

DEPARTMENT OF AGRICULTURE**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:** Proposed rule.

SUMMARY: The U.S. Department of Agriculture’s (USDA) Agricultural Marketing Service (AMS or the Agency) is soliciting comments on proposed revisions to its regulations under the Packers and Stockyards Act, 1921 (P&S Act or Act). The proposal would prohibit certain payment practices under poultry grower ranking systems (commonly known as tournaments) in contract poultry production for broiler chickens, require live poultry dealers (LPDs) to adopt policies and procedures for operating a fair ranking system for broiler growers, and require LPDs to provide certain information to broiler growers when the LPD requests or requires the grower to make additional capital investments (ACIs). AMS proposes these changes in response to numerous complaints from growers about the use of tournament systems. AMS intends for the proposed regulations to increase transparency and address deception and unfairness in broiler grower payments, tournament operations, and capital improvement systems.

DATES: Comments must be received by August 9, 2024. Comments on the information collection aspects of this proposed rule must be received by August 9, 2024.

ADDRESSES: Comments must be submitted through the Federal e-rulemaking portal at <https://www.regulations.gov> and should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting comments will be made public on the internet at the address provided above. A plain-language summary of this proposed rule is available at <https://www.regulations.gov> in the docket for this rulemaking.

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

On June 8, 2022, AMS published an advanced notice of proposed rulemaking (ANPR) in the **Federal Register** titled, “Poultry Growing Tournament Systems: Fairness and Related Concerns” (87 FR 34814), to inform policy development and rulemaking under the P&S Act regarding improved fairness in poultry grower ranking systems in contract poultry production.¹ In the ANPR, AMS solicited comment from the public on how to address potential unfairness arising from the use of poultry grower ranking systems under contracts to grow broiler chickens. As with past opportunities for input, commenters identified a lack of transparency regarding payments under tournament pay systems, fairness in tournament operations, and additional capital improvement requirements as ongoing concerns. These comments and AMS’s Packers and Stockyards Division’s (PSD) expertise provide the basis for this proposed rulemaking.

Section 407(a) of the P&S Act (7 U.S.C. 228(a)) authorizes the Secretary of Agriculture to make rules and regulations as necessary to carry out the provisions of the Act (7 U.S.C. 181 *et seq.*). The Secretary has delegated the responsibility for administering the Act to AMS. Under this authority, AMS is issuing this proposed rule to carry out the provisions of section 407 of the Act, as well as sections 202(a) (which prohibits “any unfair, unjustly discriminatory, or deceptive practice or device”), 401 (which requires an LPD to

“keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business”), and 410 (which bans the failure to pay “the full amount due [to the] poultry grower on account of such poultry”). The Federal Trade Commission (FTC)’s extensive experience enforcing prohibitions against unfair practices, unfair methods of competition, and deceptive practices arising under the FTC Act has also informed aspects of this proposed rule.²

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

- Prohibit 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.
- Establish 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 including the distribution of inputs and flock production practices, the time period of the comparison, the conditions and circumstances for the comparison, and the reasonableness of efforts to resolve disputes.
- Require 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, review their compliance with these processes not less than once every two years, and retain all relevant written records for five years.
- Require LPDs to provide a grower with a Capital Improvement Disclosure Document when an LPD requests that the grower make an additional capital investment.
- Introduce a severability clause that would permit for certain parts of the

¹ The comment period ended September 6, 2022. In response to industry organizations’ request for additional time to submit comments, AMS reopened the comment period on September 9, 2022 (87 FR 55319). That comment period closed September 26, 2022.

² 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/AMS-FTPP-22-0046-0143>; Michael Kades, “Protecting livestock producers and chicken growers,” Washington Center for Equitable Growth (May 2022).

regulations to remain in effect even if others are deemed unenforceable.

If the proposed rule is adopted, USDA would enforce the regulations through referral to the Department of Justice (DOJ) for appropriate action or, where failure to pay is implicated, through administrative action. Injured individuals would also have a right to proceed in Federal court. AMS would also conduct compliance reviews of adherence to the proposed regulatory requirements and would investigate suspected violations. Additionally, growers can always file a complaint or tip at [farmerfairness.gov](https://www.farmerfairness.gov) or by calling 1-833-DIAL-PSD (1-833-342-5773) if they suspect a violation of the Act or any other Federal law or regulation governing fair and competitive marketing, including contract growing, of livestock and poultry.

II. Industry Background and Need for the Rulemaking

A. Overview

The current broiler chicken industry is susceptible to both unfairness and deception. To build or upgrade chicken barns, growers both initially and periodically incur substantial debt in loans that typically last 15 years. To meet those obligations and earn a reasonable return, the grower is then dependent on the LPD that provides the chickens (both the number and frequency), the feed, and other inputs. Grower contracts with the LPD are commonly much shorter than the length of the loans. Growers often have little, if any, ability to negotiate their contracts with LPDs or opportunity to switch to alternative LPDs. LPDs' bargaining and market power, premised on lack of competitive alternative LPDs locally, creates significant risk to growers.

Most large LPDs today include a tournament component as part of the compensation arrangement with growers under contract. If a grower's feed conversion performance is above the average, the grower receives a bonus; if the grower is below average, the LPD reduces the grower's compensation. 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 has many problems. For example, if an LPD treats individual growers in a tournament differently (e.g., by providing different quality inputs) the grower's skill would not determine their compensation, which makes for an unfair tournament.

The difference between the length of grower's loan and the length of the grower's contract with an LPD creates another problem. Because LPDs have substantial bargaining power after the initial grower investment, an LPD can require a grower to make ACIs that will increase the grower's debt; if the grower refuses, the LPD can terminate the grower, either actually or constructively (for example, by reducing the number of flocks or chicks delivered). Depending on the facts and circumstances, such actions would be unfair and deceptive practices in violation of section 202(a) of the Act.

B. Industry Background

Until the late 1950s or 1960s, farmers owned their chickens, and the primary value was in the eggs those chickens laid. After a brief period of chicken auctions in the 1950s, farming chicken meat for distribution led to "grower" contract arrangements with feed distributors and later with processors. As these arrangements gained popularity, processors experimented with various compensation methods to capture costs and incentivize grower performance. One commonly used compensation method was a fixed performance standard payment system. Under a fixed performance standard payment system, individual grower performance is compared to a fixed standard of feed cost or efficiency set by the LPD rather than to an average of other growers in a contemporaneous settlement group. Other methods included square footage contracts, which remain common with pullet farmers (*i.e.*, farmers who raise chicks from hatching until they are ready to produce eggs, or about 20–22 weeks). Pullet farmers typically are paid weekly or biweekly based on the square footage of chicken housing, or breeder farmers, who are typically paid a flat rate per dozen eggs.³ Since the 1990s, the broiler industry overwhelmingly uses the tournament system, described below in section II.C., to compensate growers.

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. 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.⁴ Under a production contract, the LPD provides the inputs, like chicks, feed, and veterinary treatment services, that the contract broiler grower uses in growing the flock and 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.⁵ 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 an initial substantial investment in housing. Most farms have multiple houses, and the total investment required can easily exceed \$1 million.⁶ The housing, which growers build and equip specifically for the purpose of growing poultry, has an expected life of 20 years or more. The costs of adapting the housing for any other purpose can be prohibitive.⁷ Over time, LPDs have requested or required that growers make ACIs to upgrade housing and equipment for improved efficiency during the contracting relationship. An ACI is defined under 9 CFR 201.2, in relevant part, as an investment or combination of investments of \$12,500 or more per structure paid by a poultry grower or swine production contract grower over the life of the poultry growing arrangement or swine production contract beyond the initial investment for facilities used to grow, raise, and care for poultry or swine. Growers generally finance these long-term assets against much shorter-term production contracts, which generally range from between less than a year (or "flock to flock") to less than five years.⁸ This can

⁴ USDA, NASS. *2022 Census of Agriculture: United States Summary and State Data*. Volume 1, Part 51. Issued February 2024 p. 51 and p.411. https://www.nass.usda.gov/Publications/AgCensus/2022/Full_Report/Volume_1_Chapter_1_US/usv1.pdf.

⁵ 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.

⁶ See, for example, Cunningham and Fairchild (November 2011) Op. Cit.; Simpson, Eugene, Joseph Hess and Paul Brown, *Economic Impact of a New Broiler House in Alabama*, Alabama A&M & Auburn Universities Extension, March 1, 2019 (estimating a \$479,160 construction cost for a 39,600 square foot broiler house).

⁷ For a discussion of the difficulty in adapting of broiler grow houses for other purposes, see Vukina and Leegomonchai 2006, Op. Cit.

⁸ MacDonald, James M. "Financial Risks and Incomes in Contract Broiler Production." *Amber Waves* August 4, 2014. <https://www.ers.usda.gov/amber-waves/2014/august/financial-risks-and-incomes-in-contract-broiler-production/> (last accessed 12/13/2023).

³ See, e.g., *New Farmer's Guide to the Commercial Broiler Industry: Farm Types & Estimated Business Returns*—Alabama Cooperative Extension System (aces.edu).

expose growers to financial risk and uncertainty around debt repayment and the recoupment of their investments. Growers thus are dependent on LPDs—who control most aspects of a grower’s production—to recoup their substantial initial and subsequent investments.⁹

Currently, many LPDs operate with the benefit of substantial market power in local markets to purchase grower services. Broiler grower operations must

be located in close proximity (usually less than 50 miles) to an LPD’s feedmills, 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 can result in poultry production that is often highly localized and concentrated at a regional level. Most

growers have few LPDs in their area with whom they can contract. The table below shows the number of LPDs (referred to as integrators in the table) that broiler growers have in their local areas by percent of total farms (number of growers), total birds produced (number of birds), and total production (pounds of birds produced).

TABLE 1—LPDS (INTEGRATORS) IN BROILER GROWER’S AREA ^{10 11}

Integrators in grower’s area *	Farms	Birds	Production	Can change to another integrator
Number	Percent of total			Percent of farms
1	21.7	23.4	24.5	7
2	30.2	31.9	31.7	52
3	20.4	20.4	19.7	62
4	16.1	14.9	14.8	71
>4	7.8	6.7	6.6	77
No Response	3.8	2.7	2.7	Not available.

* MacDonald. (June 2014) Op. Cit. (Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011. “Respondents were asked the number of LPDs in their area, which was subjectively defined by each grower. They were also asked if they could change to another LPD if they stopped raising broilers for their current LPD.” The 7 percent of those facing a single LPD assert that they could change, presumably through longer distance transportation to an LPD outside the area. Ibid. p. 29 and 30.).

The data in the table shows that 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. This limited competition among LPDs accentuates the contract risks to growers. Even where multiple LPDs are present, there can be significant costs to switching, 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 cycles. By requiring ACIs specific to that LPD, an LPD may inhibit the ability of growers to switch to a competing LPD due to the costs associated with those differing housing specifications.

In another study of broiler concentration, MacDonald and Key (2012) found that the level of market concentration in an area tends to correlate with measurable payment impacts on growers.¹² MacDonald and Key reported that grower payments (per pound, controlling for bird size) were

lower in markets with fewer dealers. While the study could not identify the causal impact of LPD numbers on payments, the results conform to general economic theory about the impact that reduced competition would have on prices. For example, going from four LPDs to two LPDs lowered grower payments by four percent, and going from four LPDs to one LPD lowered grower payments by eight percent, controlling for compensation rates and features of the grower operation and contract.

Table 1 however, also shows that more than 23 percent of broiler growers (farms) have four or more integrators in the grower’s area, and more than 71 percent report that they can change integrator (although at what cost is not reflected). Although growers in these areas may have relatively more bargaining power than those in more concentrated markets, they remain at significant bargaining disadvantages relative to integrators and commonly subject to industry-wide practices. The potential for the abuse of market power may vary based on concentration and practices employed by specific LPDs in local markets or nationally.

In this proposed rule, AMS uses the term “inputs” to mean resources

supplied by LPDs, such as chicks or feed. There is often variation in the quality of these inputs, which can impact the performance of a grower’s flock. If an LPD distributes inputs of substantially different quality to growers within a settlement pool, these inputs contribute to differences in relative grower performance, with the growers receiving the lowest quality inputs receiving lower pay as a result. Several commenters in the 2022 ANPR, for example, noted that the quality of inputs can vary, unfairly shifting risk to the growers.

Likewise, LPDs determine production practices on growers’ farms, which also affect growers’ pay. In this proposed rule, 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 these factors are not applied evenly across grower participants in tournaments, that unevenness also unfairly skews relative performance measures. If an LPD uses a

⁹ For a discussion the difficulty in adapting of broiler grow houses for other purposes see Tom Vukina and Poramet Leegomonchai. “Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry.” *American Journal of Agricultural Economics* 88 (2006).

¹⁰ MacDonald, James M. 2014. Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, USDA Economic Research Service.

¹¹ The term “integrator” used in MacDonald (June 2014) refers to a vertically integrated poultry company that contracts with farmers who serve as

growers. LPDs referenced elsewhere in this document are also “integrators.”

¹² James M. MacDonald and Nigel Key. “Market Power in Poultry Production Contracting? Evidence from a Farm Survey.” *Journal of Agricultural and Applied Economics* 44 (November 2012): 477–490.

settlement pool to compare growers to whom the LPD has assigned substantially different production practices, perhaps, for example, to test the consequences of different feed or veterinary practices, the growers receiving the less advantageous production practices will receive relatively lower pay. These production decisions may result in variation in the amount of feed required per pound of meat that is unrelated to grower effort or acumen. Including both types of growers for comparison in a single settlement pool is analogous to matching wrestlers across different weight classes.

As described above, the organization and structure of broiler production is characterized by a high degree of vertical integration, market power in many regional markets, substantial investment in production capital that is specific to a single LPD, nearly universal use of production contracts, and use of complex grower compensation systems based on relative performance. Asymmetric information, incomplete contracts, and hold-up are also issues of concern in poultry contracting that motivate the specific interventions proposed in this proposed rule.

