063,000 discounted at a two percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs and poultry growers discounted at a two percent rate are expected to be \$6,241,000. The aggregate cost estimates of final §§ 201.106, 110, and 112 under the small business exemption alternative presented above appear in the following table. The quantified costs to the industry in the first year under the small business exemption alternative are \$24.030 million.

Table 2: Estimated Costs of Final §§ 201.106, 110, and 112 – Small Business Exemption Alternative

SBE Alternative	Expected Cost*		
	Live Poultry Dealers	Poultry Growers	Industry Total
§ 201.106			
First-Year	\$15,801,000	\$4,674,000	\$20,474,000
Ten-Year Total	\$24,593,000	\$4,674,000	\$29,267,000

PV of Ten-Year Discounted at 2%	\$23,426,000	\$4,582,000	\$28,008,000
Ten-Year Annualized at 2%	\$2,608,000	\$510,000	\$3,118,000
§ 201.110			
First-Year	\$3,269,000	\$0	\$3,269,000
Ten-Year Total	\$28,327,000	\$0	\$28,327,000
PV of Ten-Year Discounted at 2%	\$25,485,000	\$0	\$25,485,000
Ten-Year Annualized at 2%	\$2,837,000	\$0	\$2,837,000
§ 201.112			
First-Year	\$53,000	\$234,000	\$286,000
Ten-Year Total	\$525,000	\$2,337,000	\$2,862,000
PV of Ten-Year Discounted at 2%	\$472,000	\$2,099,000	\$2,571,000
Ten-Year Annualized at 2%	\$53,000	\$234,000	\$286,000
§§ 201.106, 110, and 112			
First-Year	\$19,123,000	\$4,907,000	\$24,030,000
Ten-Year Total	\$53,445,000	\$7,011,000	\$60,456,000
PV of Ten-Year Discounted at 2%	\$49,382,000	\$6,681,000	\$56,063,000
Ten-Year Annualized at 2%	\$5,498,000	\$744,000	\$6,241,000

*Rows may not sum to Total Costs due to rounding.

Estimated Costs and Expected-Benefits of Final §§ 201.106, 110, and 112 – Small

Business Exemption Alternative

According to PSD records, only 6.0 percent of poultry growing contracts are between small LPDs and poultry growers. Thus, 94 percent of all poultry growers will receive the benefits of final §§ 201.106, 110, and 112 under the small business exemption alternative.

As with the preferred option, net total costs and benefits to the industry from §§ 201.106, 110, and 112 under the small business exemption alternative cannot be quantified. Thus, AMS cannot measure any impact or shift in total industry supply or any corresponding indirect effects on industry supply and demand, including price and quantity effects.

The tables above indicate that the small business exemption alternative would cost the industry less than the preferred option. Although most growers contract with large poultry growers, AMS chose not to accept the alternative because exempting small business from complying with the regulations would also result in less benefits to growers.

Estimated Costs and Expected Benefits of Proposed Rule Alternative

AMS estimated costs for a third alternative to the “do nothing” option and the last of four total alternatives presented. This alternative considers adopting §§ 201.106, 110, and 112 for all small and large LPDs as originally proposed without including the changes in the final rule. These changes have already been described in extensively earlier in the document. The estimation of costs for the proposed rule alternative will proceed by describing differences in costs by major rule section and combined.

Costs of § 201.106 – Proposed Rule Alternative

Final § 201.106(a) is unchanged from § 201.106 as it was proposed and as it is analyzed in this alternative. Final § 201.106(b), “Excessive variability,” and (c), “Transition,” were not included in proposed § 201.106. Neither estimates of direct time costs nor other potential indirect costs or associated benefits for these provisions are included for the proposed rule alternative. Estimated costs for § 201.106 under the proposed rule alternative are equal to one-time direct costs of final § 201.106(a).

Costs of § 201.110 – Proposed Rule Alternative

Final § 201.110 requires LPDs to develop, maintain, and comply with a set of policies and procedures that are reasonably designed for the design and operation of a poultry grower ranking system that is consistent with the duty of fair comparison. As described in previous discussion of changes from the proposed to final rule, final § 201.110(a) is substantively unchanged from the proposed rule, text of final § 201.110(b)(1) has been simplified from the proposed rule to improve clarity of documentation requirements, and proposed § 201.110(b)(2), “Compliance review,” has been removed. Two other provisions of proposed § 201.110 relating to “Communication and cooperation” and “Record retention” have received paragraph number redesignations but are otherwise unchanged. Changes to § 201.110(b)(1) did not affect the estimation of hours or of costs and benefits to the rule. Estimated costs of § 201.110 under the

proposed rule alternative are therefore equal to estimated direct costs for the final § 201.110 under the preferred alternative with costs for proposed § 201.110(b)(2) added.

Proposed § 201.110(b)(2), would require LPDs to conduct a compliance review of each complex no less than once every two years to ensure compliance with policies and procedures established under proposed § 201.110(a) and (b)(1). LPDs would need to first design a compliance review system to be used for conducting written review of compliance by complex managers, production supervisors, and field agents. Compliance reviews would then need to be conducted every two years at each complex.

AMS estimates that the aggregate one-time costs of designing and initiating the compliance review process would require 2,208 legal hours, 14,720 management hours, 736 administrative hours, and 2,392 information technology hours costing \$1,993,000¹¹⁷ in the first year for LPDs to initially set up their review and compliance policies and procedures and initiate their ongoing compliance review processes.

The ongoing cost for LPDs to conduct compliance reviews for each complex every two years has been converted to an annual cost by dividing the total cost of conducting reviews on all complexes in half. This could be consistent with, for example, a system where each LPD reviews half of their complexes each year on a rolling basis or, alternatively, where a sinking fund deposit is made each year and used every other year. AMS estimates that total ongoing annual costs on the part of LPDs will require 736 legal hours, 7,360 management hours, 368 administrative hours, and 920 information technology hours to conduct and document written reviews of compliance of each complex no less than once every two years, for an aggregate annual cost of \$919,000.¹¹⁸

Costs of § 201.112 – Proposed Rule Alternative

¹¹⁷ 2,208 legal hours × \$139.96 per hour + 14,720 management hours × \$96.40 per hour + 736 administrative hours × \$49.36 per hour + 2,392 information technology hours × \$95.58 per hour = \$1,992,996.

¹¹⁸ 736 legal hours × \$139.96 per hour + 7,360 management hours × \$96.40 per hour + 368 administrative hours × \$49.36 per hour + 920 information technology hours × \$95.58 per hour = \$918,613.

Text of § 201.112(a) and (b) was changed from the proposed to final rule primarily for the purpose of clarification or to add paragraph titles; these changes did not affect the estimation of hours or of costs and benefits to the rule. The addition of final § 201.112(c), “Translation,” from the proposed to final rule is also not expected to change hours or costs because LPDs already have all necessary information to make reasonable efforts to assist growers in translating disclosure documents and have made it available to growers who request the information. Accordingly, AMS did not add any time to its cost estimates for LPDs to comply with this new requirement. AMS cost estimates to LPDs and growers of § 201.112 under the proposed rule alternative are identical to those described under the preferred alternative.

Combined Costs of §§ 201.106, 110, and 112 – Proposed Rule Alternative

Aggregate combined costs to LPDs for §§ 201.106, 110, and 112 for the proposed rule alternative are expected to be \$14,906,000 in the first year, and \$4,086,000 in subsequent years. The combined costs for poultry growers are expected to be \$5,223,000 in the first year, \$249,000 in subsequent years.

The aggregate ten-year combined quantified costs to LPDs of §§ 201.106, 110, and 112 for the proposed rule alternative are estimated to be \$51,684,000 and the present value of the ten-year combined costs is \$47,314,000 discounted at a two percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs discounted at a two percent rate are expected to be \$5,267,000.

The aggregate ten-year combined costs to poultry growers of §§ 201.106, 110, and 112 for the proposed rule alternative are estimated to be \$7,461,000 and the present value of the ten-year combined costs are estimated to be \$7,110,000 discounted at a two percent rate. The aggregate annualized costs of the PV of ten-year costs to poultry growers discounted at a two percent rate are expected to be \$792,000.

The aggregate combined costs of final §§ 201.106, 110, and 112 under the

proposed rule alternative for LPDs and poultry growers are estimated to be \$20,129,000 in the first year and \$4,335,000 in subsequent years. The aggregate ten-year combined costs to LPDs and poultry growers of §§ 201.106, 110, and 112 for the proposed rule alternative are estimated to be \$59,145,000 and the present value of the ten-year combined costs are estimated to be \$54,425,000 discounted at a two percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs and poultry growers discounted at a two percent rate are expected to be \$6,059,000. The aggregate cost estimates of final §§ 201.106, 110, and 112 under the proposed rule alternative presented above appear in the following table. The quantified costs to the industry in the first year under the proposed rule alternative are \$20.13 million.