Information asymmetry in poultry contracting arrangements can contribute 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. LPDs have information related to (as well as control over) many areas of strategic decision making that impact growers. For example, LPDs use systems of grower compensation and methods for calculating grower payment designed to limit total grower compensation, while maximizing production efficiency. LPDs also have exclusive information about many factors under their control that influence the performance elements of poultry production and thereby affect grower payments. Even where some of information is disclosed to growers, LPDs continue to have much more information about the quality and distribution of grower inputs, specific production practices the LPD assigns to individual growers, the likely effect on grower performance of different input qualities and production practices, and the manner in which the LPD chooses to compare growers in a ranking system.¹³ In addition, LPDs determine

the types of ACIs they request or require of growers, which growers may not anticipate and can place significant drains on available cash and substantially degrade expected investment returns. Neither growers, nor AMS, have ready access to the information that informs these specific requests unless LPDs provide it to them. Information asymmetry can lead to market failure in the broiler production industry because growers must make important production decisions without access to important information. This also facilitates abusive practices where the information would help growers, and AMS, identify and halt those practices sooner.

Contracts used in broiler production are also often incomplete. Under the typical poultry production contract, LPDs compensate the grower for raising live poultry from the time of chick delivery through retrieval by the LPD for slaughter. Such a contract 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. Incomplete contracts arise when terms key to basic functioning of the contract do not meet these conditions and magnify risks with respect to the performance of the other contractual party, leading to other potential inefficiencies. In this instance, incomplete contracts may give LPDs discretionary latitude to deviate from expectations.

LPDs often offer highly complex pay systems in broiler contracts based on the interplay of several separate components, including base pay rate, incentive pay for ACIs or certain production practices, and performance adjustments under the tournament. 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. For example, several ANPR commenters noted the difficulty growers face without having full understanding of—or confidence in—how inputs are distributed or how the quality may affect performance. Their inability to evaluate how this distribution occurs inhibits their ability to effectively contract and to effectively

enforce those contracts to the extent that is possible given the overall power imbalance and concentration in many local markets.

Contracts that require investments in contract-specific assets can give rise to the hold-up problem. The economic concept of a hold-up problem 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 as a result of making a transaction-specific investment, they lose bargaining leverage and become vulnerable to exploitation by the other party. This may involve one party to a contract opportunistically deviating from expectations of the other party or failing to live up to previously agreed upon terms. Hold-up occurs in broiler production due to market failures associated with incomplete grower information, contract-specific investments, and market power, as well as insufficient enforcement around aspects necessary to maintain market integrity and prevent market abuses including unfair breaches of contract. Broiler growers lack sufficient information about the nature of inputs they will receive from the LPD over time, the performance of other growers in the tournament pool, and the nature of complex tournament operations under grower contracts.

The production of broilers requires investment in specialized equipment and facilities, which can be specific to the enterprise of broiler production and have little alternative value outside of a contractual relationship with a limited pool of nearby LPDs (or, in some cases, a single LPD).¹⁴ As a result, the realistic options for growers to reallocate their labor and invested capital are reduced, and growers are committed to growing chickens to pay off the financing of the initial capital investment, plus ACIs. When growers are committed to broiler production to pay off lenders and have few, if any, alternative LPDs with whom they can contract, they are under more pressure to accept less favorable contract terms. LPDs can behave opportunistically by failing to perform under contracts in ways that growers reasonably expect and by requiring ACIs with little or no economic value to the producer. Economic research has shown that hold-up can lead to reduced

¹³ LPDs exercise discretion in fulfilling the contract terms when operating a tournament by, for example, choosing which growers to be included in a settlement group or whether appropriate

comparable growers are available for comparison purposes.

¹⁴ For a discussion of hold-up in the broiler industry, see Vukina and Leegomonchai (2006), *Op. Cit.*

compensation when a grower has only one LPD available with which to contract in the local area.¹⁵

C. The Tournament System

LPDs typically pay broiler growers for the services they provide using a unique system in which growers' pay is based in part on a comparison of their feed conversion relative to other growers. A 2014 survey found that over 93 percent of these broiler production contracts make use of a relative performance payment system, often called a tournament system.¹⁶ 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). This grouping is informally referred to as a settlement group.

Under a typical tournament system, the broiler grower receives a fixed payment per pound of broilers produced, called a base pay rate, plus a calculation adjustment based on how efficiently the grower used the resources provided by the LPD to produce each pound of broilers (informally referred to as a performance adjustment).¹⁷ 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. (As a technical matter, grower contracts sometimes use fixed weights expressed in dollar terms for this calculation.) Broiler growers whose costs are less than the average cost for that tournament settlement group receive a bonus above the base pay rate, while those whose costs are above the average incur a discount from the base pay rate. Broiler contracts also typically specify a minimum rate of pay that the grower can receive after all performance discounts have been applied. The broiler grower may receive additional incentives as components of total payment from the LPD to employ particular housing, equipment,

management practices, fuel usage, or other contributions the LPD requests. Some of these incentive payments may be based on the delivered weight of each flock and others may be a fixed per flock amount.

In a simplified example of how tournament systems operate, the LPD places flocks with 10 growers under contract to deliver the same-sized broiler chickens to the dealer's processing plant at the end of a specified growout period. Upon harvest, the LPD determines each grower's performance by measuring the quantity of feed and other inputs in the LPD's tournament formula (such as chicks supplied by the LPD or medicines) per pound of broilers produced by the grower. The LPD then compares individual grower ratios against average ratios for all growers in the settlement group and ranks individual growers according to their relative performance within the group of 10 growers. Each grower's pay is determined by adding a bonus to, or subtracting a discount from, the contract's stipulated base pay rate, calculated as the difference between the grower's ratio and the average ratio within the tournament grouping for that specific growout period. This is also known as a performance adjustment. For instance, if the grower's contract stated a base pay rate of \$0.0550 per pound, an above-average grower (*i.e.*, a more efficient grower with a lower cost per pound produced) in this hypothetical example could receive \$0.0615 after the performance adjustment, while a below-average grower could receive \$0.0530.

LPDs benefit from the tournament system in several ways. The tournament system provides LPDs control and certainty over total compensation to the growers as a group. For each tournament, the LPD knows the total compensation that will be paid per pound of broilers produced by the group; that total amount is allocated among the growers through performance adjustments (amounts above, or deductions from, the base pay rate). LPDs also benefit from the tournament system to the extent it may incentivize additional grower effort and expenditure of resources beyond that required for the grower to remain in the LPD's rotation of growers.

The tournament system is intended to, and LPDs in fact purport that it does, reward growers financially for their experience, skill, effort, and investments in up-to-date and efficient housing and equipment.¹⁸ Additionally, assuming

that all growers in a tournament grouping are treated similarly and the variables within the tournament grouping are within the control of the growers, the tournament may insulate growers to some degree against external shocks that affect all growers in the grouping.¹⁹ Examples of external shocks might include unfavorable weather, the introduction of new genetics, or changes in the LPD feed formulation. This protection can be incomplete, however, because these external shocks—some of which are within the control of the LPD—can adversely affect the overall weight of the broilers in a tournament affected by such shocks, thereby reducing the base weight compensation for all participating growers.

The tournament system can operate unfairly and deceptively. Without a guaranteed base pay rate, the complexity of the tournament makes it difficult for growers to clearly understand what the minimum amount is they could actually receive in payment. Base pay can be, but is not commonly, a guaranteed minimum pay.²⁰ (This is discussed in greater detail below in section III.A.) 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 could turn a reliable business proposition into a high-risk venture without a demonstrable countervailing benefit. Therefore, sufficiently large variance in total grower compensation can, by itself, be deceptive and unfair. Moreover, because many broiler growers operate in regions with just one to two LPDs, the local market dynamics may force

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).

¹⁹ 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.

²⁰ 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).

¹⁵ *Ibid.*

¹⁶ James M. MacDonald, "Technology, Organization, and Financial Performance in U.S. Broiler Production." U.S. Department of Agriculture Economic Research Service, Economic Information Bulletin No. 126 (June 2014).

¹⁷ 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.

¹⁸ See, *e.g.*, "How the Tournament System Works", National Chicken Council (informing

growers to enter into riskier contracts, in particular, contracts that do not guarantee them 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.

Compensation based on relative performance when LPDs control the distribution of inputs and assignment of production practices creates the potential for unfairness and deception. Nor are tournament pay systems an effective incentive system when factors outside of the grower's control largely determine performance. Unfortunately, growers have no choice but to rely on the good faith of LPDs for the fair administration of tournaments. They must trust that LPDs will use their extensive information and control to prevent or remedy situations where a particular grower within the tournament receives dissimilar inputs or the assignment of production practices that result in a substantial disadvantage to that grower within the settlement pool. They also must trust that LPDs will not use their control to advantage favored growers or to punish or otherwise impermissibly disadvantage growers.

The tournament system also introduces considerable complexity and uncertainty for growers in the calculation of the compensation for their services and in evaluating the returns on growers' investments, which can sometimes make it more difficult for growers to discover unscrupulous conduct by LPDs, to compare offers from competing LPDs, and to plan and manage their businesses.

D. Need for the Rulemaking

USDA has received concerns about the impact of unfair or non-transparent LPD practices from growers in listening sessions and during comment periods for more than a decade. In 2010, USDA held a series of workshops in conjunction with DOJ to hear from farmers about concentration and trade practice issues in agriculture. Normal, Alabama, hosted one such session with an emphasis on the poultry industry.²¹ Many growers complained that their success or failure depended on factors controlled by LPDs and that LPDs required them to undertake additional capital investments. Further, growers expressed concern about the lack of choice among LPDs in many relevant regional markets, which further

enhanced LPD's bargaining position and control over growers.

Grower public comments at the 2010 workshop led USDA to propose rules in 2010 and 2016.²² Growers have continued to communicate to USDA specific areas of concern regarding the poultry industry. Since 2021, AMS renewed its efforts to address these concerns through different approaches, one of these being the June 8, 2022, ANPR which informed this proposed rule.

In the ANPR, AMS sought comments and information to inform policy development and future rulemaking regarding the use of poultry grower ranking systems. The comment period for the original notice was June 8, 2022, to September 6, 2022. AMS provided additional time for the public to submit comments and extended the comment period to September 26, 2022. AMS received a total 168 comments, 153 during the first comment period and 15 during the second. Organizational commenters included farm bureaus, live poultry dealers, poultry industry trade associations, meat industry trade associations, and other associations or non-profit organization. Commenters expressed both support and concern about the use of tournaments in poultry production.

Many commenters supported the current poultry grower contracting system and opposed rulemaking. Commenters supporting the current poultry grower contracting system stated they believe it is well designed; efficient; and beneficial to growers, dealers, and consumers. Commenters were concerned that changes to or the elimination of the tournament system could have an adverse financial impact on LPDs. Commenters stated that they believe that the current system encourages efficient poultry production by providing greater payments to the most efficient poultry growers. Supporters contended the tournament system has fueled improvements and innovations, incentivized growers to raise birds ethically, and allowed for efficient risk management. They also stated that the Agency has failed to establish credible evidence of the existence of exploitation; that the proposed measures would address exploitation, if it existed; or, that the Agency has the statutory authority to engage in this exercise.

Other commenters opposed the current tournament payment system, stating that tournament systems do not meet their intended purpose and that the payment systems exemplify the manipulative and unjust abuses or practices that the Act was designed to prevent. They cited arbitrary, unjust, or punitive distribution of inputs and production variables, all of which are controlled by integrators; potential manipulation of the group composition for similar purposes; and penalties for even small deviations below average. Some commenters noted that LPDs often supply insufficient information with respect to requested or required upgrades and deceptively induce growers to make costly ACIs. Commenters also asserted that LPDs demand costly upgrades that are arbitrary and apparently untethered to any reasonable assurance of increased compensation. Some asserted that the tournament system operates instead as a cost-shifting mechanism that controls growers like employees while keeping them from collaborating in furtherance of their best interest. Commenters stated that proposed rulemaking would help address bargaining power imbalances for growers, provided proper enforcement. Commenters also requested that AMS establish a guaranteed base payment floor that would ensure the producer does not suffer a loss of income and can earn enough to exceed incurred debts. Trade organizations commented on how input variability affects pay and that LPDs are known to take action to reduce unpredictability in grower outcomes. Monitoring and intervention to remedy unfairness requires an LPD to expend effort and incur cost, and the LPD does not directly benefit from the increased fairness to growers. Therefore, the LPD has an incentive to shirk this responsibility.

Commenters echoed many of the same concerns that were voiced in the 2010 workshops and that animated previous unfinished rulemaking efforts. A survey conducted by the Rural Advanced Foundation International USA (RAFI) in preparation for its comments to the ANPR was particularly striking. The survey covered 105 growers from 17 States, with 90% active growers and 10% retired growers. At the broadest level, 94% of its growers expressed significant dissatisfaction with the design and operation of the tournament system, indicating that, "1. Tournament systems are generally unfair and pit growers against each other (75%). 2. Tournament systems are too often used to retaliate or discriminate against

²¹ See Transcript, United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshop May 21, 2010, Normal, Alabama.

²² Grain Inspection, Packers and Stockyards Administration (GIPSA), USDA, "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act," 75 FR 35338 (June 22, 2010) and "Poultry Grower Ranking Systems," 81 FR 92723 (Dec. 20, 2016).

growers (70%). 3. Tournament systems often negatively impact grower income (68%).”

Surveyed growers reported an astoundingly high percentage of problems, including: flock health problems (92%); suboptimal layer flock (92%); 6-hour feed disruption (90%); suboptimal flock pickup time (88%); 12-hour feed disruption (83%); incorrect feed mix (75%); extended layout times (73%); reduced stocking density (72%); arbitrarily disadvantageous tournament group placement (63%); low revenue generating breed (59%); feed delivery discrepancy (59%); reduced annual flock placement (54%); non-randomized flock gender (40%); retaliation via any of the above (25%); and more.²³ That comment also included multiple direct quotations from growers describing these types of experiences. The challenges that RAFI's growers report in their comments highlight the range of concerns with current practices in the broiler grower industry that remain unaddressed. “They don't have to cut you off, they can just bleed you dry,” said one grower in the RAFI letter, which encapsulates the challenge with both the arbitrariness and the control inherent in the design and operation of tournaments that benefits LPDs at the expense of growers. Commenters, including RAFI, highlighted expensive additional capital upgrades that unexpectedly burden growers, as well as inhibit the ability to switch integrators. Growers also reported informal “no poach” agreements and conscious parallelism among LPDs. According to the most recent large USDA survey on the topic, growers with the choice of only one integrator are paid six percent less than those with four or more integrators.²⁴

Some of the largest LPDs have begun adopting contracts that ameliorate certain aspects of these persistent complaints. For example, some LPDs offer contracts where the base pay rate

²³ Rural Advancement International Foundation—USA, “Letter to S. Brett Offutt, Packers and Stockyards Division, USDA—AMS, Fair Trade Practices Program,” Filed as a comment to “Poultry Grower Tournament Systems: Fairness and Related Concerns,” Sept. 2022, pp. 15–18, available at <https://www.rafiusa.org/blog/comments-on-poultry-tournament-system/>; <https://www.rafiusa.org/wp-content/uploads/2022/09/RAFI-USA-Comment-on-Poultry-Growing-Tournament-System-Fairness.pdf>.