Table 3: Estimated Costs of §§ 201.106, 110, and 112 – Proposed Rule Alternative

Preferred Alternative	Expected Cost*		
	Live Poultry Dealers	Poultry Growers	Industry Total
§ 201.106			
First-Year	\$9,106,000	\$4,974,000	\$14,080,000
Ten-Year Total	\$9,106,000	\$4,974,000	\$14,080,000
PV of Ten-Year Discounted at 2%	\$8,928,000	\$4,876,000	\$13,804,000
Ten-Year Annualized at 2%	\$994,000	\$543,000	\$1,537,000
§ 201.110			
First-Year	\$5,742,000	\$0	\$5,742,000
Ten-Year Total	\$41,996,000	\$0	\$41,996,000
PV of Ten-Year Discounted at 2%	\$37,864,000	\$0	\$37,864,000
Ten-Year Annualized at 2%	\$4,215,000	\$0	\$4,215,000
§ 201.112			
First-Year	\$58,000	\$249,000	\$307,000
Ten-Year Total	\$582,000	\$2,487,000	\$3,069,000
PV of Ten-Year Discounted at 2%	\$523,000	\$2,234,000	\$2,757,000
Ten-Year Annualized at 2%	\$58,000	\$249,000	\$307,000
§§ 201.106, 110, and 112			
First-Year	\$14,906,000	\$5,223,000	\$20,129,000
Ten-Year Total	\$51,684,000	\$7,461,000	\$59,145,000
PV of Ten-Year Discounted at 2%	\$47,314,000	\$7,110,000	\$54,425,000
Ten-Year Annualized at 2%	\$5,267,000	\$792,000	\$6,059,000

*Rows may not sum to Total Costs due to rounding.

Estimated Costs and Expected Benefits of §§ 201.106, 110, and 112 – Proposed Rule Alternative

The expected benefits of proposed §§ 201.106, 110, and 112 as analyzed in the proposed rule alternative have been described in the discussion of benefits for the preferred option, final §§ 201.106, 110, and 112, with the exception of § 201.110(b)(2), “Compliance review,” which was removed from the proposed to final rule. Proposed § 201.110(b)(2) would require a written review of each broiler complex at least every other year to ensure compliance with the policies and procedures developed under this section. While the proposed rule would not require that LPD documentation be distributed to growers, it would be subject to USDA review to ensure ongoing maintenance and compliance. This compliance review requirement would not provide benefits separate

from those generated by establishing the duty in § 201.110(a); however, documentation of regular review of LPD procedures could assist in ongoing enforcement of the proposed rule, thereby increasing the likelihood of compliance so that benefits of the proposed rule are realized by growers.

All potential non-quantifiable benefits and indirect costs of final § 201.106(b) and (c) are excluded from the proposed rule alternative. Net total costs and benefits to the industry from §§ 201.106, 110, and 112 in the proposed rule alternative cannot be quantified in relation to the total value of industry production. Thus, AMS cannot measure any impact or shift in total industry supply or any corresponding indirect effects on industry supply and demand, including price and quantity effects.

Comments from the proposed rule have been discussed and changes to the final rule have been explained previously in this regulatory analysis. Expected benefits and costs of adopting the proposed rule are presented in this section as a third regulatory alternative to final §§ 201.106, 110, and 112. Estimated direct costs for the final rule preferred alternative are decreased by removal of proposed § 201.110(b)(2), “Compliance review” and increased by the addition of § 201.106(b) and (c). As a net result of all changes, estimated direct costs are lower for the proposed rule alternative in comparison to the final §§ 201.106, 110, and 112. The proposed rule alternative also excludes expected benefits and indirect costs of § 201.106(b) and (c). As discussed previously, commenters on the proposed rule expressed strong support for including these provisions. Under the proposed rule alternative, growers would be denied protection against excessive variation in compensation by establishing 25 percent as a presumptively unfair percentage of performance-based pay. Without protection during the transition period for implementation of these rule provisions, growers would be vulnerable to reductions in compensation by LPDs.

After considering all four regulatory alternatives, AMS determined that the

preferred alternative is the best alternative.

C. Regulatory Flexibility Act

As part of the regulatory process, a Regulatory Flexibility Analysis (RFA) is conducted in order to evaluate the effects of this final rule on small businesses.

AMS is adding final §§ 201.106, 110, and 112 to the regulations under the Packers and Stockyards Act. The regulations will establish requirements for LPDs that produce broilers with grower ranking contracts. LPDs that only produce turkeys, ducks, geese, or other fowl will not be affected. Final § 201.106 will require LPDs to develop and implement new broiler grower contracts and grower payment systems. Final § 201.110 will impose a duty on LPDs that produce broilers to establish and maintain compliance with written processes for the design and operation of poultry growing ranking systems consistent with a duty of fair comparison. Final § 201.112 would require LPDs to produce and distribute disclosures when they request growers to make additional capital investments.

Summary of the Final Rule

Final § 201.106 will prevent LPDs reducing compensation rates based on a grower's grouping, ranking, or comparison to others. All payment adjustments related to grower performance will need to be positive adjustments. LPDs are prevented from taking deductions based on relative performance rankings.

Final § 201.106 will also establish a presumptive unfairness limitation on the share of grower payments that an LPD may determine by a grower's grouping, ranking, or comparison to others. The Secretary will presume that an LPD is in violation of the Act if a payment associated with a grower's grouping, ranking, or comparison to others is more than 25 percent of the total payments to growers in a calendar year.

Final § 201.106 also creates a transition period lasting three years after the regulation becomes effective. During the transition period, if an LPD reduces the price

per pound, the LPD will be required to forward to the AMS Administrator a copy of the prior and the modified contract and any LPD Disclosure Document.

Final § 201.110 will require LPDs to provide for fair comparison among growers when basing compensation on a upon a grouping or ranking of growers delivering during a specified period. Final § 201.110 also lists factors that the Secretary will consider in determining whether the system was designed to deliver a fair comparison, which include: whether growers will be compared to growers supplied with inputs or assigned production practices that result in material differences in performance metrics used in payment calculations, whether growers will be compared over appropriate time periods, whether any non-comparison payment methods applied are appropriate, whether the LPD has made reasonable efforts to timely resolve concerns a grower raises regarding the LPD's design and operation of its poultry grower ranking system, and any other factor relevant to a fair comparison.

Final § 201.110 will further require that when an LPD uses a poultry grower ranking system and cannot conduct a fair comparison for one or more growers, the LPD must compensate those growers through an appropriate non-comparison method specified in the contract that reflects reasonable compensation to the grower for its services.

Final § 201.110 will also require LPDs to establish and maintain written documentation of poultry grower ranking system policies and procedures for the design and operation of a poultry grower ranking system that is consistent with the duty of fair comparison. The written documentation must include policies and procedures regarding the manner in which LPDs will work to ensure a fair comparison among contract growers taking into account the distribution of inputs and assignment of production variables that are controlled by the LPD, any flexibility the LPD has in performing these comparisons, and how the LPD resolves concerns regarding the design and operation of the poultry grower ranking system by the LPD.

Final § 201.112 will require LPDs to provide a Capital Improvement Disclosure Document any time the LPD requests or requires existing broiler chicken growers to make an additional capital investment that is \$12,500 or more per structure excluding maintenance or repair. The Capital Improvement Disclosure Document must include information about the goal or purpose of the investment, all schedules and deadlines for the investment, a description of changes to housing specifications, and analysis of projected returns.

Comments on the Proposed Rule and Associated Changes to the Final Rule

AMS did not receive comments from small LPDs. AMS received comments from trade associations that likely represent small LPDs, but none of their comments specifically addressed issues concerning small LPDs. After consideration of all the public comments, AMS chose to adopt the proposed rule as a final rule with several modifications. Large LPDs and trade associations commented that the regulation would be particularly challenging if the period of time allowed for regulated entities to comply with the provisions is too short.

To allow sufficient time for regulated entities to comply with the final rule and avoid excess implementation costs, AMS is setting the effective date for this rule at July 1, 2026, which is approximately 18 months following publication in the *Federal Register*. This extended time frame will not impact the amount or timing for estimated costs of the final rule because regulated entities are expected to incur costs during the year preceding the effective date.

Industry trade organizations and large LPDs commented that the full cost of implementing the proposed rule would be far greater than estimated by AMS. The commenters asserted that AMS greatly underestimated the costs that will be required for employing teams with highly specialized legal and technical expertise to implement the proposed rule by modifying or replacing grower contracts and communicating changes to

growers. Commenters suggested that AMS did not adequately consider the total number of hours needed, but none provided quantified estimates. Large LPDs also commented that hourly rates paid to specialized industry professionals such as attorneys should be much higher. Commenters also suggested that implementation of the rule would require LPDs to hire and train additional staff and pull resources away from other important activities.

For the time that small LPDs would require to comply with the rule, AMS consulted auditors and supervisors as subject matter experts who are familiar with LPDs and broiler complex operations from many years of experience employed with AMS in auditing LPDs for compliance with the Act. Small LPDs may need to hire new staff to implement the changes required by final §§ 201.106, 110, and 112, particularly in the first year. Hourly rates used in cost analysis for the proposed rule were based on averages within the agricultural sector as published and annually updated by the U.S. Bureau of Labor Statistics.¹¹⁹ AMS expects that average hourly rates provide an appropriate benchmark for estimating industry average costs. While some LPDs commented that AMS's estimates were too low, none of them recommended a different method of estimating costs.

In preparation for the final rule AMS reviewed direct costs with the subject matter experts. After doing so, AMS added modest amount of time to account for the cost of IT work in preparing disclosures in § 201.112.