²⁴ James MacDonald and Nigel Key, Economic Research Services, USDA, “Market Power in Poultry Production Contracting? Evidence from a Farm Survey,” *Journal of Agricultural and Applied Economics*, November 2012, 44(04):477–490, available at https://www.researchgate.net/publication/305948391_Market_Power_in_Poultry_Production_Contracting_Evidence_from_a_Farm_Survey.

is the minimum pay and there are no negative performance adjustments. In response to an enforcement matter, one of the largest LPDs has also already limited the magnitude of comparison-based pay, in part to address related concerns.²⁵ This proposed rule takes note of and builds on that progress to align important farmer protections across the industry.

III. Broiler Grower Compensation Design (Proposed § 201.106)

Current tournament contracts are unfair and deceptive when they mislead growers about expected revenue and the potential range of payment outcomes on a settlement-by-settlement basis—particularly when they are unclear about growers' practical ability to control the range of the payment outcomes. Both the lack of grower control over payment outcomes and the variability of the outcomes can be unfair. The complexity and opacity of current tournament contracts impair growers' ability to compare contract offers between LPDs. This section describes this problem in depth, discusses AMS's proposed regulation, and provides questions for commenters to consider, including around an additional proposal to limit excessive variability in pay.

A. Degradation of Contract Pay Rates in Tournament Payments

As explained in section II, “Industry Background and Need for the Rulemaking,” tournament contracts contain one or more pay rates that LPDs use as a basis to allocate compensation among growers in a flock settlement group. These pay rates are generally expressed in cents per pound. In most tournament contracts, positive relative performance (bonuses) will add to these rates while poor relative performance (discounts) will deduct from these rates, to reflect the grower's performance within a settlement group. Applying these adjustments, whether positive or negative, significantly affects growers' effective rates of compensation and net income.

In a 1999 survey conducted by Schrader and Wilson, 43 percent of growers reported earning income below their expectations.²⁶ In response to the

²⁵ See *United States v Cargill Meat Solutions Corp. et al.* Civil Action No.: 1:22-cv-1821, District of Maryland, Final Judgement entered June 5, 2023.

²⁶ The 1999 survey was conducted by Lee Schrader of Purdue University and John Wilson of Duke University and included responses from 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). This survey is cited frequently in this document because

ANPR for this proposed rule, some commenters contended that any ranking system is fundamentally unfair if it lacks a firm base pay rate. Some commenters stated that premiums should be determined by objective and transparent criteria, and a few suggested a capped or limited premium such as 25% of base pay or a percentage based on performance. An agricultural advocacy organization further acknowledged that a system in which performance-based incentives include only additive bonuses and not negative discounts could still be effective in fostering competition among growers. Another commenter noted that LPDs entice growers by representing that they can expect to earn the average pay provided to all growers, obscuring the fact that every settlement has winners and losers regardless of an individual grower's absolute performance. The Chair of the FTC, in response to the 2022 ANPR, commented that “poultry companies often function as local monopolists or oligopolists with the power to control prices, prescribe contract terms, and retaliate against growers who object to these tactics,” and that disclosure was valuable but insufficient to address the problem. A consumer advocacy group said tournament systems that dock pay based on relative performance can lead to capricious pay differences that do not accurately reflect differences in performance, such as cases where a grower who ranks last in a tournament at 10 percent below the average feed-to-weight conversion receives a 50 percent pay cut. Many of these and other commenters further recommended that AMS should set a price floor for grower pay rates to ensure growers can, among other things, earn reasonable profits and cover costs.

An organization representing LPDs countered that most poultry contracts already have a minimum “base” payment floor that performance-based adjustments to growers' “standard” or “average” pay cannot go below, and that AMS should not regulate this issue.

It included questions meant to assess the impact of broiler company practices on growers in contract poultry production. Although the survey is older, it was conducted by respected academic experts and provides information on the experiences of a broad sample of growers and covers specific questions of concern in this rulemaking. Based on AMS's experience, the survey is still relevant and useful as a reasonable reflection of the views of growers today. 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/>, last accessed 07/28/2023.

According to the commenter, if LPDs wanted to avoid passing on costs to consumers, they would be forced to lower their new base pay rate to keep the overall pool of money allocated to grower pay at a similar level, which means they would calculate all performance-based compensation bonuses based on this lower rate rather than on a rate equivalent to the current average pay. This commenter asserted this outcome would lead to an income redistribution from high-performing growers to low-performing growers, encouraging less efficient, and therefore costlier and less profitable, poultry production.

In carefully considering this issue, AMS analyzed a sampling of current contracts from a cross-section of ten LPDs, including at least one contract from each of the top five broiler companies identified in the WATT 2021 rankings²⁷ to evaluate their contract terminology and the significance of the gap between “base” and “minimum” pay rates. Seven out of ten, including the top five companies ranked, use the term “base” with reference to a pay rate that the LPD adjusts by tournament ranking. Two use the term “average”, and one uses the term “middle.” The differences between the “base” or “average” rate and the “minimum” rate were as high as 42 percent and as low as 13 percent, with an average of approximately 27 percent with “minimum” pay always lower than “base” pay. This serves as a rough proxy for the range of variation that may exist under different contracts, and thus demonstrates that the stated base pay rate is not representative of actual, ultimate pay to growers. In general, there is no limit (maximum) on bonus payments in most contracts. No contract in our sample used the term “base” to identify the actual minimum payment possible. This analysis also demonstrates that the disparity between “base” and “minimum” rates is often significant.

After considering public comments and the results of its contract and settlement analyses, AMS has determined that the practice of discounting or reducing contract pay rates creates significant risk of deception or unfairness for growers. This practice conceals the true payment baseline, which makes it difficult for growers to compare broiler production contracts from LPDs competing for their services. This can reduce competition among LPDs for grower services and

result in market inefficiencies. It can also inhibit growers’ ability to plan and manage their businesses. A grower evaluating the expected value of these contracts can estimate potential earnings by reviewing a contract’s stated “base” or “average” pay rates; however, growers are not able to precisely evaluate the “downside risk” (used here to refer to the financial risk associated with performing in the bottom half of the settlement pool). It is very difficult for a grower to estimate how much their pay rate might be discounted (*i.e.*, reduced below the stated base pay rate) based on their relative performance in the settlement pool. This is especially problematic because the design of the tournament system means that roughly half of growers will rank below average. Significant factors that affect tournament rankings—such as settlement groupings, inputs, and flock ages, the timing of collection for delivery, and weights—are outside growers’ control.

Moreover, empirical research has shown that franchisees (whose relationships with franchisors in some respects look similar to the relationships growers have with LPDs) are overly optimistic in their expectations of their performance under the franchise agreement. In their review of the empirical literature, Benoliel and Buchan report that “although franchisees are often perceived as sophisticated business people, they systematically suffer from a common psychological bias: over-optimism about the future.”²⁸ Benoliel and Buchan’s findings are consistent with previously cited comments from grower organizations suggesting that growers underestimate the possibility of below average outcomes, reflecting the same type of optimism bias reported for franchisees.

Under section 202 of the P&S Act, the practice of discounting disclosed “base” pay rates in broiler contracts is an unfair and deceptive practice. The use by LPDs of contracts that fail to clearly state an accurate rate of compensation obscures substantial and unavoidable downside risk. Under this system, growers must estimate future earnings using contractually stated “base” pay rates, rates that, by the design of the system, LPDs know will not be realized by roughly half of the settlement group. Additionally, this lack of clarity in contracting terms impedes growers’ ability to meaningfully compare

competing offers from other LPDs in markets where growers are fortunate enough to have more than one or two LPDs to contract with. AMS’s analysis of unfair and deceptive trade practices in poultry contracts is informed by prior P&S Act case law and States’ unfair practice laws. Additionally, the FTC’s extensive experience enforcing prohibitions against unfair practices and unfair methods of competition arising under the FTC Act has, in part, informed this proposal.²⁹

In conclusion, deductions from the contractually stated base pay rate create variance in pay that harms growers and their ability to accurately assess the risk they are taking, which is particularly problematic given the risk they bear. Further, these growers cannot reasonably avoid this harm if they wish to become or continue to be growers. Finally, AMS has not found any evidence that poultry tournament systems that include deductions from the base pay rate 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 within the control of the producer. This deceptive poultry discounting practice creates an unfair competitive advantage for LPDs who use it relative to LPDs who do not discount the base pay rate. The widespread adoption of these types of contracts has frustrated fair competition, instead of enhancing it. Such discounting also is a reflection of the market power of the LPDs.

B. Summary of Proposed § 201.106

AMS is proposing to add a new § 201.106 titled, “Broiler grower compensation design.” This proposed provision would prohibit the reduction, or discounting, of any compensation rate under the broiler growing arrangement on account of a comparison to other growers. That is, when a broiler growing arrangement between an LPD and the grower provides for the grower’s compensation (which is commonly determined by a weight-based rate), the broiler growing arrangement would

²⁹ See *e.g.* Michael Kades, “Protecting livestock producers and chicken growers,” Washington Center for Equitable Growth (May 2022), discussing FTC Policy Statement on Unfairness, 1980, available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> (last accessed Jan. 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>.

²⁷ WATT PoultryUSA Top Companies Survey, 2021; www.WATTPoultry.com; accessed 12/13/2023.

²⁸ Benoliel, U. and J. Buchan. “Franchisees’ Optimism Bias and the Inefficiency of the FTC Franchise Rule.” *DePaul Business and Commercial Law Journal* 2015 13(3): p. 414.

clearly state that rate and not provide for further mechanisms or calculations that would reduce that rate based on the grower's performance relative to other growers. The broiler growing arrangement could provide for the 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. As used in this proposed rule, "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 they perform 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)).

Prohibiting the discounting or reduction of rates of compensation would provide growers greater clarity regarding the minimum payments they could earn under compensation rates stated in the broiler growing arrangement, thus better enabling them to properly evaluate their base pay rate under the arrangement prior to entering the contract. The proposed rule's prohibition against discounting or reducing the rate of compensation disclosed in the contract would provide growers with an assured minimum payment when they satisfy their responsibilities under the agreement. Increased clarity regarding the rate of compensation may also enable new growers to better determine how they will perform under the tournament system before they undertake costly investments. Experienced growers may benefit as well, especially in advance of any potential capital investments.

This proposed rule would prohibit LPDs from misleading growers with the presentation of a compensation design whereby the grower receives an income lower than expected under a rate of compensation in the broiler growing arrangement. As noted above, minimum pay is a payment term that would be required to be disclosed under the terms of broiler growing arrangement. (9 CFR 201.100(c)(2).) This proposed rule would also protect growers against the risk of unavoidable discounts. While a grower may miss out on additional

income, the LPD would not be permitted to discount the grower's pay below the expected rate of compensation that was disclosed to the grower and relied upon by the grower when making the decision to participate in the broiler growing arrangement. AMS emphasizes that it may also be a deceptive practice were an LPD to make representations during the contracting process that implied most growers will get bonuses or are otherwise likely to earn more than the minimum where such representations were false, misleading, or contained material omissions or were otherwise not in compliance with other relevant rules and regulations under the Act. (9 CFR 201.102.)

AMS expects that LPDs will still be able to pay a grower to elicit a competitive level of performance using a design that conforms to the requirements of this proposed 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. A compensation structure without a penalty or reduction from a true guaranteed minimum pay rate, however, may still be unfair and/or deceptive if facts and circumstances demonstrate an unlawful exercise of market power or other legally unjustified means. For example, if the variable income (from the range of bonuses) is large relative to the grower's potential total compensation, the grower may still be unable to reasonably estimate actual payments. The variability of payments alone may create unjustifiable risk for the grower. As a result, the compensation system could still be unfair and/or deceptive. We are seeking comment, as noted below, on the best way to assess such unfairness and/or deception.

Based on AMS experience (including investigations and reviews of contracts), many LPDs already separately identify bonuses to incentivize capital investments as additions to a base pay rate. Under most current LPD grower contracts, growers receive these additions to the base pay rate before the performance adjustment. Under the proposed rule, LPDs would be prohibited from making any adjustments to discount or reduce the rate of compensation disclosed in the contract. LPDs can adhere to this requirement without changing the total expenditure per pound of broilers or performance incentive structure used in most contracts, despite the new base pay rate being the true guaranteed minimum pay rate. Clearly rewarding

performance above the base would give growers clarity regarding which elements of their pay are based solely on the weight of the delivered flock and which elements reflect their performance relative to other growers. Virtually all growout contracts currently have a minimum pay, but it is often not clear how that minimum relates to performance pay. As noted earlier, some of the largest LPDs have already adopted contracts at some complexes where the base pay rate is the minimum pay and there are no negative performance adjustments.

AMS emphasizes that the proposed rule would not absolve the LPDs of liability under section 202 of the Act arising in other ways from any particular tournament system or tournament systems overall, including from any rate, distribution, or variability of compensation. Excessive variability in total pay can make it difficult for growers to estimate likely earnings and can unfairly transfer costs or risk from the LPDs to growers. Such a system also means a substantial number of growers may not be able to earn a reasonable return. For example, if an LPD set the base pay rate at \$0.01, AMS would almost certainly find that this violates section 202. If the base pay rate does not reasonably guarantee that the grower can make loan payments, which are known to the LPD, the compensation system is likely unfair. Likewise, if the base pay rate is suppressed below competitive levels (due to an unlawful exercise of market power or other legally unjustifiable means) and does not provide a reasonable return considering the operating costs and the costs of investments over the long term, the compensation system may still be unfair.