AMS received comments from growers, grower groups, government agencies, and advocates in support of additional limitations on grower risk from excessive variability in compensation. Based on these comments, AMS has added provision § 201.106(b), which establishes a presumption that a regulated entity is in violation of the

¹¹⁹ See U.S. Bureau of Labor Statistics, May 2023 National Occupational Employment and Wage Estimates, May 2023. <https://www.bls.gov/oes/special.requests/oesm23all.zip>.

Act when aggregate gross annual payments based upon a grouping, ranking, or comparison of growers (performance pay) exceed of 25 percent of total gross payments (including performance and all other types of grower pay).

AMS added costs for LPDs to implement and monitor this new provision, which are discussed and quantified as direct administrative costs. Other expected additional benefits and indirect costs resulting from this new provision cannot be quantified and are discussed separately.

AMS also solicited comment in the proposed rule on whether there was a need to protect growers against the risk that LPDs might unfairly reduce broiler grower total compensation during a transition period after implementation of the final rule. Based on comments, AMS added § 201.106(c), which will require LPDs to submit copies of the prior and modified contracts and disclosures to AMS if average gross grower payments at a complex show year-over-year decline following a contract modification during the three calendar years commencing with and including the effective date of the rule. AMS will review the information provided by LPDs to identify any potentially unfair practices related to broiler grower compensation.

AMS expects that requirements in final § 201.106(c) will increase direct administrative costs for LPDs relative to the proposed rule. Final § 201.106(c) may increase indirect costs as well, but AMS does not have sufficient data to quantify the potential indirect costs or benefits associated with final § 201.106(c).

AMS received comments suggesting that some of the detailed documentation requirements under proposed § 201.110(b) were similar to existing documentation requirements and might create unnecessarily burdensome and complex paperwork. In response to these comments, AMS made several changes to § 201.110(b) in the final rule that included consolidating and streamlining the documentation requirements and removing some detailed requirements that were included in the proposed rule. AMS

expects these changes to modestly reduce the total recordkeeping requirements or time cost of the information collection for LPDs, but AMS is unable to estimate these effects with certainty. To limit the potential for underestimating costs, AMS did not reduce hours and accordingly these changes did not affect the estimation of costs or benefits in the final rule relative to the proposed rule.

The proposed rule included § 201.110(b)(2), “Compliance review,” which required LPDs to conduct a required bi-annual review process. AMS removed this requirement in response to comments that self-audits would be burdensome for LPDs, and that elimination of this requirement would not substantially diminish compliance with § 201.110. Compliance will be enforced through regular AMS review of the policies and procedures poultry dealers are required to establish and maintain under § 201.110(b). Removing the compliance reviews reduced costs in the final rule relative to the proposed rule.

Based on comments received, AMS added a provision at § 201.112(c) to require that the LPD make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Capital Improvement Disclosure Document. Reasonable efforts include, but are not limited to, providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the poultry grower's geographic area. Reasonable efforts, depending on the facts and circumstances (such as convenience, expense, and timeliness of the translation), may also include allowing the grower access to a computer-generated translation of the Disclosure Document and additional time to review any translated Disclosure Document.

A similar requirement was established for LPDs in § 201.102 of the

“Transparency in Poultry Grower Contracting and Tournaments” final rule.¹²⁰ As LPDs already have all necessary information to make reasonable efforts to assist growers in translating disclosure documents and have made it available to growers who request the information. Similarly, AMS did not increase grower review time for the addition of § 201.112 as growers who require translation assistance already should be connected with the resources from § 201.102.

Small Businesses Affected

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).¹²¹ SBA considers broiler producers small if sales are less than \$3.5 million per year. LPDs, classified under NAICS 311615, are considered small businesses if they have fewer than 1,250 employees.

AMS maintains data on LPDs from the Annual Reports these firms file with PSD.¹²² Currently, 42 LPDs would be subject to the regulation. Of these, 21 LPDs would be small businesses according to the SBA standard. In their fiscal year 2023, LPDs reported that they had 18,806 production contracts with broiler growers. Small LPDs accounted for 1,208 contracts (6.0 percent).

Annual Reports from LPDs indicate they had 20,014 contracts, but a poultry grower can have more than one contract. The 2022 Census of Agriculture indicated that there were 14,144 contract broiler growers in the United States.¹²³ AMS does not regulate poultry growers and has no record of the number of poultry growers that qualify as small businesses but expects that nearly all of them are small businesses.

¹²⁰ 88 FR 83210, 83301 (Nov. 28, 2023).

¹²¹ 13 CFR 121.201.

¹²² All LPDs are required to annually file PSD form 3002 “Annual Report of Live Poultry Dealers,” OMB control number 0581-0308. The Annual Report form is available to the public at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

¹²³ USDA, NASS. *2023 Census of Agriculture: United States Summary and State Data*. Volume1, Part 51. Issued February 2024 Table 42. st99_1_042_044.pdf (usda.gov).

The typical size of broiler grow-out operations has trended larger from the early 2000s—when a typical broiler farm consisted of a 80,000–100,000 square foot operation—to a typical new farm today which “may have eight or more barns of over 30,000 square feet each on one site.”¹²⁴ Projected gross revenue for a newer farm receiving relatively high performance-based pay rates is \$224,000 for two 36,000 square foot barns.¹²⁵ Extrapolating these projections on a per house basis, gross revenue for an eight barn 288,000 square foot operation would total just under \$900,000 and an operation with 30 barns could still remain within the \$3.5 million threshold for small business classification. However, this same study notes that, “still, 80,000 to 120,000 square feet of housing for most family farms is all a single farmer can successfully operate while limiting hired labor.”

Direct costs of final §§ 201.106, 110, and 112

Direct costs of final §§ 201.106, 110, and 112 to LPDs would primarily consist of the time required to modify existing contracts, develop and comply with new policies, and collect and distribute it among the growers. Final §§ 201.106, 110, and 112 would also cost poultry growers the value of the time they put into reviewing and acknowledging receipt of new contracts and disclosures.

Expected direct costs are estimated as the total value of the time required by LPDs to modify existing contracts, develop and comply with new policies, and collect and distribute required disclosures that would be required by final §§ 201.106, 110, and 112 as well as the time to create and maintain any necessary additional records. Estimates of the amount of time required to create and distribute the disclosure documents were

¹²⁴ Brothers, D. Goeringer, P. Thompson, J. "U.S. Broiler Growers Face Increasing Challenges on the Family Farm," *Choices Magazine*, December 2023. Available online at <<https://www.choicesmagazine.org/choices-magazine/submitted-articles/us-broiler-growers-face-increasing-challenges-on-the-family-farm>> last accessed 11/6/2024.

¹²⁵ Alabama A&M & Auburn University Extension ANR-2932, February 2024. Available online at <https://www.aces.edu/wp-content/uploads/2022/10/ANR-2932_FarmTypesandEstimatedBusinessReturns_021924L-G.pdf> last accessed 11/6/2024.

provided by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in auditing LPDs for compliance with the Packers and Stockyards Act. Estimates for the value of the time are U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics estimate released May 2023.¹²⁶ AMS marked up the wages 41.79 percent to account for benefits.

AMS estimated one-time first-year investment to LPDs of updating grower contracts and developing new grower payment systems, including modifying information systems to include new calculations as well as filing, and reporting to comply with § 201.106 would require 2,448 legal hours at \$139.96 per hour costing \$342,000, 5,670 hours of management time at \$96.40 per hour costing \$547,000, 1,440 hours of administrative time at \$49.36 per hour costing \$71,000, and 2,160 hours of information technology staff time at \$95.58 per hour costing \$206,000. Aggregate total first-year setup costs are expected to be \$1,167,000¹²⁷ for final § 201.106.¹²⁸

AMS expects that ongoing aggregate costs of implementation, maintenance, monitoring, and compliance with final § 201.106 would annually require an additional 144 legal hours at \$139.96 per hour costing \$20,000, 540 hours of management time at \$96.40 per hour costing \$52,000, 144 hours of administrative time at \$49.36 per hour costing \$7,000, and 288 hours of information technology staff time at \$95.58 per hour costing \$28,000. Total aggregate ongoing costs to small LPDs for final § 201.110 are expected to be \$107,000 annually.¹²⁹

AMS estimated the total costs of developing new policies and procedures,

¹²⁶ See U.S. Bureau of Labor Statistics, *May 2023 National Occupational Employment and Wage Estimates*, May 2023 <https://www.bls.gov/oes/special.requests/oesm23all.zip>.

¹²⁷ $2,448 \text{ legal hours} \times \$139.96 \text{ per hour} + 5,670 \text{ management hours} \times \$96.40 \text{ per hour} + 1,440 \text{ administrative hours} \times \$49.36 \text{ per hour} + 2,160 \text{ information technology hours} \times \$95.58 \text{ per hour} = \$1,166,741$.

¹²⁸ Please note throughout the document that components may not sum exactly to aggregate amounts due to rounding.

¹²⁹ $144 \text{ legal hours} \times \$139.96 \text{ per hour} + 540 \text{ management hours} \times \$96.40 \text{ per hour} + 144 \text{ administrative hours} \times \$49.36 \text{ per hour} + 288 \text{ information technology hours} \times \$95.58 \text{ per hour} = \$106,845$.

communications plans, and compliance review systems to comply with final § 201.110 would require a one-time first-year aggregate investment of 480 legal hours at \$139.96 per hour costing \$67,000, 3,894 hours of management time at \$96.40 per hour costing \$375,000, 228 hours of administrative time at \$49.36 per hour costing \$11,000, and 270 hours of information technology staff time at \$95.58 per hour costing \$26,000. Total aggregate first-year setup costs are expected to be \$480,000¹³⁰ for final § 201.110.

AMS expects that ongoing aggregate costs of implementation, maintenance, monitoring, and compliance with final § 201.110 would annually require an additional 240 legal hours at \$139.96 per hour costing \$214,000, 2,856 hours of management time at \$96.40 per hour costing \$95,000, 114 hours of administrative time at \$49.36 per hour costing \$6,000, and 114 hours of information technology staff time at \$95.58 per hour costing \$11,000. Total aggregate ongoing costs to small LPDs for final § 201.110 are expected to be \$325,000 annually.¹³¹

Proposed § 201.112 would require LPDs to provide a Capital Improvement Disclosure Document any time the LPD requests existing broiler chicken growers to make an additional capital investment.¹³² AMS estimated ongoing annual costs of final § 201.112 to small LPDs would require on average an additional 7 legal hours at \$139.96 per hour costing \$1,000, 36 hours of management time at \$96.40 per hour costing \$3,000, 7 hours of administrative time at \$49.36 per hour costing \$400, and 9 hours of information technology staff time at \$95.58 per hour costing \$900. Total aggregate ongoing costs to small LPDs for final § 201.110 are expected to be \$6,000 annually.¹³³

¹³⁰ 480 legal hours × \$139.96 per hour + 3,894 management hours × \$96.40 per hour + 228 administrative hours × \$49.36 per hour + 270 information technology hours × \$95.58 per hour = \$479,623.

¹³¹ 240 legal hours × \$139.96 per hour + 2,856 management hours × \$96.40 per hour + 114 administrative hours × \$49.36 per hour + 114 information technology hours × \$95.58 per hour = \$325,432.

¹³² Based on information provided by subject matter experts, AMS estimates that capital upgrades would be required at 5% of complexes each year, triggering creation of a new disclosure document for approximately 5% of growers annually.

¹³³ 7 legal hours × \$139.96 per hour + 36 management hours × \$96.40 per hour + 7 administrative hours × \$49.36 per hour + 9 information technology hours × \$95.58 per hour = \$5,694.

Expected costs of final §§ 201.106, 110, and 112 are associated with developing, maintaining, updating, and complying with policies and procedures that will be implemented at poultry growing complexes and communicating changes, and producing and distributing disclosure documents among contract growers. AMS expects that firms with fewer contract types and those that contract with few growers will have lower costs. Larger LPDs will tend to have larger numbers and types of contracts and will likely have more costs. Final §§ 201.106 and 201.110 only concern poultry grower ranking systems. Smaller LPDs that do not have grower ranking or tournament contracts will not have any of the costs associated with final §§ 201.106 and 201.110. Some LPDs have few contracts with poultry growers and raise poultry in their own facilities. Those dealers will have relatively lower costs.

AMS does not regulate poultry growers, and, with the exception of reviewing and signing contracts that have been updated by LPDs to meet requirements of § 201.106 and acknowledging receipt of Capital Improvement Disclosure Documents at the time of capital investment requests, the final rule imposes no requirements on poultry growers. To benefit from the disclosures and to understand the updated contracts, growers would need to review the new contracts and disclosure information provided. Growers that do not expect a benefit from reviewing the disclosure information likely would not review it.

AMS estimates aggregate growers' costs for reviewing updated contracts and disclosures associated with final §§ 201.106 and 201.112 combined to be \$315,000 in the initial year. After an updated contract has been reviewed and signed in the first year, AMS expects the annual aggregate cost for reviewing disclosures by growers making additional capital investments would be \$15,000 each year. This amounts to \$400 per grower in the first year. The table below summarizes costs of final §§ 201.106, 110, and 112 to small LPDs and small poultry growers.

Indirect Costs Associated with Final §§ 201.106, 110, and 112

Final § 201.106 will require all LPDs involved in broiler production with tournament or grower ranking contracts to redesign the way they pay broiler growers. It is likely that all LPDs will be required to change their contracts to make all performance base adjustments positive adjustments to the base prices. AMS does not have sufficient data to determine how many LPDs will need to change contracts to comply with the provision capping performance payments at 25 percent of total payments at a complex. AMS is aware that some firms would currently be in compliance with a 25 percent cap, and at least some firms will not.

Any firms that modify existing grower compensation structures at a complex in response to this rule could experience increased production costs if reductions in performance-based payments relative to total payments adversely affect grower performance incentives and cause growers to produce broilers less efficiently. In general, the “tournament” system of broiler grower compensation bases payments to individual growers on their performance relative to other growers. Performance payments provide an incentive for growers to optimize factors under their control, such as effort and management, and to some extent investment (subject to the concerns highlighted by this rule), to improve their own relative performance efficiency and increase income. Tournament systems have been described in economic literature as “particularly economical means to provide incentive.” The strength of individual performance incentives is directly related to the size of expected grower performance payments, which will be limited by the total amount of performance-based pay distributed among all growers. Any firms that modify existing grower compensation structures at a complex in response to this rule by decreasing the relative size of performance payments available to growers at a complex might therefore weaken performance incentives and could result in reduced grower efficiency in broiler production.

Given the range of possible outcomes, AMS is unable to predict effects with any

degree of certainty. For example, if production efficiency is reduced, economic principles suggest that cost of production would increase at the impacted broiler complex, causing an inward shift of a firm's marginal cost curve and an associated decrease in broiler production at the impacted complex. A decrease in production for a broiler complex would also be likely to reduce demand for broiler growing services in the area and could result in LPDs lowering overall rates of grower compensation and possibly terminating some marginal growers.

AMS is not able quantify indirect costs related to capping performance payments. However, if the cap has any significant effect on grower productivity, it is likely that indirect costs of capping performance payments will be considerably larger than the direct costs that AMS has been able to estimate.

**Table 4: Estimated Direct Costs to Small Businesses of
Final §§ 201.106, 110, and 112**

Type of Cost	Regulated Live Poultry Dealers	Unregulated Growers	Total*
Final § 201.106			
First-year Cost	\$1,167,000	\$300,000	\$1,467,000
First-year Cost per Firm	\$56,000	\$351	NA
PV of Ten-year Cost Discounted at 2%	\$1,722,000	\$294,000	\$2,017,000
Ten-year Cost Annualized at 2%	\$192,000	\$33,000	\$225,000
Average Ten-Year Cost per Firm Annualized at 2%	\$9,000	\$38	N/A
Final § 201.110			
First-year Cost	\$480,000	\$0	\$480,000
First-year Cost per Firm	\$23,000	\$0	NA
PV of Ten-year Cost Discounted at 2%	\$3,074,000	\$0	\$3,074,000
Ten-year Cost Annualized at 2%	\$342,000	\$0	\$342,000
Average Ten-Year Cost per Firm Annualized at 2%	\$16,000	\$0	NA
Final § 201.112			
First-year Cost	\$6,000	\$15,000	\$21,000
First-year Cost per Firm	\$271	\$18	NA
PV of Ten-year Cost Discounted at 2%	\$51,000	\$135,000	\$186,000
Ten-year Cost Annualized at 2%	\$6,000	\$15,000	\$21,000
Average Ten-Year Cost per Firm Annualized at 2%	\$286	\$18	NA
Proposed §§ 201.106, 110, and 112			
First-year Cost	\$1,652,000	\$315,000	\$1,967,000

Type of Cost	Regulated Live Poultry Dealers	Unregulated Growers	Total*
First-year Cost per Firm	\$79,000	\$369	NA
PV of Ten-year Cost Discounted at 2%	\$4,848,000	\$429,000	\$5,277,000
Ten-year Cost Annualized at 2%	\$540,000	\$48,000	\$587,000
Average Ten-Year Cost per Firm Annualized at 2%	\$26,000	\$56	NA

*Rows may not sum to Total Costs due to rounding.

** Totals do not include indirect costs to associated with possible changes in supply or demand. AMS was not able to estimate indirect costs, but it is possible that they are larger than the direct costs in the table.

LPDs report net sales in Annual Reports to AMS. Table 5 below groups small LPDs' net sales into quartiles, reports the average net sales in each quartile, and compares average net sales to average expected first-year direct costs per firm for each of final §§ 201.106, 110, and 112 and total first-year direct costs.¹³⁴ Estimated first-year direct costs are higher than 10-year annualized costs, and for the threshold analysis, first-year costs will be higher than annualized costs as a percentage of net sales. Correspondingly, the ratio of ten-year annualized direct costs to net sales is lower than their corresponding first-year cost ratios listed in Table 5. If estimated costs meet the threshold in the first year, they will in the following years as well. AMS is able to perform a threshold analysis on based on direct costs. However, AMS was unable to estimate indirect costs associated with the final rule include indirect costs.

Estimated first-year direct costs per firm are less than 1 percent of average net sales in the three largest quartiles. Total first-year direct costs as a percent of net sales are estimated to be about 0.8 percent for the smallest quartile. However, average first-year cost per entity in Table 5 is the average cost of all of the small businesses. Costs for the LPDs in smallest quartile will likely be less than the average for small businesses.