Neither this proposed § 201.106, nor proposed §§ 201.110 or 201.112, purport to alleviate all potential unfair aspects of the tournament system or of the integrated model of broiler production. At this time, AMS proposes enforcement on a case-by-case basis to remedy other particular aspects of tournament system unfairness, including issues arising from excessive variability in payments. For example, the Department of Justice, upon referral by USDA, entered into a settlement with LPDs for P&S Act violations.³⁰ That settlement barred processors from discounting base pay rate compensation and capped total relative (comparison-based) compensation at 25 percent of the total of base pay rate plus

³⁰ See *United States v Cargill Meat Solutions Corp. et al.* Civil Action No.: 1:22-cv-1821, District of Maryland, Final Judgement entered June 5, 2023.

performance compensation. AMS believes that this approach alleviates extreme variability as an aspect of existing tournament system unfairness and believes that compensation variability beyond 25 percent is presumptively unfair, whether as a function of the tournament system or as a result of other payment practices utilized by LPDs in the integrated model of broiler production.³¹

In support of that goal, AMS believes that the clarity and simplicity provided by the proposed rule's prohibition on deductions will assist AMS and growers in identifying the presence of such concerns, and thus will assist AMS in any further review regarding unfairness overall. As noted, we are also seeking comment on whether other options would work more effectively. In particular, AMS asks below (in section III.C.) whether it should be more prescriptive in the proposed rule, including whether it should adopt requirements to document or disclose processes related to the proportion of relative pay to the base pay rate, whether this proportion should be limited in all circumstances, and whether and how to establish a methodology for evaluating unfairness where the minimum base pay rate for growers was not reasonably likely to deliver a fair return. It also seeks feedback on whether these requirements should apply to payment systems that are not a tournament but may be otherwise unfair or deceptive due to asymmetrical power and other dynamics in the integrated model of broiler production. We also seek comment on the economic outcomes from these possibilities, including whether they would change the performance incentive structure, in particular whether it would raise total grower compensation by increasing total expenditure or whether it would adjust performance payments within the existing total expenditure.

Under proposed § 201.106, LPDs may not reduce any rate of compensation under a broiler growing arrangement based upon the grower's grouping, ranking, or comparison to other growers in the grower ranking system. Further, because optimism bias may dilute the effect of disclosure—and because disclosure is not always a sufficient remedy for an unfair act or device—this proposed rule is intended to complement existing regimes aimed at improving transparency and fairness in the poultry industry.³² Improved clarity

in the presentation of payment systems would enhance the effectiveness of disclosure requirements and is intended to bring to light unfairness in other aspects of payment systems.

AMS expects that LPDs would comply with this proposed rule by desisting from discounting any rate of pay under the broiler growing arrangement and instead utilizing a minimum rate of pay with comparison-based performance bonuses paid in addition to the new minimum base pay rate. AMS is attentive to the risk that LPDs would lower the base pay rate beyond what the grower expects to be the minimum based on the broiler growing arrangement or LPD promises and grower expectations. Those concerns may be particularly acute where the bonus is large relative to the base compensation. AMS is also attentive to concerns that growers may not have entered into their current contracts had a clear base pay rate been disclosed.

Accordingly, AMS also asks questions below regarding whether to establish limitations on the lowering of the base pay rate, such as by establishing a backstop or criteria based on existing obligations under the present contract with the grower; by using a relationship between pay per pound (pool payments) at the complex and the minimum pay; by setting a hard limitation on the proportion of comparison-based pay to total pay (such as 25 percent of the sum of base plus comparison-based performance pay³³); or by requiring a base pay rate that makes a reasonable return likely if the grower delivers under the contract. In addition, AMS inquires on the advisability of AMS reviewing contracts for compliance with the transition limitations, as well as for how long those limitations should be in place.

Enforcement of § 201.106 could occur in several ways. Growers would contact AMS to submit a complaint regarding an alleged violation of § 201.106. AMS would investigate, which could lead to referral to DOJ for appropriate action or, where failure to pay is implicated, USDA enforcement through administrative action.³⁴ AMS also would review LPD contracts, along with other required records from the LPD (including with respect to actual payments made), in connection with

routine compliance reviews and investigations. Injured individuals would also have a right to proceed directly in Federal court.

C. Questions

AMS specifically invites comments on various aspects of the proposal as described above. Please fully explain all views and alternative solutions or suggestions, supplying examples and data or other information to support those views where possible. Parties who wish to comment anonymously may do so by entering "N/A" in the fields that would identify the commenter. While comments on any aspect of the proposed rule are welcome, AMS specifically solicits comments on the following:

1. Does proposed § 201.106 effectively and appropriately address concerns that growers have expressed in increasing transparency, understandability, fairness, or certainty as to compensation under a comparison system or otherwise benefit growers in reducing deception and/or unfairness? How might this rulemaking more effectively and appropriately ensure that what growers can reasonably expect regarding their compensation (based on disclosures in the contract or otherwise) matches what growers actually receive? If the proposal will be effective, why? If not effective, in what ways can it better do so?

2. AMS has indicated that if the base pay rate is suppressed below the competitive levels, such as due to the LPD's unlawful exercise of market power or other legally unjustified means, and does not provide a reasonable return considering the operating costs and the costs of investments over the long term, the compensation system may be unfair. Should AMS adopt a rule that more prescriptively requires that the base pay rate must be expected to provide a reasonable opportunity for a grower that delivers under the contract to earn a reasonable return if they comply generally with the specified production practices? If so, please describe the rationale and methodology to be applied (including whether and how it should account for local market power dynamics); and, if not, would another approach be more effective?

3. Is it presumptively unfair for comparison-based compensation to equal or exceed 25 percent of total (base pay rate plus comparison-based) compensation for any grower? If so, is the 25 percent threshold the appropriate portion to presume unfairness, and is it most effective if calculated at the complex level or at the individual grower level?

³¹ *Ibid.*

³² See, e.g., generally 9 CFR 201.100, 9 CFR 201.215–218.

³³ Wayne-Sanderson, DOJ Consent Decree, June 25, 2022, available at <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

³⁴ 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).

4. Is case-by-case enforcement on the fairness of the total comparison-based bonus effective? Should AMS include a paragraph (b) to proposed § 201.106 stating that, “Although unfairness will be determined on a case by case basis, the LPD shall be deemed presumptively in violation of this paragraph (b) if: on an annual basis at any complex [for any grower] of the LPD, the amount of Performance Payments exceeds 25% of the sum of Performance Payments and Base Payments, where ‘Performance Payments’ are the compensation paid to broiler grower that is subject to adjustment based upon the relative performance in a grouping, ranking, or other comparison of broiler growers; and ‘Base Payments’ are all compensation that is guaranteed to be paid to broiler growers.”?

5. Please comment on the expected response to the inclusion of the provision described in question 4. In particular, how likely is the provision to be a binding constraint at either the grower or complex level? When the constraint is binding, would LPDs be likely to raise base pay and/or limit performance payments—thus reducing the difference between top and bottom performing growers—without increasing total grower compensation expenditures? Would LPDs also change the types of growers they contract with, for example in terms of size or performance?

6. If AMS were to include the provision described in question 4, would LPDs be likely to provide non-comparison-based incentives (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)? Would total grower compensation expenditures by LPDs be expected to increase under these other incentives? How would this vary with or depend upon grower characteristics (e.g., size, individual management ability, or investment) or market conditions?

7. How would the inclusion of the provision described in question 4 affect the relationship between tournament compensation systems and additional capital investments? Would it help to ensure that growers receive adequate compensation for ACIs?

8. What additional requirements would help ensure compliance with this proposed rule such that grower comparison-based unfair and deceptive reductions or discounts to compensation are eliminated, while continuing to permit payment designed to incentivize performance? Please provide as much detail as possible

regarding the relationship between payment and performance, any injuries to growers and whether they can be avoided, the effects on other growers and competition, and what data sources AMS should examine to evaluate these concerns more effectively.

9. Should AMS require LPDs to document or disclose the process they use to establish the proportion of total grower pay that is determined by comparing a grower’s performance to other growers’ performance? Should regulations require documentation of comparisons designed to prevent unfair or unreasonable levels of relative performance-based pay? Should regulations require companies to report how the proportion of comparison-based performance pay to total pay incentivizes effort, grower investment, and other outcomes? If AMS creates these documentation responsibilities, should this be done based on an individual grower or complex-wide basis?

10. What specific burdens might LPDs face in complying with this proposed rule? Would this require LPDs to substantially modify their business model? If so, what specific modifications would be required and why?

11. What risks might growers and/or LPDs face during any transition to the proposed § 201.106? How might AMS mitigate transition risks? How might AMS more fully account for unfairness and deception that may have occurred in the course of contracting for the current broiler growing arrangement? Should AMS establish a backstop for this regulation or set out criteria based on existing obligations under the present contract with the grower (e.g., requiring that the current base pay rate be the new minimum rate, or requiring current payments overall remain comparable), on a relationship between compensation per pound (pool payments) at the complex and the minimum pay, or on the proportion of comparison-based compensation for a grower (such as a limit to 25 percent of total compensation). If so, how long should any transition limitations extend?

12. 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? Should compensation data be required to be submitted for review? Should AMS review of modified or revised contracts during any transition assess the changes made to ensure LPDs have not reduced total aggregated and individual grower payments in such a

way that is inconsistent with payment expectations under the original contracts?

13. Should AMS make the effective date for the provisions of this proposed rule 180 days following publication of the final rule in the **Federal Register**? If you recommend shorter or longer for some or all of the provisions, please explain why.

IV. Operation of Broiler Grower Ranking Systems (Proposed § 201.110)

Under the tournament system, LPDs control the inputs and production practices assigned to growers. Therefore, LPDs unfairly affect grower payments when they compare growers without taking action to manage and mitigate unequal inputs or unfavorable production practices over one or more tournament settlements. This section describes this issue in depth, discusses AMS’s proposed regulation, and provides questions for commenters to consider.

A. The Act Prohibits Certain Aspects of Current Tournament Practices

As described above in section II, “Industry Background and Need for the Rulemaking,” LPDs control the inputs and production practices growers use to compete under the tournament system. LPDs generally promise that tournaments provide growers with the same inputs, production practices, and contract-related services.³⁵ Yet LPDs do not have sufficient incentive to ensure the design or operation of a fair ranking system for growers. LPDs commonly do not adequately specify in their contracts their obligations regarding the operation of the tournament. LPDs benefit from information asymmetries relative to their growers. LPDs also commonly do not adequately perform under their contracts with growers, failing to meet growers’ reasonable expectations relating to contractual performance or behaving in a punitive or inequitable manner to growers.

The harms of an unfair tournament system fall disproportionately on growers. The benefits of increasing fairness in the tournament to the LPD may not justify the costs in providing greater fairness. Many growers and grower representatives responding to the ANPR for this proposed rule expressed concern regarding the extent to which variability in inputs can affect

³⁵ 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.”; available at <https://www.chickencheck.in/faq/tournament-system/> (last accessed May 22, 2024).

grower performance and thus pay. Commenters stressed the problematic nature of LPD control over inputs and the resulting potential for poor-quality inputs to affect broiler grower compensation. These commenters said LPDs' discretion over the distribution of inputs and flock production practices gives them control over almost all factors affecting a grower's final performance, such as health, breed, and gender composition of flocks; age of breeder flocks; number of birds placed; amount, quality, and timing of food; medical care provided; and flock pick-up. Although some industry trade associations commented in response to the ANPR that the tournament system worked effectively to manage these risks, other industry commenters noted that without adequate safeguards to manage and mitigate input and production practice differences, the tournament system is coercive, predatory, and deceptive because it denies growers the ability to earn based on their skills, efforts, and investments.

Several of these commenters emphasized that LPDs are unlikely to acknowledge variability in their distribution of these inputs to growers or engage in timely communication and cooperation to address what growers believe is the inappropriate provision of input or production practices. Commenters also asserted that LPDs sometimes intentionally deliver inappropriate inputs and assign inappropriate production practices to growers (e.g., by providing high percentages of sick chicks, delivering feed designed for older birds to new birds, or delaying pickup) to penalize growers or force contract termination. According to commenters, even unintentional input variability can lead to unfair comparisons within a tournament group. These commenters indicated poultry growers who receive lower quality inputs (including inputs inappropriate for the type or age of the bird) are likely to rank lower compared to those who receive better inputs, and consequently, receive lower pay than the rate disclosed in the growing contract. Some commenters asserted that issues with the availability and quality (including appropriateness) of feed are especially common. In response to the ANPR, a North Carolina non-profit organization conducted an anonymous contract grower survey in 2022.³⁶ Ninety-six percent of poultry

growers surveyed reported a negative impact on their income due to feed disruption, receipt of incorrect feed mixes for a flock's growth stage, or receipt of less feed than stated on their feed load receipt.

Studies demonstrate 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.³⁷ Some breeds, for example, may exhibit faster growth rates, which may result in heavier farm weights and better feed conversion rates than other breeds.³⁸ A major genetics company, Cobb-Vantress, reports substantially different feed conversion rates and finishing weights for three of the most commonly used commercial broiler breeds. AMS investigations and analyses have likewise found situations where growers' performance increased with some inputs compared to others and that growers performed better when assigned certain production practices rather than others.³⁹

In response to the ANPR, LPDs and trade associations representing them noted the challenges in trying to determine standards to regulate distribution of inputs and production practices among growers. A meat industry trade association indicated that LPDs are known to take action to reduce unpredictability in grower outcomes, such as contracts that evaluate

performance over multiple flocks and contract pay adjustments 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. 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, which helps growers avoid unintentionally punitive outcomes than would otherwise be the case. Yet these claimed practices are not universal and depend extensively on the goodwill of the LPD, commonly via the manager of the local complex. This dynamic leaves considerable room for local complexes to make discretionary decisions that may harm growers. While LPDs regularly maintain extensive grower manuals, there is currently no requirement that manuals address the range of situations that can undermine a fair comparison or monitor whether the local complexes comply with that manual in practice.

LPDs would incur the costs associated with ensuring the fair operation of their tournaments, while the benefits of a fairly operated tournament would accrue primarily to broiler growers. However, LPDs' substantial bargaining power, growers' risk, and growers' inability to reasonably avoid the tournament system (or other payment systems that effect similar dynamics arising from unfair distribution of inputs and assignment of production practices) require that LPDs provide a basic level of fairness for growers.

AMS acknowledges that some variability in input quality is unavoidable: not all chicks or inputs controlled by the LPD could ever be identical. Moreover, the ability of an LPD to adapt regarding input decisions and production practices is necessary to respond to external conditions. While these changes can dramatically, and sometimes disastrously, affect overall compensation for growers, these changes may not significantly affect the distribution of the relative performance component of compensation among rival growers. That is, 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 components under LPD control may not unfairly affect growers. In situations where LPDs rank

³⁷ 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.