LPDs do not report to AMS whether any of their contracts are tournament-style contracts but evaluating the number contracts that LPDs listed in their Annual Reports to AMS, few of the LPDs in smallest quartile contracted with a sufficient number of

¹³⁴AMS expects that recordkeeping costs will be correlated with the size of the firms. AMS ranked live poultry dealers by size and grouped them into quartiles.

growers to implement tournament contracts. It is unlikely that any of the LPDs in the smallest quartiles had any tournament contracts. It is unlikely that several of the smaller LPDs in the second quartile had any tournament contracts either.

Since final §§ 201.106 and 201.110 only apply to tournament contracts, none of the LPDs in the smallest quartile are likely to incur any costs from final §§ 201.106 and 201.110. Their costs are likely only costs associated with final § 201.112, which, as percentage of net sales would be 0.003 percent. Because the smallest LPDs have fewer contracts than the other small LPDs, their costs associated with final § 201.112 are also likely less than average.

Costs in the threshold analysis do not include indirect costs, which AMS was not able to quantify. The size of the indirect costs is not known, and AMS cannot state with any confidence that the total costs associated with final §§ 201.106, 110, and 112 will be insignificant for any LPD.

Table 5: Comparison of Small Live Poultry Dealers' Net Sales to Expected Annualized Direct Costs of Final §§ 201.106, 110, and 112*

Quartile	Average Net Sales	First-Year Costs Related to § 201.106 as a Percent of Net Sales	First-Year Costs Related to § 201.110 as a Percent of Net Sales	First-Year Costs Related to § 201.112 as a Percent of Net Sales	Total First-Year Costs as a Percent of Net Sales
0 to 25%	\$10,017,311	0.559%	0.230%	0.003%	0.789%
25 to 50%	\$34,567,539	0.162%	0.067%	0.001%	0.229%
50 to 75%	\$92,380,634	0.061%	0.025%	0.000%	0.086%
75 to 100%	\$226,958,521	0.025%	0.010%	0.000%	0.035%

*Numbers in the table may not sum to one due to rounding.

** Costs do not include indirect costs to associated with possible changes in supply or demand. AMS was not able to estimate indirect costs, but it is possible that they are larger than the direct costs in the table.

Direct Cost Associated with an Alternative §§ 201.106, 110, and 112

AMS also estimated costs of the original proposed rule as an alternative. Section 201.106(b) and (c) in the final rule were not include in the proposed rule. AMS estimated that alternative § 201.106 would require a one-time first-year investment of 1,728 legal hours at \$139.96 per hour costing \$242,000, 2,970 hours of management time at \$96.40

per hour costing \$286,000, 720 hours of administrative time at \$49.36 per hour costing \$36,000, and 720 hours of information technology staff time at \$95.58 per hour costing \$69,000. Aggregate total first-year setup costs are expected to be \$633,000. AMS does not expect additional ongoing costs of implementing final § 201.106 under the proposed rule alternative.

Under the proposed rule alternative, § 201.110(b) includes a section dealing with compliance reviews. AMS estimated that alternative § 201.110 would require a one-time first-year aggregate investment of 696 legal hours at \$139.96 per hour costing \$97,000, 5,334 hours of management time at \$96.40 per hour costing \$514,000, 300 hours of administrative time at \$49.36 per hour costing \$15,000, and 504 hours of information technology staff time at \$95.58 per hour costing \$48,000. Total aggregate first-year setup costs for small LPDs under the alternative are expected to be \$675,000.

AMS expects alternative § 201.110 would annually require an additional 312 legal hours at \$139.96 per hour costing \$44,000, 3,576 hours of management time at \$96.40 per hour costing \$345,000, 150 hours of administrative time at \$49.36 per hour costing \$7,000, and 204 hours of information technology staff time at \$95.58 per hour costing \$19,000. Total aggregate ongoing costs to small LPDs for final § 201.110 are expected to be \$415,000 annually.

All sections of § 201.112 were included under the proposed rule alternative. AMS estimated that first-year and ongoing annual costs of final § 201.112 to small LPDs would require on average an additional 7 legal hours at \$139.96 per hour costing \$1,000, 36 hours of management time at \$96.40 per hour costing \$3,000, 7 hours of administrative time at \$49.36 per hour costing \$400, and 9 hours of information technology staff time at \$95.58 per hour costing \$900. Total aggregate ongoing costs to small LPDs for final § 201.110 are expected to be \$6,000 annually.

The alternative would have a relatively small effect on costs to poultry growers on

a per grower basis, and growers will only review the disclosures if they perceive that they are beneficial. AMS estimates growers' aggregate costs for reviewing updated contracts and disclosures associated with final §§ 201.106 and 201.112 combined to be \$315,000 in the initial year. AMS expects the annual aggregate cost to growers making additional capital investments to be \$15,000 each year. Table 6 below summarizes costs of alternative §§ 201.106, 110, and 112 to small LPDs and small poultry growers.

**Table 6: Estimated Costs to Small Businesses of
Alternative §§ 201.106, 110, and 112**

Type of Cost	Regulated Live Poultry Dealers	Unregulated Growers	Total*
Final § 201.106			
First-year Cost	\$633,000	\$300,000	\$933,000
First-year Cost per Firm	\$30,000	\$351	NA
PV of Ten-year Cost Discounted at 2%	\$620,000	\$294,000	\$914,000
Ten-year Cost Annualized at 2%	\$69,000	\$33,000	\$102,000
Average Ten-Year Cost per Firm Annualized at 2%	\$3,000	\$38	N/A
Final § 201.110			
First-year Cost	\$675,000	\$0	\$675,000
First-year Cost per Firm	\$32,000	\$0	NA
PV of Ten-year Cost Discounted at 2%	\$3,266,000	\$0	\$3,266,000
Ten-year Cost Annualized at 2%	\$364,000	\$0	\$364,000
Average Ten-Year Cost per Firm Annualized at 2%	\$17,000	\$0	NA
Final § 201.112			
First-year Cost	\$6,000	\$15,000	\$21,000
First-year Cost per Firm	\$271	\$18	NA
PV of Ten-year Cost Discounted at 2%	\$51,000	\$135,000	\$186,000
Ten-year Cost Annualized at 2%	\$6,000	\$15,000	\$21,000
Average Ten-Year Cost per Firm Annualized at 2%	\$286	\$18	NA
Final §§ 201.106, 110, and 112			
First-year Cost	\$1,313,000	\$315,000	\$1,628,000
First-year Cost per Firm	\$63,000	\$369	NA
PV of Ten-year Cost Discounted at 2%	\$3,937,000	\$429,000	\$4,366,000
Ten-year Cost Annualized at 2%	\$438,000	\$48,000	\$486,000
Average Ten-Year Cost per Firm Annualized at 2%	\$21,000	\$56	NA

*Rows may not sum to Total Costs due to rounding.

Net sales for small LPDs that would be required to make disclosure under alternative §§ 201.106, 110, and 112 averaged \$91 million for their fiscal year 2023.

Expected first-year cost per LPD would be well below 0.1 percent.¹³⁵

Table 7: Comparison of Small Live Poultry Dealers' Net Sales to Expected Annualized Costs of Alternative §§ 201.106, 110, and 112

Quartile	Average Net Sales	First-Year Costs Related to § 201.106 as a Percent of Net Sales	First-Year Costs Related to § 201.110 as a Percent of Net Sales	First-Year Costs Related to § 201.112 as a Percent of Net Sales	Total First-Year Costs as a Percent of Net Sales
0 to 25%	\$10,017,311	0.299%	0.319%	0.003%	0.629%
25 to 50%	\$34,567,539	0.087%	0.093%	0.001%	0.182%
50 to 75%	\$92,380,634	0.032%	0.035%	0.000%	0.068%
75 to 100%	\$226,958,521	0.013%	0.014%	0.000%	0.028%

Clearly, excluding § 201.110(b)(1)(vi) and (b)(2) would reduce cost to small LPDs. AMS prefers final §§ 201.106, 110, and 112 because it reduces the amount of variation in payments that broiler growers might receive and provides protection against lower contract prices during the transition period of the first three years following implementation of the final rule.

If direct costs were the only consideration, it is likely that final §§ 201.106, 110, and 112 would not have a significant economic impact on a substantial number of small business LPDs. AMS does not have sufficient information to make a quantified estimate of the indirect costs associated with §§ 201.106, 110, and 112, but the indirect costs have the potential to be much larger than the direct costs that AMS was able to quantify. If indirect costs are equal to direct costs, total costs would be about 1.26 percent for LPDs in the smallest quartile. It is possible that the indirect costs are considerably larger than direct costs, in which case larger LPDs would face significant costs. It is likely that costs will be significant for a substantial number of small business LPDs.

Costs to growers will be limited to the time required to review and acknowledge

¹³⁵ The first-year cost per small live poultry dealer of \$63,000 divided by the average net sales for all small live poultry dealers of \$91 million is equal to 0.069 percent.

receipt of updated grower contracts and disclosures. AMS expects that final §§ 201.106, 110, and 112 will have effects on a substantial number of growers. However, the costs will not be significant for any of them. Because AMS does not regulate poultry growers, AMS does not have information regarding the business sizes of poultry growers similar to the information it has concerning LPDs.

Based on the above analyses, it is unlikely that final §§ 201.106, 110, and 112 will create significant costs for a substantial number of small business broiler growers. AMS was not able to quantify indirect costs associated with final §§ 201.106, 110, and 112 but the rulemaking could cause significant costs for a substantial number of small LPDs.

D. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), AMS requested OMB approval of the new information collection and recordkeeping requirements related to this final rule when it was proposed in the *Federal Register* on June 10, 2024 (89 FR 49002). The proposed information collection was for a total of 59,182 hours for the first year, and 42,682 hours per year thereafter. The comment period was open for 60 days and closed on August 9, 2024. Below is a summary of the final rule's information collection requirements, the comments AMS received relating to the information collection requirements of the proposed rule, and any changes AMS made in response to the comments. Additional detail can be found in the Regulatory Impact Analysis (RIA).

Title: Poultry Growing Tournament Systems: Fairness and Related Concerns

OMB Number: 0581-0346.

Expiration Date of Approval: This is a NEW collection.

Type of Request: Approval of a New Information Collection.

Abstract: The information collection requirements in this request are essential to

improve transparency and forestall deception and unfairness in the use of broiler growing arrangements, in accordance with the purposes of the Packers and Stockyards Act, 1921. The revisions to the Packers and Stockyards regulations would require that live poultry dealers (LPDs) establish, maintain, and review written documentation regarding their processes for the design and operation of a poultry grower ranking system that is consistent with the LPD duty of fair comparison, provide information through disclosures to growers when requesting that growers make additional capital investments, and submit contract and disclosure documentation to USDA when contract modifications result in reduced annual grower compensation during a transition period.

Under this final rule, LPDs must develop and document policies and procedures for the design and operation of their tournament system consistent with the duty of fair grower comparison. All LPD documentation will be provided to USDA on request, maintained for no less than five years, and used for ongoing internal compliance activities. The final rulemaking requires that LPDs provide a Capital Improvement Disclosure Document to growers when LPDs request that growers make additional capital investments. In addition, for each of the three years following the effective date, LPDs will be required to provide the prior and modified contracts as well as all related LPD Disclosure Documents to USDA if any contract modification or renewal results in less than the prior annual-calendar year's complex-wide average gross payment to the grower. The estimates provided below apply only to LPDs when they are required to provide the information to growers or create documentation for internal use and review. Poultry growers would not be required to provide information but would be able to use the information provided by LPDs to analyze additional capital investment decisions.

Broiler Grower Compensation Design Under § 201.106(c)

Estimate of Burden: Public burden for this collection of information is estimated to average 0.01 hours per response (years two through four), 0 hours per year thereafter.

Respondents: Live poultry dealers.

Estimated Number of Respondents: 42

Estimated Number of Responses: 20,014

Estimated Number of Responses per Respondent: 477

Estimated Total Annual Burden on Respondents: 0 hours in the first year, and 194 hours per year thereafter for years two through four.

Operation of Broiler Grower Ranking Systems Under § 201.110(a) and (b)(1)(i) through (v)

Estimate of Burden: Public burden for this collection of information is estimated to average 193.33 hours per response (first year), 169.61 hours per year thereafter.

Respondents: Live poultry dealers.

Estimated Number of Respondents: 42

Estimated Number of Responses: 184

Estimated Number of Responses per Respondent: 4

Estimated Total Annual Burden on Respondents: 35,572 hours in the first year, and 31,208 hours per year thereafter.

Communication and Cooperation Under § 201.110(b)(1)(vi)

Estimate of Burden: Public burden for this collection of information is estimated to average 45.00 hours per response (first year), 16.00 hours per year thereafter.

Respondents: Live poultry dealers.

Estimated Number of Respondents: 42

Estimated Number of Responses: 42

Estimated Number of Responses per Respondent: 1

Estimated Total Annual Burden on Respondents: 1,890 hours in the first year, and 672 hours per year thereafter.

Broiler Grower Capital Improvement Disclosure Document Under § 201.112

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.61 hours per response (first year), 0.61 hours per year thereafter.

Respondents: Live poultry dealers.

Estimated Number of Respondents: 42

Estimated Number of Responses: 1,001

Estimated Number of Responses per Respondent: 24

Estimated Total Annual Burden on Respondents: 607 hours in the first year, and 607 hours per year thereafter.

AMS estimates that 42 LPDs would each submit the prior and modified contracts as well any LPD Disclosure Documents prepared with respect to those contracts to AMS as required under final § 201.106(c). AMS arrived at its estimate that 477 responses would be produced per LPD during each of years two, three, and four following the rule effective date in complying with the new requirements during a transition period following modification and renewal of broiler growing contracts by dividing the 20,014 grower contracts with broiler growers that were reported by 42 LPDs that filed fiscal year 2023 Annual Reports with AMS. AMS does not have access to sufficient data and cannot predict the number of complexes for which the annual calendar year's complex-wide average gross payment to the grower will be less than the prior year. Based on information provided by subject matter experts, AMS estimates that LPDs would be able to submit the required documentation for all contracts to USDA electronically once per year for a fixed annual time cost per complex. As a result, the estimate that all LPDs will provide 477 responses per year in years two through four therefore likely overestimates the burden by a substantial amount given that average grower payments may not be less than the prior year at most complexes. AMS estimates the annual cost of collecting and submitting required contract documents in years two through four, including management, legal, administrative, and information technology time, will require an

average 0.01 hours each. AMS arrived at the estimates of the number of hours on an annual basis to submit required contract documentation by dividing the number of hours to collect and submit the required documents (184 hours in each of years two through four) by the annual number of responses for all LPDs (20,014).

AMS estimates that 42 LPDs would each establish, maintain, and review documentation of written processes for the design and operation of a poultry grower ranking system that is consistent with a duty of fair comparison as required under final § 201.110.¹³⁶ AMS arrived at its estimate that four (4) responses would be produced per LPD in complying with new requirements for poultry grower ranking system fairness policies and procedures by dividing the 184 broiler plants (or complexes) indicated in the fiscal year 2023 Annual Report filed by 42 LPDs with broiler production.¹³⁷ AMS estimates first-year development and production of § 201.110 policies and procedures, including legal, management, administrative, and information technology time, would require an average of 193.33 hours for each response, while ongoing annual maintenance, compliance monitoring, production, and distribution would take 169.61 hours. AMS estimates first-year development and production of § 201.110 policies and procedures, including legal, management, administrative, and information technology time, would require an average of 193.33 hours for each response, while ongoing annual maintenance, compliance monitoring, production, and distribution would take 169.61 hours. AMS arrived at the estimates of the number of hours per response on an annual basis to set up, produce, distribute, monitor, review, and maintain § 201.110 policies and procedures by dividing the total number of hours required (35,572 first-year hours and 31,208 ongoing hours) by the annual number of responses for all LPDs (184).

¹³⁶ Responses and costs related to final § 201.110(b)(1)(vi), “Communication and cooperation,” are discussed below separately from the other paragraphs of § 201.110. Costs associated with final § 201.110(b)(2), “Record retention,” are included in cost estimates for § 201.110(b)(1).

¹³⁷ All live poultry dealers are required to annually file PSD form 3002 “Annual Report of Live Poultry Dealers,” OMB control number 0581-0308. The Annual Report form is available to the public at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

AMS estimates that 42 LPDs would each develop and document one set of processes that address communication and cooperation when resolving grower concerns as required under final § 201.110(b)(1)(vi). AMS estimates first-year set-up and implementation of the plan, including management, legal, administrative, and information technology time, would require approximately 45.00 hours. AMS estimates ongoing annual implementation of communication, cooperation, and dispute resolution processes would require an average of 16.00 hours.

AMS estimates each of 42 LPDs would create and distribute an average of 24 Broiler Grower Capital Improvement Disclosure Documents each year for poultry growers relating to additional capital investments, as required under final § 201.112. AMS arrived at its estimate of 24 developed disclosure documents per LPD per year from AMS records which show 42 LPDs filed fiscal year 2023 Annual Reports with AMS, and their reports indicate that they had 20,014 growing contracts with broiler growers during fiscal year 2023. Based on information provided by subject matter experts, AMS estimates that capital upgrades would be required at 5 percent of complexes each year, triggering creation of a new disclosure document for approximately 5 percent of growers annually. AMS multiplied the 20,014 growing contracts by 5 percent and divided by the 42 LPDs to arrive at 24 disclosure documents per LPD. LPDs would only be required to provide the Broiler Grower Capital Improvement Disclosure Document to growers when requesting or requiring the grower to make an additional capital investment. AMS estimates first-year and ongoing development, production, and distribution of the disclosure documents, including management, legal, administrative, and information technology time, would require an average 0.61 hours each. AMS arrived at the estimates of the number of hours on an annual basis to set up, produce, and distribute the Broiler Grower Capital Improvement Disclosure Documents by dividing the number of hours to set up, produce, and distribute the disclosures (607 first-year and annual ongoing hours)

by the annual number of responses for all LPDs (1,001).

Under § 201.106(c) LPDs are required for a period for three years following the effective date to submit to USDA copies of the prior and modified contracts and any LPD Disclosure Documents prepared under § 201.102 if the annual-calendar year's complex-wide average gross payments to growers at a complex of an LPD is less than the prior annual-calendar year's complex-wide average gross payments to growers at the complex.