³⁸ Cobb500TM Broiler Performance & Nutrition Supplement (2022), Cobb-Vantress; Cobb700TM Broiler Supplement, Cobb-Vantress, 2022; Ross 308/Ross 308FF Broiler Performance Objectives 2019, Aviagen Ross, <http://eu.aviagen.com/tech-center/download/1339/Ross308-308FF-BroilerPO2019-EN.pdf>, accessed March 25, 2022.

³⁹ See, e.g., Dkt. No. 12–0123 (USDA March 8, 2013).

³⁶ Rural Advancement Foundation International-USA, "Comment on AMS-FTPP-22-0046: Poultry Growing Tournament Systems: Fairness and Related Concerns" (received Sept. 26, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-22-0046-0166>.

growers against growers who have received higher-quality inputs—or who operated under more favorable production practices—without taking effective steps to make appropriate adjustments, the tournament operation itself is unfair because the growers who received lower-quality inputs or less favorable production practices will likely receive lower pay compared to the rest of the tournament group through no fault of their own. The ranking in the tournament will not reflect the grower's actual performance.

Because different inputs and flock production practices affect performance under the tournament, and therefore a component of grower payments, an LPD has committed an unfair and deceptive practice under the Act when it operates a tournament that uses arbitrary or inequitable delivery of inputs and production practices—that is, without establishing systems to manage and mitigate material differences in inputs and production practices among growers in a comparison group. This duty of a fair comparison also arises out of the Act's prohibitions on unjust discrimination, the manipulation of prices, and failure to pay. 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).

Current tournament practices are persistent and prevalent across the industry, giving rise to industry-wide harm because even small pay differences cause significant harms in the aggregate. As supported by the response to the ANPR, growers have complained to AMS over the years of arbitrary, inequitable, and sometimes punitive delivery of adverse inputs or unfavorable production practices in successive tournaments. Growers cannot avoid the impact of adverse inputs and unfavorable production practices on their performance. For example, LPDs determine the type, quality, and number of chicks delivered to a grower per square foot of housing, handle the delivery of feed, and determine the age at which they collect the chickens.

As discussed in section II, the tournament system can sometimes reduce harm to growers from external shocks (such as adverse weather conditions) and may enhance competition among growers in ways that, at least in theory, can improve grower productivity. Yet arbitrary or inequitable differences in inputs and production practices are not an essential feature of delivering those benefits; in fact, they undermine them. Arbitrary or

otherwise inequitable differences run contrary to the theoretical design of the tournament system and the description of the tournament system that the industry itself provides.

In theory, LPDs would provide the optimal mix of inputs to all growers to yield an overall better final product and in turn yield a larger profit. However, differences in inputs will exist, and LPDs want to obtain full value out of all usable inputs—even if those inputs perform differently. LPDs also have limited financial incentive to engage in the effort to evenly distribute inputs and production practices across growers in a settlement pool. Indeed, growers have commonly asserted that the “noisy” grower who complains more to local agents is commonly believed to more readily be tendered “bad” or otherwise inappropriate, untimely, etc., inputs or flock production practices. The question is thus how to manage those differences to ensure a fair comparison between growers. For example, breeders 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 therefore will distribute higher- and lower-quality chicks in any one settlement period. Growers who receive a higher proportion of suboptimal chicks are disadvantaged in a relative comparison to growers who received a higher proportion of optimal chicks. The LPD's general incentive is to use all the chicks, regardless of how they are distributed among growers.

Because the tournament system functions to allocate a component of grower pay, LPD practices that impair the fairness of the comparison result in a misallocation of performance compensation, thereby unfairly reducing the compensation that may otherwise be due to some growers in violation of section 410 of the Act. Section 410 requires full payment if LPDs fail to compensate or supplement the compensation of affected growers through alternative means. Further, AMS's analysis of unfair and deceptive trade practices in the operation of these comparisons has been informed by prior P&S Act case law, States' unfair practice laws, as well as the FTC approach to unfair practices and unfair methods of competition.

For this part of the proposed rule, AMS seeks to build on the series of poultry practices regulations that it has adopted over the years, including 9 CFR 201.100 (which requires various settlement and other disclosures), 9 CFR 201.215 through 218 (which provide

various protections against unfair and deceptive practices relating to the suspension of delivery of birds, additional capital investments, reasonable time to remedy a breach of contract, and arbitration), and other provisions, as well as enforcement actions in response to grower complaints about the tournament system and its operation. This proposed rule would require that broiler grower ranking systems contain adequate safeguards necessary to ensure that they function fairly and as described to growers in their contracts.

When an LPD describes the tournament system under the broiler growing arrangement as delivering certain outcomes for growers, yet the LPD does not implement sufficient processes to ensure a fair comparison in the tournament system, the LPD is exploiting the asymmetric information gap, as well as the gap in bargaining power and hold up, between the LPD and growers. From the perspective of a reasonable grower, this is misleading and harmful. It also gives rise to harms that growers cannot avoid. Such harm includes the loss of earnings. In some cases, it includes targeted coercion, retribution, or manipulation of prices from the strategic deployment of inappropriate inputs or flock production practices, as well as LPD failure to communicate or address concerns. These unfair and deceptive practices are impermissible under the Act.

In addition, under those circumstances, LPDs compete in a market in which the incentive is to avoid their obligations and at times deploy tournament operational differences to obtain coercive or punitive ends. Pervasive deception in contractual relationships, breach of contract, or the use of coercion or retribution in markets are not beneficial to competition. The grower may not have entered into the contract knowing that the tournament would be deceptively or unfairly manipulated to the grower's disadvantage, and the grower has an expectation that the LPD will make a good faith effort to distribute inputs and production practices evenly. Boilerplate disclosure that seeks to limit an LPD's commitment to good faith implementation of tournament practices does not cure the deception either, because the LPD maintains full control over the inputs and flock production practices, which are at the very heart of the LPD's offer to growers under a contract. Disclosure is not a remedy for unfair practices by LPDs.

LPDs' existing recordkeeping regarding the design and ongoing

operation of their tournaments is insufficient for AMS to monitor the ongoing transactions between LPDs and growers as it relates to allocation of payment for grower services. LPDs do not currently maintain clearly written processes describing how and when the LPD distributes inputs and deploys flock production practices, makes adjustments to comparisons or deploys non-comparison compensation methods, and responds to complaints. Existing LPD records have tended to lack sufficient documentation that would allow for systematic examination of the reasoning for changes in the inputs, flock production practices, or communication practices assigned to particular growers, either as designed or during operation of the tournament. Therefore, even when LPDs provide the details of those input or flock production practices to AMS investigators, the insufficiency of the documentation impedes AMS's ability to reconstruct an LPD's reasoning for its decisions. LPD communications and complaint monitoring documentation has also been lacking. Further, AMS has encountered challenges within LPD organizations regarding corporate management's ability to record and monitor practices occurring at local complexes. AMS's enforcement of the Act is hampered when corporate management lacks documented processes and records to explain why coercive and retributive practices appear to have been deployed at local complexes despite corporate management's assurance that coercion and retribution are not a factor in the assignment of inputs and flock production practices; enforcement is also hampered when LPD corporate management lacks documented processes and records to explain an LPD's purported failure to address complaints.

B. Summary of Proposed § 201.110

AMS is proposing to add a new § 201.110, "Operation of broiler grower ranking systems," to regulate LPDs' operation of ranking systems (*i.e.*, tournaments) for broiler growers. Paragraph (a) establishes an LPD duty of fair comparison in tournaments. This duty of fair comparison would require LPDs to structure their tournament system in a manner that will provide a fair comparison among growers. AMS acknowledges that there may be instances in which a fair comparison is not possible. AMS recognizes unforeseen differences in inputs or other circumstances occasionally prevent fair comparison in a tournament. In those instances, 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.

Thus, under § 201.110(a) the Secretary would evaluate specific factors to determine if a poultry grower ranking system (*i.e.*, tournament) is reasonably designed to deliver a fair comparison among growers. Paragraph (a)(1) would require that LPDs providing compensation to broiler growers based upon a grouping, ranking, or comparison of growers delivering poultry design and operate their poultry grower ranking system in a manner that would provide a fair comparison among growers. Paragraph (a)(2) would establish the factors the Secretary will consider in determining whether an LPD reasonably designed its poultry grower ranking system to deliver a fair comparison among growers or whether the LPD must utilize a non-comparison compensation method. Paragraph (a)(3) would 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 a non-comparison method specified in the contract that reflects reasonable compensation to the grower for its services. The non-comparison method is intended to fairly compensate the grower and therefore, absent special circumstances where a rationale and an agreement to do otherwise are reasonable and appropriate (and documented as such), would need to be equal to or more than what the comparison-based compensation rate would have delivered. The provisions of paragraph (a) are described in more detail below.

Paragraph (b) would establish documentation requirements regarding the processes (policies and procedures) the LPD maintains for the design and operation of poultry grower ranking systems for broiler growers. AMS is proposing this provision to ensure that the LPD would maintain a full and complete record of every aspect of the tournament system structure. This recordkeeping system would provide AMS with the information needed to determine whether the tournament is, in fact, following principles of fairness laid out in proposed paragraph (a). Paragraph (b)(1) would require 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; paragraph (b)(1) also delineates the items the written documentation must

include. Paragraph (b)(2) would require that LPDs review their compliance with those processes not less than once every two years and delineates the requirements of that review. Paragraph (b)(3) would require that LPDs retain all written records relevant to their compliance with paragraph (b) for no less than five years from the date of record creation. These provisions, their anticipated effect, and compliance requirements are discussed in more detail below.

Section 201.110(a)(1) would require LPDs to design and operate their poultry grower ranking system to provide a fair comparison among growers. The proposed rule would focus on how LPDs address inputs and flock production practices, as well as flexibility and communications practices controlled by the LPD that impact grower payment. LPDs have a multitude of means to maintain fair comparisons, including correcting inputs or production practices inappropriately delivered, extending the time period over which the comparison is made, adjusting payment for certain inputs or production practice differences, removing growers from tournaments where a fair comparison is not possible, etc. LPDs are in violation of the Act when they do not design and deploy, based on the particular circumstances of their businesses, those tools to deliver a fair comparison.

Section 201.110(a)(2) describes the factors that AMS would consider when 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. The factors are listed in subparagraphs (i) through (vi).

Paragraphs (a)(2)(i) and (ii) address whether an LPD's distribution of inputs and assignment of flock production practices would cause material differences in performance that growers cannot avoid, and whether the LPD will make 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 would need to identify inputs and flock production practices under their control that impact grower payment.

LPDs would also be required to improve systems to monitor and, as appropriate, adjust the allocation of inputs and flock production practices to reduce the unequal distribution among growers settled together. LPDs would be required to adjust grower pay to compensate growers if a fair comparison is impractical due to unavoidable inequitable allocations. For example, the LPD may determine that a grower payment adjustment, such as a five-flock average, may be appropriate when the LPD provided chicks that are later discovered to be diseased, and no fair comparison is possible. Such a grower payment adjustment would need to employ a non-comparison method specified in the contract that reflects reasonable compensation to the grower for its services. Ensuring that the payment adjustments agreed to are fair will be part of regular AMS poultry compliance reviews.

Paragraph (a)(2)(iii) would address whether the designated time period used in the 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 necessarily require that LPDs provide all growers precisely equal inputs and identical production practices for each flock. This proposed rule would permit LPDs to minimize production inefficiencies that would arise from a literal equality standard while avoiding an unfair comparison of grower performance by ensuring that LPDs compare growers fairly over a flexible but reasonable period of time. 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) would address whether conditions and circumstances outside the control of the LPD render comparison impractical or inappropriate. A settlement group may have differences among 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. Pursuant to paragraph (a)(3) of this section, under these circumstances the LPD is required to compensate growers using an alternative to the tournament system through a non-comparison method specified in the contract. One approach is to pay the grower for pounds delivered at a rate that is the sum of the grower's base pay rate and the average per pound performance compensation rate for the tournament from which the grower was excluded, or for the last several tournaments in which the grower participated. An average of the grower's own per-pound total compensation rate over the previous 12 months—commonly, a 5-flock average, variable depending on the size of the birds—might be a useful non-comparison alternative if the prior tournaments were not also affected by unfair conditions and circumstances that would reduce their utility as reference points. AMS may review documentation maintained by the LPD to ensure that such conditions and circumstances were not present.

Paragraph (a)(2)(v) would address whether an LPD has made reasonable efforts to resolve concerns in a timely manner that a grower may raise regarding the LPD's exercise of discretion over the implementation of its fair comparison processes. In determining compliance with this requirement, through audit or in response to a complaint, AMS would consider whether an LPD has demonstrated responsiveness and commitment to resolving legitimate concerns in an appropriate manner that would avoid potential secondary harm to the grower. "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 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's resolution of this concern should be as immediate as possible to limit any additional undue damage to the grower's flock due to lack of adequate nutrition. If a grower raises concerns about feed persistently being delivered late or in an insufficient quantity, the Agency would examine the LPD's "reasonable efforts" taken to adjust the method of delivery. Additionally, an LPD would be

prohibited from retaliating against a grower in any manner for raising concerns as to whether a fair comparison method was used.

Lastly, paragraph (a)(2)(vi) would state that the Secretary would consider any other factor relevant to a fair comparison. This provision would give 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 would determine compliance with this requirement by examining the facts and circumstances, and in particular, whether the LPD took specific actions to undermine the comparison process. For example, were the LPD to intentionally group together certain growers for a comparison as a means of manipulating or adversely affecting their comparison-based outcomes, this prong would enable AMS to consider those facts and circumstances.

AMS underscores that it would, when determining whether an LPD has designed and operated their broiler grower ranking system to provide a fair comparison among growers, consider the fair comparison factors set forth in § 201.110(a)(2) against the backdrop of the magnitude and design of the relative performance pay. Where relative performance compensation forms a very small portion of grower compensation net of long-term debt and other fixed costs, AMS would expect that differences in inputs and flock production practices would cause fewer material differences in pay. AMS would expect this to operate on a sliding scale. AMS would 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 can make a reliable comparison impossible. In such cases, the proposed rule under § 201.110(a)(3) would require that an LPD must fairly compensate growers through a non-comparison method. The non-comparison method must be specified in the contract and would have to reflect a reasonable effort to fairly compensate the grower. 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 particular circumstances. For example, AMS is aware that LPDs often pay the grower an amount equal to the average rate they received over their previous five flocks.

Compliance with § 201.110(a) would require that LPDs establish a standard for fairness in the operation of tournament compensation systems. The proposed regulation creates a framework for holding an LPD to account under the Act for using an unfair comparison between growers because of the LPD's unequal distribution of inputs and assignment of flock production practices. The proposed rule would require LPDs to assess input allocations and flock production practices to meet the standard of fairness delineated in § 201.110(a)(2). LPDs could meet the standard through a range of approaches deployed over time, allowing the LPD to take into account the natural variability in living systems while protecting growers from substantial injuries they cannot avoid owing to the distribution of those inputs. For example, typically, flocks are settled with chickens ready for slaughter in a particular week. Sometimes, if there are not enough similar birds (*e.g.*, similar weight) ready in one week, LPDs may use all birds slaughtered over two or three weeks. Alternatively, some contracts settle a grower's last five flocks (approximately one year) against all other growers' last five flocks to help choose a comparable settlement pool. AMS considers a period of up to one year to be reasonable because that provides sufficient time to limit variation from one event, while assuring that LPDs treat growers fairly over a reasonable timeline. Relying on the documentation of written processes set out in proposed § 201.110(b), AMS would evaluate compliance based on the extent to which the LPD carefully evaluated the factors and took reasonable measures to protect growers from substantial injuries that they could not avoid.

Inputs like breed of chick, feed, and medication can vary independently of production practices like density, target weight and slaughter age, and vice versa. The proposed rule would provide LPDs flexibility in managing these elements within the framework of their duty to provide a fair comparison, as documented by the written processes required under proposed § 201.110(b). Based on their evaluation of these elements as set forth in their written processes, LPDs would use allocation and grouping strategies that promote a fair comparison among tournament

participants, provide remedial action to offset unavoidable circumstances in which fair comparison is not possible, and resolve grower concerns. With respect to both the distribution of inputs and the assignment of flock production practices, an LPD's duty is to design and operate a tournament to enable a fair comparison between growers. While AMS acknowledges the possibility of variability in inputs and production practices, the LPD should not design and operate their contract with the grower in manner that would impose on the grower injuries that the grower cannot reasonably avoid which the LPD could reasonably prevent.

Section 201.110(b) would set 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) would require 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 proposed rule would require documentation to include written processes, informally called policies and procedures, regarding the process for (i) inputs under LPD control, (ii) flock production practices under LPD control, (iii) comparison flexibility, and (iv) communication and cooperation with growers. The written processes would provide a general description of the items that the proposed rule requires be set forth, yet must contain sufficient detail to provide a reasonable user of the processes—such as the local manager that directs the operation of a tournament at a complex—with an understanding of the processes, including any policies that the LPD adopts governing the relevant parts of its operation and any discretion it or its agents may exercise under those policies, as well as the procedures it or its agents may deploy.

Under paragraph (b)(1)(i), LPDs would be required to create written processes for selecting and distributing inputs to growers, including how and when the LPD delivers inputs, how and when the LPD manages similarities and differences of quality and quantity in the delivery of inputs, how and when the LPD identifies differences in inputs and the potential effects of those differences on grower performance, how

and when the LPD adjusts the inputs the grower receives, and any steps the LPD takes to adjust compensation calculations based on inputs growers receive. LPDs unfairly harm growers when they distribute inputs in a manner that disadvantages a grower relative to other growers in a tournament. Growers cannot control inputs such as quality of chicks or high- or low-quality feed, yet receipt of low-quality inputs has an unfair impact on their performance in a tournament. LPD processes would require ongoing accounting and monitoring of inputs supplied to each producer using objective measures of quality that are generally accepted in the industry. Processes developed by LPDs would be required to address key areas of concern, including management of chicks that differ in quality and performance and variation in quality or quantity of feed or medication provided to growers, as well as conscious selection and delivery of inputs to specific growers for specific purpose to facilitate fair comparisons. To the extent possible, LPDs should include policies and procedures for balancing disparity of inputs either within a single flock or over multiple flocks as appropriate and feasible.

Under paragraph (b)(1)(ii), LPDs would be required to create written processes for production of live poultry, including 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, including documenting any variation by pounds and number of growout days; 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 the flock production practices the grower receives; 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 within a single tournament settlement group for which LPDs have required different types of production practices. Under the proposed 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, for example, if differences do not equitably balance out over time as set forth in the LPD's written processes.

Under paragraph (b)(1)(iii), LPDs would be required to create written processes for the LPD's grower comparison flexibility methods. If an LPD evaluates growers over one or more groupings or rankings (rather than within each grouping or ranking), these policies and procedures would need to describe how the LPD sets a reasonable time period over which the LPD fulfills its duty of fair comparison. Additionally, if the LPD might remove a grower from a ranking group, the LPD would be required to describe the circumstances under which the LPD would remove a grower and how the LPD would compensate the grower to satisfy the non-comparison compensation method required under proposed § 201.110(a)(3). 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 production practices that materially impacted the grower's performance, necessitating removal of the grower from the grouping and compensation under a non-comparison compensation method. Lastly, if the LPD groups growers based on criteria other than in the manner grouped in previous settlements, the LPD would need to set out written processes for how and when that is to be done. Settlement groupings, also called league composition, are most commonly based on their chronological availability for slaughter within the complex but could be by housing type or on other ways. Generally, the settlement is determined by flock placement timing, which commonly varies based on chronological needs by the LPD and grower. For example, one or the other may need additional layout time between flocks for cleaning, maintenance, vacation, or other similar reasons. This proposed rule would not seek to disturb that ordinary decision-making but would rather serve to identify practices or circumstances that would diverge from those ordinary reasons. While there are legitimate reasons to deviate from a strict chronological availability-based grouping, this provision is principally meant to ensure that LPDs do not inappropriately use comparison flexibility to interfere with fair comparison by intentionally grouping

specific growers together to lower their pay, or to otherwise manipulate pay to deliberately benefit certain growers over others.

Under paragraph (b)(1)(iv), LPDs would be required 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 negligent or malicious actions taken by the LPD that may impact grower performance without fear of retribution. The proposed rule would provide 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.

Section 201.110(b)(2) would require LPDs to review their compliance with the processes set forth in paragraph (b)(1) not less than once every two years. Under this requirement, (i) the reviewer must be independent of the management chain of a particular complex and qualified to conduct the review; (ii) the review must include examination of compliance practices of the complex management, production supervision, and all agents that have discretion in contract implementation, including an analysis of how often growers must be paid outside of the tournament system in order to meet the duty of fair comparison and whether the payments given were in fact greater than or equal to what the growers would otherwise have received; and (iii) the LPD must prepare a written report with the conclusions of the review, which must be based on work papers of the review and other documentation relevant to the review.

Under this proposed rule, LPDs would have a duty to monitor compliance with the processes established under paragraph (b)(1). LPDs would be required to formalize tournament operation standards and assemble either internal or external teams of reviewers to perform compliance reviews. An LPD's failure to run a tournament that provides a fair comparison between growers may result from decisions made at the complex

level rather than at corporate headquarters. The requirement for periodic compliance reviews will ensure regular supervision of local complex employees' adherence to the LPD's processes. AMS anticipates that complex management will adopt practices to comply with LPD standards with respect to tournament operation. A qualified reviewer would be a person familiar with broiler growout operations who has experience analyzing the management, operations, settlement procedures, and documentation commonly used by poultry complexes of the scale and complexity being reviewed and who is familiar with and able to apply relevant principles of internal accounting controls or a comparable internal control methodology appropriate to the industry. Under this proposal, AMS would require that LPDs create a written report providing the conclusions of the compliance review to aid AMS in enforcing the requirements of this section. Section 201.110(b)(2)'s requirement that LPDs establish documented, ongoing review of compliance processes would contribute to the operation of fair tournaments by preventing harms such as LPD manipulation of prices or delivery of subpar inputs and assignment of undesirable production practices by local complex managers.

Section 201.110(b)(3) would require 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. Relevant records would 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; compliance review reports covering the last five years; 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 this proposal, AMS would require that LPDs 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 would enhance LPD management's ability to establish and monitor compliance, as well as AMS's ability to supervise and enforce the proposed rule.

Compliance with proposed § 201.110(b) would require LPDs to document processes for the design and operation of broiler grower ranking systems that are 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 the proposed 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 could occur in several ways. Growers could 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.⁴⁰ AMS would 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 would also have a right to proceed directly in Federal court.

C. Questions

AMS specifically invites comments on various aspects of the proposal as described above. Please fully explain all views and alternative solutions or suggestions, supplying examples and data or other information to support those views where possible. Parties who wish to comment anonymously may do so by entering "N/A" in the fields that would identify the commenter. While comments on any aspect of the proposed rule are welcome, AMS

specifically solicits comments on the following:

1. Does proposed § 201.110 effectively and appropriately benefit growers in reducing unfairness and deception? If so, why? If not, in what ways can it better do so?

2. Are the duty of fair comparison and the factors for evaluating whether the LPD reasonably designed its ranking system to deliver fair comparison appropriately designed? If not, how should they be changed?

3. Are the policies and procedures and the compliance review requirement effective and appropriate tools for documenting and enhancing compliance with the fair comparison duty? Why or why not? If not, what additional tools are needed? Is additional documentation on the inputs provided, timing of input delivery, and requirements for growing methods needed? Why or why not?

4. What means exist for LPDs, growers, and AMS to evaluate performance differences stemming from inputs and production practices? To the extent that information asymmetries continue to exist, please offer any views or suggestions on ways to address them.

5. How should the non-comparison methods of compensation be set to ensure that growers are fairly compensated outside of the tournament system, if needed? Should the proposed rule permit other non-comparison methods of compensation that are not specified in the broiler grower contract to be used as long as they are mutually agreed upon by both parties (*i.e.*, both the affected grower and the LPD)?

6. Should AMS be more specific regarding what constitutes "reasonable efforts" made by the LPD to resolve disputes, and if so, for which circumstances and how?

7. What specific burdens might LPDs face in complying with this proposed rule? Would this require LPDs to substantially modify their business model? What specific modifications would be required and why?

8. Is this proposal's standard for determining if a difference in inputs was material to grower performance—*i.e.*, whether it meaningfully impacts pay from the perspective of the grower—appropriately designed? Should the Agency set a threshold for change in pay (*e.g.*, a percentage) that is always material? If so, what threshold?

9. Are there simpler means to achieve the ends proposed in § 201.110? For example, would a limitation on the proportion of comparison-based compensation to total compensation—like comparison-based compensation limited to 10 percent of total

compensation—be sufficient to provide flexibility to LPDs and protect growers from variability in inputs and flock production practices?

10. Should AMS's final rule expressly clarify that a pattern or 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? In particular:

a. Please explain why or why not or suggest alternative approaches to address particular concerns with non-tournament pay systems that rely on grower performance.

b. Would some or all of the criteria with respect to the duty and the requirement for written processes set forth in § 201.110 be useful to address concerns with these non-tournament performance pay systems? If so, please explain under what circumstances and how.

c. Are there specific circumstances where AMS should articulate additional protection for growers against punitive actions by LPDs through the differential provision of inputs or other processes?

11. Should AMS make the effective date for the provisions of this proposed rule 180 days following publication of the final rule in the **Federal Register**? If you recommend shorter or longer for some or all of the provisions, please explain why.

V. Broiler Grower Capital Improvement Disclosure Document (Proposed § 201.112)

LPDs often request or require that growers make costly additional capital investments. These ACIs may benefit LPDs by enabling them to profit from growers' investment in more efficient technology or by otherwise enabling LPDs to meet changing consumer demand for different products (for example, because growers have invested in producing antibiotic-free chickens). ACIs may also benefit growers by enabling them to earn more in some cases.

At the same time, ACIs can be problematic. The LPD requesting an ACI may be exploiting its bargaining leverage and forcing the grower to bear unreasonable risk. The terms of the ACI may also be complicated or difficult to evaluate. Because of the tournament system, the grower's benefits may dissipate over time as other growers

⁴⁰ 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).

adopt similar ACIs. In such cases, the grower may face increased debt with only a small increase in revenue. Growers, however, are often not in a financial position to avoid making an ACI. Generally, growers have already incurred debt to enter into a broiler growing arrangement. They need to repay their existing broiler-production related debts. If their LPD threatens them with termination or reduced compensation, growers may have no choice but to make the investment. Further, growers have limited options to switch to alternative LPDs, and the cost of switching LPDs can be high. Undertaking an ACI increases growers' debt, which can further increase growers' dependence on their relationship with their LPD. These problems were identified in a USDA rule published in 2011 (which added § 201.216 governing USDA's evaluation of unfairness in ACIs (76 FR 76874; December 9, 2011)) and were among the concerns raised by growers in the ANPR for this proposed rule.

Even when a grower has sufficient bargaining leverage, the LPD may not provide sufficient information for the grower to assess the risk and reward of undertaking the ACI. Many growers undertake ACIs without the opportunity to fully understand the ACI's purpose, design, risks, and impacts on their financial well-being. Information asymmetry impairs growers' ability to negotiate, effectively exercise independent decision-making to reject an ACI, and, more broadly, manage their farming operation. 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 ACI, 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 ACI 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 ACIs. AMS emphasizes that disclosure under proposed § 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, and the P&S Act more broadly, when terms are unfair.

This section describes the problem in depth and further discusses AMS's

proposed regulation to require disclosures to facilitate AMS's and growers' ability to better identify and enforce growers' rights against unfair ACIs under the existing ACI criteria in § 201.216. Lastly, this section provides questions for commenters to consider regarding the proposed regulation, including whether additional substantive limits on additional capital investments are needed in addition to the proposed disclosure.

A. Problems Related to ACIs in Broiler Contracts

ACIs in poultry growing facilities can improve growout productivity, satisfy customer demands related to broiler production (e.g., animal welfare), qualify an operation for USDA's Process Verified Program,⁴¹ and help growers conform to other product or process attributes demanded by LPDs. ACI programs, however, impose costs and risks borne largely, and often solely, by growers. Due to asset specificity and hold-up problems (discussed in section II, "Industry Background and Need for the Rulemaking") many growers are uncomfortable taking on additional financial risk—especially absent appropriate compensation—but for all practical purposes are compelled to when LPDs unilaterally impose ACI costs and risks.