Final § 201.110 would require LPDs to provide a fair comparison among growers when basing compensation on a grouping or ranking of growers delivering during a specified period of time and would also require LPDs to document how they comply with that duty of fair comparison. The policies and procedures documentation required under final § 201.110 must describe the LPD's processes for the design and operation of a poultry grower ranking system for broiler growers that is consistent with the duty of fair comparison. The documentation of processes under final § 201.110, must also include a plan for communication and cooperation between the LPD and growers. LPDs are required to document, maintain, and comply with all policies and procedures required under final § 201.110 on an ongoing basis and provide them to USDA upon request. LPDs must retain all written records relevant to compliance with § 201.110(b) for no less than 5 years from the date of record creation.

Final § 201.112 would require LPDs to provide a Broiler Grower Capital Improvement Disclosure Document any time the LPD requests existing broiler chicken growers to make an additional capital investment (\$12,500 or more per structure excluding maintenance or repair). The Broiler Grower Capital Improvement Disclosure Document must include information about the goal or purpose of the investment, financial incentives and compensation for the grower associated with the additional capital investment, all schedules and deadlines for the investment, a description of changes to housing specifications, and analysis of projected returns.

Costs of Final §§ 201.106, 110, and 112

The combined costs to LPDs for compliance with the recordkeeping and disclosure requirements of final §§ 201.106, 110, and 112 are expected to be \$3,807,000 in the first year, \$3,181,000 in years two through four, and \$3,168,000 in subsequent years. The total hours estimated for the LPDs to create, produce, distribute, and maintain these documents are 38,069 in the first year, 32,671 in in years two through four, and 32,487 in subsequent years. As stated previously, the estimates provided apply only to LPDs who would be required to provide the information to growers.

The amount of time required for recordkeeping and disclosure was estimated by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in AMS's Packers and Stockyards Division (PSD) conducting investigations and compliance reviews of regulated entities.

AMS used the May 2023 U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics for the time values in this analysis.¹³⁸ BLS estimated an average hourly wage for general and operations managers in animal slaughtering and processing to be \$67.99 per hour; \$34.81 per hour for administrative assistants; \$67.41 per hour for IT system managers; and \$98.71 per hour for lawyers in food manufacturing. In applying the cost estimates, AMS marked-up the wages by 41.79 percent to account for fringe benefits. The average hourly wage rates, adjusted to include the 41.79 percent markup for benefits, are as follows: \$96.40 for managers, \$49.36 for administrative assistants; \$95.58 for IT system managers, and \$139.96 for lawyers.

Comments From the Proposed Rule and Changes to the Final Rule

After consideration of public comments, AMS determined to adopt the proposed rule as a final rule with several modifications. This section provides an overview of the

¹³⁸ Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available at <https://www.bls.gov/oes/special-requests/oesm23all.zip> (accessed 9/14/2024). Featured OES Searchable Databases: U.S. Bureau of Labor Statistics (bls.gov) (accessed September 2024).

comments made specifically on the costs and benefits and how the final rule differs from the proposed rule in that analysis.

Industry trade associations and LPDs commented that the full cost of implementing the proposed rule would be far greater than estimated by AMS. The commenters asserted that AMS greatly underestimated the costs that will be required for employing teams with highly specialized legal and technical expertise to implement the proposed rule by modifying or replacing grower contracts and communicating changes to growers. Commenters suggested that AMS did not adequately consider the total number of hours needed, but none provided quantified estimates. LPDs also commented that hourly rates paid to specialized industry professionals such as attorneys should be much higher. Commenters also suggested that implementation of the rule would require LPDs to hire and train additional staff and pull resources away from other important activities.

AMS consulted auditors and supervisors as subject matter experts who are familiar with LPDs, integrators, and broiler complex operations from many years of experience with AMS in auditing LPDs for compliance with the Act. The final rule provides an extended period of approximately 18 months following publication in the *Federal Register* before the effective date, to permit sufficient time for implementation. Hourly rates used in cost analysis for the proposed rule were based on averages for legal, management, administrative, and information technology labor categories specifically within the agricultural sector as published and annually updated by the U.S. Bureau of Labor Statistics. Although the largest corporations likely employ lawyers and other specialists at hourly rates much higher than the national average, contract development and review efforts at those companies are spread across many complexes. AMS expects that average hourly rates provide an appropriate benchmark for estimating industry average costs. After further discussion with subject matter experts, AMS added a modest amount of time to account for the cost of information technology work in preparing §

201.112 disclosures. AMS subject matter experts confirmed that all other costs from the proposed rule are accurate estimates and accordingly, AMS made no other changes to the information collection requirements of the rule based on this comment.

AMS also received comments on the proposed rule in support of adding measures to protect growers against the risk that LPDs might unfairly reduce broiler grower total compensation during a transition period after implementation of the final rule. Based on comments received, AMS added § 201.106(c), which will require LPDs to submit copies of the prior and modified contracts and disclosures to AMS if average gross grower payments at a complex show year-over-year decline following a contract modification during the three calendar years commencing with and including the effective date of the rule. AMS will review the information provided by LPDs to identify any potentially unfair practices related to broiler grower compensation. AMS consulted with its internal subject matter experts and added direct information collection costs for LPDs to comply with this provision during the three-year period.

AMS also received comments suggesting that some of the detailed documentation requirements of proposed § 201.110(b) were similar to existing P&S documentation and disclosure requirements and might create unnecessarily burdensome and complex paperwork that could burden service technicians at broiler complexes and keep them from other important responsibilities such as assisting growers. In response to these comments, AMS made several changes to § 201.110(b) in the final rule that included consolidating and streamlining the documentation requirements and removing some detailed requirements delineated under subparagraphs in the proposed rule. AMS expects that these changes in final § 201.110(b) will add clarity and minimize potential confusion about the documentation requirements, thereby making them more effective. AMS expects these changes will somewhat reduce total recordkeeping requirements for LPDs. Based on consultation with internal subject matter experts, AMS determined that the

precise amount of time savings is difficult to estimate. AMS therefore chose a cautious approach to avoid underestimating costs and did not reduce the total recordkeeping requirements or the time cost of the information collection for LPDs. Accordingly, these changes did not affect the estimation of costs or benefits in the final rule.

The proposed rule included § 201.110(b)(2), “Compliance review,” which required LPDs to conduct a required bi-annual review of the processes set out in § 201.110(b)(1). AMS removed this requirement from the final rule in response to comments that self-audits would be burdensome for LPDs, and that elimination of this requirement would not substantially diminish effective compliance with § 201.110. Compliance will be enforced through regular AMS review of the policies and procedures LPDs are required to establish and maintain under § 201.110(b). Accordingly, removal of § 201.110(b)(2) eliminated the burden of compliance review on LPDs and reduced costs from the proposed to the final rule by the cost estimate in the proposed rule for that provision.

Based on comments received, AMS added a provision at § 201.112(c) to require that the LPD make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Broiler Grower Capital Improvement Disclosure Document. Reasonable efforts include, but are not limited to, providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the poultry grower's geographic area. Reasonable efforts, depending on the facts and circumstances (such as convenience, expense, and timeliness of the translation), may also include allowing the grower access to a computer-generated translation of the Disclosure Document and additional time to review any translated Disclosure Document. A similar requirement was established for LPDs in § 201.102(g)(4). As LPDs already have all necessary information

to make reasonable efforts to assist growers in translating disclosure documents and have made it available to growers who request the information, AMS did not add any time to its information collection cost estimates for LPDs to comply with this new requirement.

E. Executive Order 12988—Civil Justice Reform

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations to avoid unduly burdening the court system. This rule has been reviewed under Executive Order 12988 and complies with these requirements. This rule is not intended to have retroactive effect. This rule would not preempt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rulemaking. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this rule is intended to interfere with a person's right to enforce liability against any person subject to the Act under authority granted in section 308 of the Act.

F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult with Indian Tribes on a government-to-government basis on policies that have Tribal implications. This includes regulations, legislative comments or proposed legislation, and other policy statements or actions. Consultation is required when such policies have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or the distribution of power and responsibilities between the Federal Government and Indian Tribes. The following is a summary of activity to date.

AMS engaged in a Tribal Consultation in conjunction with a previous rulemaking also under the Act (*Inclusive Competition and Market Integrity Under the Packers and Stockyards Act* (87 FR 60010, October 3, 2022)) on January 19, 2023, in person in Tulsa,

Oklahoma, and virtually. AMS received multiple Tribal comments from that Consultation, many of which were specific to and considered in that rulemaking. In that consultation, Tribes raised legal concerns with respect to the jurisdiction of the AMS enforcement of the P&S Act. Tribes commented that the P&S Act does not apply to Tribes and Tribal entities. Those comments raise a legal issue of statutory interpretation, but these concerns are not directly implicated by this final rule. This final rule provides additional standards for individual LPDs or growers, and AMS does not find that this rule carries substantial direct effects on one or more Indian Tribes beyond the purely legal issue raised during consultation.

AMS recognizes and supports the Secretary's desire to incorporate Tribal and Indigenous perspectives, remove barriers, and encourage Tribal self-determination principles in USDA programs, including hearing and understanding Tribal views on legal authorities and cost implications as facts and circumstances develop. If a Tribe requests additional consultation, AMS will work with USDA's Office of Tribal Relations to ensure meaningful consultation is provided in accordance with Executive Order 13175.