These costs and risks are particularly problematic when growers lack relevant information about the purpose, risks, and returns of the ACI. As a result, growers may be unable to protect themselves against insufficient compensation or other unfair practices including by, for example, attempting to switch LPDs. The ability to make such a switch is extremely limited because of LPD-specific housing specifications. Even when the ACI is presented as voluntary, it can be as coercive as a mandatory ACI if the grower cannot evaluate risks and rewards or if the grower has few or no options to switch to an alternative LPD. Indeed, the LPD often has substantial bargaining power: switching may be difficult or costly, alternative LPDs may not need additional growers, differing requirements may increase the cost of switching, and preexisting debt that has not been fully recouped (owing to mismatches between the duration of growers' contracts and the duration of their borrowing terms) can aggravate costs and risks to growers. Given these challenges, growers are commonly unable to negotiate with LPDs over ACIs

or decline to make a particular investment and thus limit their risk.

Assuming a well-designed ACI that results in improved efficiency, failing to implement an ACI when other growers do will likely result in inherently weaker performance under the tournament. An LPD may offer an incentive payment (commonly added to base pay rates) to a grower to make a desired ACI, but growers have limited, if any, ability to negotiate those incentive payments. LPDs continually benefit from ACIs to the extent they improve production efficiency for growers or enable growers to match consumer preferences by switching to specific production processes, such as limited antibiotic usage. But any relative performance advantage gained by early adopters of an ACI will fade as other growers make the investment and gain the same productivity advantages. The incentive payments thus may not sufficiently compensate for the additional risk and cost of the debt or enable growers to fully share in the cost-savings or improvements to the product.

Further, when LPDs do not provide important information about the nature of the ACI growers cannot determine the extent to which incentive payments could be expected to compensate them for the costs of these investments. Nor can they evaluate the risks relating to the structure of those incentives—including whether the opportunity for recoupment is undermined by other growers adopting the same technology.

Without sufficient, simple, and clear disclosures, growers cannot assess the benefits or risks of making the investment. Growers cannot determine whether a program presented as voluntary is, for all practical purposes, mandatory. AMS notes that LPDs may not retaliate against a grower's refusal to engage in ACI programs—for example by the intentional delivery of subpar or inappropriate inputs or production practices—under the P&S Act.

Past grower concerns and comments in response to the ANPR add further context from both sides of this issue. The 1999 FLAG survey found that 33 percent of broiler growers believed that making improvements to housing as recommended by their LPD did not make them better off financially. As the cost of poultry growing infrastructure has increased over the past two decades, the financial risk of ACIs appears to be increasing. Multiple ANPR commenters indicated that contracts are not long enough to ensure return on costly infrastructure investments. One State farm bureau, for example, commented that upgrades of equipment and housing typically benefit the LPD at the cost of

⁴¹ See <https://www.ams.usda.gov/services/auditing/process-verified-programs>.

the grower. Another State farm bureau commented that LPDs should provide documentation citing relevant research to justify mandatory modification of buildings and equipment and that LPDs should offer contracts for a sufficient length of time to recoup the cost of poultry growers' investment. Grower advocate organizations stated that some LPDs require poultry growers to make unnecessary upgrades and further urged AMS to consider the practice of demanding large capital investments without commensurate assurance of income from those capital investments to be an unfair and deceptive practice.

Organizations representing LPDs countered that existing protections and regulations sufficiently address this issue. A commenter on the ANPR cited the list of criteria in 9 CFR 201.216, "Additional capital investments criteria," that the Agency may use in considering whether capital investment requirements violate the Act. This commenter also underscored the prevalence of existing industry practices that address this issue, such as the practice of LPDs offering compensation through contract amendments to growers when they make equipment changes during the term of that contract. The commenter also stated that existing causes of action for breach of contract protect growers in cases where an LPD refuses to honor a signed contract by cancelling or modifying it.

The Agency agrees with the commenter's perspective that the existing regulation in § 201.216 may allow the Agency to partially mitigate the effects of these problems. The regulation sets forth criteria for whether ACIs would be an unfair practice or other violation of the Act. These criteria include whether the grower can decide against the ACIs; whether the ACIs were a result of coercion, retaliation, or threats by the LPD; and whether the ACIs can result in reasonable recoupment, or adequate compensation for the ACIs, among other non-exhaustive criteria. However, AMS has found that the presence of the criteria alone is insufficient to effectively address problems stemming from ACIs. AMS and growers lack the data necessary to analyze whether an ACI violates the criteria. Moreover, once an investment is made and a grower incurs debt, it can be nearly impossible to unwind. Technical specifications can make switching costly (where even possible), and alternative uses at similar compensation rates are nearly nonexistent.

A key component of the criteria, expectation of recoupment (§ 201.216(f)), is impossible to assess in

the absence of reliable and accurate projections of revenue and earnings and is best evidenced by data possessed by the LPD who is asking the grower to make the ACI. Insufficient information about ACIs also, for example, impacts the criteria seeking to preserve the grower's discretion to decide against an ACI (§ 201.216(a)), in that a grower is unable to effectively analyze the extent to which without the ACI they would still be able to compete against other growers. AMS has encountered these issues in investigations regarding ACI programs.

As the practice of LPDs requiring or seeking ACIs in tournament system growing arrangements has become standard practice, Congress enacted section 208 of the Act to inform unsuspecting growers that such potential investments may be required.⁴² The need for such a disclosure emphasizes the prevalence of the practice and its perceived unavailability owing to growers' lack of reasonable alternatives and the pervasiveness of ACIs across the industry. A grower may not have meaningful opportunity to choose whether to make an ACI if a grower only has one or two LPDs to choose between, faces obstacles switching LPDs, is denied the key information needed to understand the risks and returns of the ACI, and/or fears retaliation from an LPD if it refuses an ACI.

In carefully considering this issue, AMS is concerned that some growers are unable to negotiate or refuse contracts to prevent the imposition of ACIs and that the imposition of some particular ACIs are unfair under a § 201.216 analysis. When LPDs can impose ACIs on unfair terms, they expose growers to financial risk that growers cannot mitigate during the contracting process. While the statutory ACI disclosure tells growers there is a potential risk of ACIs, the majority of contracts contain no information relating to when ACIs may be required, nor the costs of any such ACI, nor what, if any, limits there are on an LPD's ability to unilaterally impose ACIs that do not materially improve production efficiency or meet consumer demands.

AMS is also concerned that if growers are precluded from negotiating on ACIs, they also lack the ability to demand increased transparency related to ACI programs. Transparency will not cure

⁴² Section 208 requires all poultry production contracts to include a "required disclosure" that "additional large capital investments may be required of the poultry grower or swine production contract grower during the term of the poultry growing arrangement or swine production contract." 7 U.S.C. 197a(b)(1).

unfairness, but it may help growers and AMS assess the risks and benefits of an ACI. For example, growers have asserted that some ACIs have been experimental in nature, which may implicate unfairness concerns in § 201.216. Compliance with these disclosures would also create the records necessary to analyze the § 201.216 criteria.

To better enable AMS and growers to protect against unfairness and deception, LPDs must disclose and record more information regarding the ACIs they request from broiler growers. The disclosures must occur before growers take on the financial burden and risks of the ACI. 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.

Growers bear all, or nearly all, of the costs and risks of ACIs. LPDs do not own the production capital and therefore do not share in these risks, although they frequently dictate grower investments. The system of ownership of poultry production capital provides no direct incentive for LPDs to carefully consider the extent to which the ACI will improve individual grower production efficiency, whether the ACI will result in financial benefit to growers, and whether the cost of the ACI is proportionate to any such benefits. Even when LPDs share in some of the costs by providing ACI incentive payments, the payments may not cover all the costs or risks that the grower bears. These are problems this proposed rule alone cannot and does not purport to solve; however, the disclosure required in this proposed rule will provide data points for analysis under § 201.216 that have been lacking based on AMS's experience.

When considering new investment, growers seek to maximize net productivity benefits subject to cost. However, when LPDs do not bear investment cost, they have incentives only to maximize their benefits and encourage growers to over-invest in poultry-specific production capital to the point of negative returns for the grower. LPDs' use of incentive payments to compensate growers for ACIs can help to align investment incentives. For these arrangements to work properly, however, growers must clearly understand the parameters of the investment and its future revenue potential to evaluate potentially unfair ACIs under § 201.216.

LPDs possess material information that is critical for growers and for the recordkeeping of ACI transactions.

When LPDs withhold important information about ACI programs, they prevent growers from making fully informed decisions, understanding the extent of over-investment, and assessing the fairness of the transaction. LPDs can exploit this information asymmetry to impede growers' ability to evaluate contracts and manage farms effectively; in more competitive markets, LPDs can impede growers' ability to compare contracts among LPDs, bargain efficiently with competing LPDs, and enforce their rights under the Act. This type of deceptive conduct results in misallocation of grower resources, enhanced LPD bargaining power, exacerbation of hold-up problems, significant financial risk to growers, and reduced competition among LPDs for grower services. An increase in grower investment also leads to increased grower dependency on LPDs to generate returns on that investment through poultry contracting. Additionally, in some cases the presence of few or no other poultry contracting options in a grower region further focuses dependence on a single LPD. The misalignment of incentives coupled with growers' inability to bargain creates deceptive and unfair conditions. These practices may amount to unfair and deceptive trade practices under an analysis informed by Packers and Stockyards Act case law and States' unfair practice laws, as well as the FTC approach to unfair practices and unfair methods of competition.

Clear disclosure of ACI 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 ACI), as well as other provisions of the P&S Act and regulations. Disclosure alone is not a remedy for an ACI that is unfair if, for example, an LPD with the advantage of hold-up power (*e.g.*, there are no alternative LPDs for growers to contract with) requires an ACI that is likely to have unreasonably low or negative financial returns for growers who in good faith have invested in a long-term relationship with that LPD. Nevertheless, the disclosures required by proposed § 201.112 will create a record that will facilitate the Agency's ability to enforce the Act under § 201.216.

In section V.C. below, AMS asks commenters questions regarding proposed § 201.112 to determine whether the proposed disclosure requirement will help growers effectuate their rights under § 201.216. In that section, we are also seeking comment on whether to strengthen the substantive protections for reasonable capital

investments and adopt a requirement preventing an LPD from mandating an ACI unless the cost of the required ACI can reasonably be expected to be recouped by the grower or another similar requirement to ensure that ACIs are reasonable for growers.

B. Summary of Proposed § 201.112

AMS is proposing to add new § 201.112, "Broiler grower Capital Improvement Disclosure Document," which would require that LPDs use a Capital Improvement Disclosure Document (Disclosure Document). Paragraph (a) of the new section states that when an LPD requests that a grower make an ACI, the LPD must provide the grower with a Disclosure Document. Paragraph (b) describes the disclosures that the LPD would be required to include in the Disclosure Document. These disclosures include the purpose of the ACI and a summary of relevant research or other supporting material that the LPD has relied upon in justifying the ACI (paragraph (b)(1)). LPDs must also disclose all relevant financial incentives and compensation for the grower associated with the ACI (paragraph (b)(2)), along with all relevant construction schedules related to the request for the ACI (paragraph (b)(3)). LPDs must also identify the housing specifications associated with the ACI (paragraph (b)(4)) and any required or approved manufacturers or vendors (paragraph (b)(5)). The proposed rule would also require LPDs to provide an analysis—including any assumptions, risks, or uncertainties—of projected returns the grower can expect related to the ACI sufficient to allow the grower to make their own projections (paragraph (b)(6)). Lastly, the proposed rule (in paragraph (b)(7)) would require LPDs to provide a specific statement in the Disclosure Document. The statement indicates that USDA has not verified the information contained in the Disclosure Document and that if the Disclosure Document contains any false or misleading statement or a material omission, a violation of Federal and/or State law may have occurred which may be determined to be unlawful under the P&S Act. The statement also includes contact information for use in filing a complaint with PSD and a web address to find additional information on rights and responsibilities under the Act. The specific provisions of the proposed rule are discussed in more detail below.

Proposed § 201.112(a) would require that LPDs assemble a Disclosure Document and provide the document to growers before requesting an ACI. This disclosure provision would require LPDs to make explicit representations

about the nature of required ACIs. Growers would review the disclosure information provided by LPDs when making the further investment decisions contemplated by the ACI. This disclosure would not cure any unfairness in the ACI itself, but the requirement would alleviate some asymmetric information problems and better enable growers and agencies to identify problematic practices relating to ACIs including to assess and apply the criteria in § 201.216.

Information provided in the Disclosure Document would then help growers protect themselves at an earlier stage—before the investment—from unfair practices, by enabling them to report to AMS potentially unfair ACI practices or bring their own action. Improved documentation will also enable AMS to take earlier and more effective action against problematic ACI practices, owing to past insufficiency in obtaining a timely and clear understanding of the full range of costs, risks, and/or benefits relating to the ACI. Transparency will also enable some growers, where sufficient choice exists, to make better additional investment decisions. The Disclosure Document would be required to clearly state the intended and expected outcome of LPD ACI requirements. As such, LPDs would demonstrate the extent and likelihood that growers would benefit from or be put at risk by the ACI.

The requirement to provide the disclosure would be triggered when the LPD requests the grower make an ACI. At a minimum, this would occur when the LPD provides any new or modified housing specifications to the grower. AMS has chosen to utilize this timing as the trigger because capital investments generally take months, not days, to plan, finance, and operationalize, affording the grower sufficient time during the steps that advance that process forward (such as engaging in planning and borrowing) to be able to act on the information provided in the Disclosure Document, including contacting AMS to report concerns. Accordingly, providing the grower with the Disclosure Document no later than when the LPD provides any new or modified housing specifications to the grower, will provide the grower with ample opportunity and flexibility for review to effectuate their rights. Additionally, an LPD may not restrict growers from sharing the Disclosure Documents with legal counsel, accountants, family, business associates, and financial advisors or lenders.

Proposed § 201.112(b) lists the items the Disclosure Document is required to disclose. These disclosures must be

prominently presented in a clear, concise, and understandable manner. Paragraph (b)(1) would require that the Disclosure Document provide the purpose of the ACI for both the LPD and the grower and a summary of any relevant research or other supporting material linking the specific infrastructure modification/housing specification with that purpose. Growers, and AMS, face significant obstacles in assessing the potential costs, benefits, and risks relating to any ACI, and therefore are hamstrung in their ability to take action against problematic ACI practices. LPDs almost always have superior information regarding the outcomes of and risks around the contemplated ACI. LPDs commonly research and design ACIs and usually have a plan or intended outcomes with respect to their request for the adoption of an ACI. Growers have limited to no access to that information, yet they are asked to expend hundreds of thousands or even millions of dollars to implement ACIs.