G. Civil Rights Impact Analysis Statement

AMS has considered the potential civil rights implications of this final rule on members of protected groups to ensure that no person or group would be adversely or disproportionately at risk or discriminated against on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA. This final rule does not contain any requirements related to eligibility, benefits, or services that would have the purpose or effect of excluding, limiting, or otherwise disadvantaging any individual, group, or class of persons on one or more prohibited bases.

In its review, AMS conducted a disparate impact analysis, using the required calculations, which resulted in a finding that Asians and Native Hawaiian or Other Pacific Islanders could be disproportionately impacted by the rule, insofar as fewer farmers in those groups participate in poultry production than would be expected by their representation among U.S. farmers in general and therefore are less likely to benefit, as a whole, from the protections provided by this rule.¹³⁹ However, the regulations would provide benefits equally to all individual poultry growers across demographic characteristics, with some demographic groups being more or less represented among poultry growers. AMS will enhance efforts to notify the groups found to be more significantly impacted of the regulations and their implications. AMS will conduct mitigation and monitoring strategies and reach out to several organizations that represent the interests of the impacted groups.

H. E-Government Act

USDA is committed to complying with the E-Government Act by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

I. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104-4) requires Federal agencies to assess the effects of their regulatory actions of State, local, and Tribal governments, or the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more (adjusted for inflation) in any 1 year for State, local or Tribal governments, in the aggregate, or to the private

¹³⁹ Among Asian and Native Hawaiian or Other Pacific Islander growers, a smaller percent participates in livestock or poultry agriculture (animal agriculture) than in other types of agriculture. A larger percent of American Indian or Alaskan Native growers participates in animal agriculture than in other types of agriculture. The other demographic groups' participation in animal agriculture tended to fall within 10 percentage points of their participation in agriculture overall.

sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule will not compel the expenditure in any one year of \$100 million or more (adjusted for inflation) by State, local, and Tribal governments, in the aggregate, or by the private sector. Therefore, a statement under 2 U.S.C. 1532 is not required.

J. Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C. 801 *et seq.*), OMB's Office of Information and Regulatory Affairs has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

List of Subjects in 9 CFR Part 201

Confidential business information, Reporting and recordkeeping requirements, Stockyards, Surety bonds, Trade practices.

For the reasons stated in the preamble, AMS amends 9 CFR part 201 as follows:

PART 201—ADMINISTERING THE PACKERS AND STOCKYARDS ACT

1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181-229c.

2. Add § 201.106 to subpart N to read as follows:

§ 201.106 Broiler grower compensation design.

(a) *Rate transparency.* When a broiler growing arrangement between the live poultry dealer and the broiler grower compensates the grower based upon a grouping, ranking, or comparison of growers delivering poultry during a specified period, the live poultry dealer may not use the grower's grouping, ranking, or comparison to others to reduce any rate of compensation under the broiler growing arrangement.

(b) *Excessive variability.* The Secretary presumes that a live poultry dealer violates the Act when aggregate gross annual payments based upon a grouping, ranking,

or comparison of growers exceed 25 percent of total gross payments to growers in a complex on an annual-calendar year basis.

(c) *Transition.* For modified or renewed broiler growing arrangements subject to paragraph (a) of this section, for each of the three calendar years commencing with and including the year this section becomes effective, if the annual-calendar year's complex-wide average gross payments to growers at a complex of a live poultry dealer is less than the prior annual-calendar year's complex-wide average gross payments to growers at the complex, the live poultry dealer must submit to the Secretary the following:

(1) A copy of the prior broiler growing arrangement and the modified or renewed growing arrangement; and

(2) Any Live Poultry Dealer Disclosure Document prepared under § 201.102 with respect to the prior broiler growing arrangement and the modified or renewed broiler growing arrangement for the growers at the complex.

3. Add § 201.110 to subpart N to read as follows:

§ 201.110 Operation of broiler grower ranking systems.

(a) *Fair comparison.* – (1) *Duty of fair comparison.* Live poultry dealers providing compensation to broiler growers based upon a grouping, ranking, or comparison of growers delivering poultry must design and operate their poultry grower ranking system to provide a fair comparison among growers.

(2) *Fair comparison factors.* In determining whether the live poultry dealer reasonably designed or operated its poultry grower ranking system to deliver a fair comparison among growers or whether the live poultry dealer must utilize a non-comparison compensation method, the Secretary shall consider the following:

(i) Whether the distribution of inputs by the live poultry dealer causes material differences in performance, and whether appropriate adjustments to grower compensation will be made.

(ii) Whether the assignment of flock production practices by the live poultry dealer causes material differences in performance, and whether appropriate adjustments to grower compensation will be made.

(iii) Whether the designated time period used in the live poultry dealer's comparison is appropriate, including whether the live poultry dealer uses one or more groupings, rankings, or comparisons of growers to mitigate the effects of any differences in inputs over the designated time period.

(iv) Whether conditions and circumstances outside the control of the live poultry dealer render comparison impractical or inappropriate.

(v) Whether the live poultry dealer has made reasonable efforts to timely resolve concerns a grower raises regarding the live poultry dealer's design and operation of its poultry grower ranking system to deliver a fair comparison among growers.

(vi) Any other factor relevant to a fair comparison.

(3) *Non-comparison compensation method.* When a live poultry dealer uses a poultry grower ranking system and cannot conduct a fair comparison for one or more growers, the live poultry dealer must compensate those growers through a non-comparison method specified in the contract that reflects reasonable compensation to the grower for its services.

(b) *Documentation.* – (1) *Policies and procedures.* A live poultry dealer must establish and maintain written documentation of its processes for the design and operation of a poultry grower ranking system for broiler growers that is consistent with the duty of fair comparison. The written documentation must include the following:

(i) *Inputs under live poultry dealer control.* How and when the live poultry dealer assigns, adjusts, or otherwise accounts for similarities and differences of quality and quantity in the delivery of inputs to growers.

(ii) *Flock production practices.* How and when the live poultry dealer assigns,

adjusts, or otherwise accounts for differences in production practices.

(iii) *League composition*. How the dealer determines groupings of growers for settlement.

(iv) *Evaluation period*. A reasonable time period over which the dealer evaluates the duty of fair comparison.

(v) *Non-comparison*. When a live poultry dealer may remove growers from a ranking group, and how the live poultry dealer compensates the growers to satisfy the non-comparison compensation method under paragraph (a)(3) of this section.

(vi) *Communication and cooperation*. How the live poultry dealer resolves a grower's concerns with the design or operation of a poultry grower ranking system for broiler growers that is consistent with the duty of fair comparison, including the timeliness of the resolution.

(2) *Record retention*. The live poultry dealer must retain all written records relevant to its compliance with this paragraph (b) for no less than 5 years from the date of record creation.

4. Add § 201.112 to subpart N to read as follows:

§ 201.112 Broiler grower Capital Improvement Disclosure Document.

(a) *Disclosure requirement*. When a live poultry dealer requests that a broiler grower make an additional capital investment, the live poultry dealer must provide the broiler grower with a Capital Improvement Disclosure Document, as described in paragraph (b) of this section.

(b) *Disclosure contents*. The Capital Improvement Disclosure Document must disclose the following in a clear, concise, and understandable manner:

(1) The purpose of the additional capital investment for both the live poultry dealer and the grower, and a summary of all research and other supporting material that the live poultry dealer has relied upon in justifying the additional capital investment.

(2) All financial incentives and compensation for the grower associated with the additional capital investment.

(3) All construction schedules related to the request for additional capital investment.

(4) The housing specifications associated with the additional capital investment.

(5) Any required or approved manufacturers or vendors, and all financial benefits, if any, that the live poultry dealer or any officer, director, decision-making employee, or close family member of any such person, receives from the use of the required or approved manufacturer or vendor.

(6) An analysis of projected returns the grower can expect related to the additional capital investment, including any assumptions, risks, or uncertainties, sufficient to allow the grower to make their own projections.

(7) This statement that “USDA has not verified the information contained in this document. If this disclosure by the live poultry dealer contains any false or misleading statement or a material omission, a violation of Federal and/or State law may have occurred. Violations of Federal and State laws may be determined to be unfair, unjustly discriminatory, or deceptive and unlawful under the Packers and Stockyards Act, as amended. You may file a complaint at *farmerfairness.gov* or call 1-833-DIAL-PSD (1-833-342-5773) if you suspect a violation of the Packers and Stockyards Act or any other Federal law governing fair and competitive marketing, including contract growing, of livestock and poultry. Additional information on rights and responsibilities under the Packers and Stockyards Act may be found at *www.ams.usda.gov*.”

(c) *Translation.* Upon delivery to the grower, the live poultry dealer must make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Capital Improvement Disclosure Document.

5. Add § 201.290 to subpart N to read as follows:

§ 201.290 Severability.

If any provision of this subpart or any component of any provision is declared invalid, or the applicability thereof to any person or circumstances is held invalid, it is the Agricultural Marketing Service's intention that the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby with the remaining provision, or component of any provision, to continue in effect.

Erin Morris,
Associate Administrator,
Agricultural Marketing Service.

[FR Doc. 2025-00508 Filed: 1/15/2025 8:45 am; Publication Date: 1/16/2025]