As part of any assessment of risks or benefits relating to an ACI, growers need to understand the intended purpose of the ACI and have access to any relevant research or other supporting material regarding that ACI. Over the years and in response to the ANPR, growers have raised concerns that ACIs are often experimental, that it is difficult to determine whether ACIs are necessary, and whether ACIs would be profitable. Providing the information proposed in this paragraph would assist growers, and in turn AMS, in evaluating whether a requested or required ACI raises those concerns or other potentially unfair practices. An ACI for which the LPD does not clearly provide this information is more likely to be deceptive because growers are unable to evaluate the real purposes and material risks relating to the ACI. For example, without disclosures indicating that an ACI was designed to improve growout productivity, growers would be unable to evaluate the real implication of the structures and the incentives offered. Similarly, without disclosures indicating that an ACI was designed for animal welfare, compliance with a USDA Process Verified Program, or other similar reasons, growers would be unable to assess the risks and incentives for them to implement the ACI.

Under this proposal, LPD failure to adequately disclose this information would be deceptive and harmful to growers by imposing undue financial risk and increasing the likelihood of a poor financial outcome on the investment. Omissions of this information would prevent growers

from making an informed business decision. This proposal would also help AMS and growers identify unfair practices because it would require LPDs to provide increased transparency regarding ACIs. The provision of transparency under this proposed rule is not itself a cure for the unfair practices, relief for which would be sought through separate enforcement action under § 201.216 and otherwise under the P&S Act. AMS believes that the provision of this information will assist AMS and growers in their efforts to halt unfair practices in their incipiency and potentially deter some violations.

Under proposed § 201.112(b)(2) through (5), LPDs would be required to provide clear ACI schedules and specifications to growers and state any compensation promised to growers for the ACI. Growers must plan loan repayment schedules based on expected LPD payments. Incentive payments often constitute an important component of grower repayment capacity. Paragraph (b)(2) requires the disclosure of such payments prior to the investment. LPD construction schedules, housing specifications, and approved manufacturers or vendors are critical components to any ACI. The provision of these basic details regarding the ACI would enable a grower to understand the workings, process, and design characteristics of the ACI. They thus would enable a grower to identify certain risks relating to the ACI and potentially unfair or otherwise impermissible ACI practices under § 201.116, for example, if favoritism (*e.g.*, to relatives of LPD employees or to certain growers) were present in the vendors chosen. Additionally, failure to provide such information is likely to be deceptive. The information is material to any contracting and investment decision, and the absence of such information is likely to mislead the grower. Therefore, AMS would require those disclosures under proposed § 201.112(b)(3) through (b)(5). LPDs harm growers when they refuse to pay promised additional compensation, discontinue a contract, or require further investment by growers to align with LPD expectations that growers fail to meet because of LPDs' initial nondisclosure.

Under § 201.112(b)(2) and (3), LPDs would be required to disclose all relevant financial incentives and compensation associated with an ACI and establish a schedule of expected grower construction for new ACIs. Financial incentives would include all incentives relating to the ACI, 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 ACI 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 ACI.

By enabling growers to clearly understand each component of the ACI being requested by the LPD, the disclosures proposed in § 201.112(b)(2) through (5) would address key information asymmetries that exist between the LPD and the grower with respect to LPD's purposes, bases, and expectations for an ACI. Growers will be better positioned to evaluate the true costs and risks from the ACI, as well as the operational implications for their farming enterprise.

The provision of this information is essential for AMS and for growers to identify and take action against unfair practices as contemplated under § 201.216 and otherwise. Failure to provide this information is deception because growers are asked to make investment and contracting decisions without information that is material to those decisions; the lack of this information is likely to mislead growers. Section 201.112(b)(6) would require that LPDs provide a financial analysis—including any assumptions, risks, uncertainties—that can be relied upon by growers facing ACI decisions. 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 ACI and the impacts on the reliability of returns in relation to the incentives. The financial analysis would also be expected to clearly describe the risks relating to the duration of the contract. For example, the LPD may need to take into account whether and how the LPD terminated

any growers without cause during the last 5 years as potentially informing those risks. That analysis may also describe the extent of any compensation provided to terminated growers (e.g., if the remaining X number of years a contract was paid off or if any assistance was provided to reduce or pay off the remaining X number of years of a loan), and whether the LPD provided any risk-sharing mechanisms to assist it and the grower in managing changing consumer demand and preferences for poultry.

LPDs possess information about the expected returns on ACIs that producers do not have and cannot obtain independently. Therefore, LPDs exert substantial control over growers' ability to evaluate the economic and financial feasibility of an ACI while possessing the power to impose all ACI costs on growers. Growers lack the bargaining power to demand the information they need to make decisions for their financial benefit. In addition to being deceptive, 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 ACIs under the Act generally.

The proposed rule would require LPDs to prepare analyses of expected grower returns for ACIs using information at their disposal about investment purpose, expected benefit, and grower performance. LPDs would provide this information and analysis to assist growers in evaluating the ACI request or requirement and to assist growers and AMS in evaluating whether LPDs have complied with the requirements of § 201.216. Growers can then review and consider this information when deciding whether to make proposed new investments and whether to pursue their rights under § 201.216 or other legal protections.

As noted above, the disclosures in proposed § 201.112 would significantly assist AMS in analyzing and applying the criteria under § 201.216. For example, an ACI with a speculative purpose or one not grounded in research and reasonable estimates—a concern that growers have reported to AMS regarding ACIs—would be more apparent if AMS and growers were able to review an LPD's representations about the purpose of an ACI, the research associated with it, and an LPD's expectation of costs, construction schedules, and approved vendors for the ACI. Such information would benefit growers in engaging in their own analysis of potential unfairness and

would not otherwise be accessible to growers since the purpose and bases of an ACI are entirely under the control of the LPD. It has also proven difficult for AMS to collect this information in investigations, thus necessitating the proposed disclosures to create records of these transactions.

Additionally, these disclosures, in particular the disclosures regarding financial incentives and projected returns, would be highly valuable to AMS and growers in identifying ACI instances or programs that raise concerns relating to whether the grower, as a practical matter, could refuse to participate in an ACI; whether the ACI was a result of coercion, retaliation, or threats by the LPD; and whether the grower can reasonably recoup the investment. For example, and as discussed above, whether a grower has a reasonable opportunity to recoup the cost of the investment depends on the financial incentives, the projected returns, and the contract duration of the proposed ACI. Similarly, the grower should understand whether, and to what degree, relative performance in the tournament system determines whether the grower will recoup the investment required by the ACI. If the fixed portion of compensation is too low to cover the costs of the ACI, recoupment would be unlikely as other growers adopted similar improvements making the first grower's initially above-average performance simply average over time. Under these circumstances, the LPD (and not the growers) would obtain most or all of the benefit of efficiency gains from grower investments.

This dynamic is an additional reason why a limitation on comparison-based performance bonuses may be necessary. As discussed above under proposed § 201.106, after a referral from AMS to DOJ on a potential P&S Act violation, DOJ in cooperation with USDA reached a settlement in 2022 which limited the proportion of comparison-based performance compensation to 25% of base-plus-comparison total compensation (i.e., compensation from the guaranteed base pay rate plus compensation from comparison-based bonuses). Other forms of performance pay were not affected, such as non-comparison-based bonuses that rewarded or incentivized performance, including to invest in more efficient technology.⁴³ As noted above, based on the facts and circumstances AMS is engaged in a case-by-case enforcement

strategy with respect to whether performance bonuses in the tournament system can be unfair, and the existence of an ACI may affect AMS's assessment—though we have requested information under the questions to proposed § 201.106 to assess whether alternative strategies are more apt. In sum, conducting the analysis necessary to determine compliance under the Act is challenging today—especially for the grower, but also for AMS. AMS has noted limitations in the records available to conduct those analyses, especially on the timely basis necessary to protect growers being asked to enter into potentially illegal ACIs or otherwise difficult contracting decisions.

Section 201.112(b)(7) would require that LPDs include in the Disclosure Document a statement, the text of which is provided in paragraph (b)(7). The statement includes the disclosure that the Disclosure Document has not been reviewed by USDA, and that false and misleading statements or material omissions may be violations of State and/or Federal laws. The statement also indicates that violations of Federal and State laws may be determined to be unfair, unjustly discriminatory, or deceptive and unlawful under the P&S Act, as amended. AMS does not intend for the proposed 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 a facts and circumstances analysis of each case. The required statement also includes Packers and Stockyard Division contact information that growers can use to report violations and other concerns. Lastly, the statement provides website contact information for those seeking additional information on rights and responsibilities under the P&S Act.

Compliance with § 201.112 would require 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 ACI.

Enforcement 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 referral to DOJ for appropriate action or, where failure to pay is implicated, USDA enforcement through administrative action.⁴⁴ As necessary

⁴³ Wayne-Sanderson DOJ Consent Decree, June 25, 2022, available at <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

⁴⁴ 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).

for compliance enforcement or during investigations, AMS would review Disclosure Documents to ensure completeness. Injured individuals would also have a right to proceed in Federal court.

C. Questions

AMS specifically invites comments on various aspects of the proposal as described above. Please fully explain all views and alternative solutions or suggestions, supplying examples and data or other information to support those views where possible. Parties who wish to comment anonymously may do so by entering "N/A" in the fields that would identify the commenter. While comments on any aspect of the proposed rule are welcome, AMS specifically solicits comments on the following:

1. Do the Capital Improvement Disclosure Document provisions of the proposed rule assist growers in identifying and appropriately addressing concerns that growers have expressed relating to ACIs? If so, why? If not, what ways can it better do so?
2. Are there specific ACI-related programs or other related conduct that LPDs engage in that are not solved by the proposed disclosures? If so, identify the conduct and whether additional disclosures, presumptions, or prohibitions would effectively address the harms from the conduct. Please explain both the problematic programs/conduct and any harms in detail.
3. What considerations, if any, should AMS take into account with respect to the timing, delivery, or readability with respect to the Disclosure Document? For example, should AMS include a provision requiring that LPDs, at the time they deliver the Disclosure Document to the grower, make reasonable efforts to assist the grower in translating the Disclosure Document and to ensure that growers are aware of their right to request such translation assistance?
4. 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.
5. Proposed § 201.112(b)(6) does not include a specific format for reporting projected returns. Should LPDs be required to follow a specific format for the analysis required in § 201.112(b)(6)?

If so, what individual components would be most usual to growers contemplating ACIs?

6. What other disclosures should be required of LPDs when they request or require broiler growers to make ACIs, and why? In particular, are there other disclosures that could enhance the Secretary's consideration of criteria in current regulations in § 201.216?
7. What specific burdens or obstacles might LPDs face in complying with this proposed rule? Would this require LPDs to substantially modify their business model? What specific modifications would be required and why?
8. Should disclosures or prohibitions be scaled based on the size of the investment? If so, how and based on what scaling? If so, please explain the reasons and implications for LPDs and growers?
9. What disclosures, forms, presumptions, or prohibitions could AMS require or incentivize of an LPD to align the length of any contract following an ACI with any debt that the grower undertook as part of the ACI? In particular:
 - a. Should AMS establish a categorical presumption of unfairness when the duration of the contract is shorter than the duration of the loan or other similar requirement?
 - b. What other requirements or presumptions might be needed or useful to design or enforce such a presumption? Should these relate, for example, to a grower's assignment of payments from the LPD, monitoring practices by the LPD of the grower's farm financial circumstances, the timing of ACI programs with respect to the existing loans that grower holds, or the 5-year turnover rate of growers for the LPD?
 - c. To what extent might such a presumption give rise to disparate treatment between growers based on the particular financial circumstances of the farm, and if presented, how much those circumstances be addressed?
 - d. Please provide as much specificity as possible in your responses regarding why or why not to the above items, including examples and data if possible.
10. Should AMS amend § 201.216 to revise or include additional criteria that may be considered as categorical presumptions of unfairness or otherwise as violations of the Act? Please provide as much specificity as possible in your responses regarding why or why not, including examples and data if possible. In particular:
 - a. Should AMS revise or include as an additional requirement that "A live poultry dealer shall not mandate an additional capital investment unless the

cost of the required additional capital investment can reasonably be expected to be recouped by the poultry grower"?

- b. With respect to recoupment, how should AMS evaluate factors that go into an analysis of "reasonably be expected," such as: the costs of investments at a local complex; any variation between growers; the duration of likely borrowing by growers; the contractual terms including guaranteed and not guaranteed compensation rates and flock placements, etc.; and other factors including the extent to which they are known to the LPD?
 - c. Should AMS set a standard or presumption for contracts in ACI circumstances such that no less than 85, 90, or 100 percent of the projected recoupment must come from compensation methods that are not based on performance? If so, at which level and why?
 11. Should AMS make the effective date for the provisions of this proposed rule 180 days following publication of the final rule in the **Federal Register**? If you recommend shorter or longer for some or all of the provisions, please explain why.
- ### VI. Severability (Proposed § 201.290)
- AMS is proposing to add new § 201.290, "Severability," to subpart N of part 201 to ensure that if any provision of subpart N or any component of any provision is declared invalid, or the applicability thereof to any person or circumstances is held invalid, it is AMS'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. Such a provision is typical in AMS regulations that cover several different topics and is included here as a matter of housekeeping.
- This rulemaking proposes to add three new sections to subpart N to address different harms common in the broiler production industry: lack of payment transparency in boiler growing arrangements, unfairness in tournament operations, and lack of disclosure from LPDs regarding ACIs. Each of these provisions can operate independently in the absence of the others. Conduct that violates one provision 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 proposed § 201.106, the Agency would remain able to enforce this provision even if the provision requiring the fair operation of

broiler growing 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 prohibiting an LPD from reducing a grower's rate of pay from that disclosed in the contract. As another example, were the proposed provision regarding ACIs (proposed § 201.112) struck, AMS would still retain criteria under § 201.216 to evaluate whether required an ACI constitutes a violation of the P&S Act.

AMS intends for the proposed severability provision to operate to the fullest extent possible. For example, under § 201.110(b)(1), "Policies and procedures," if the comparison flexibility 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) (communication and cooperation). 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.

VII. Regulatory Notices and Analyses

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), AMS has requested OMB approval of new information collection and recordkeeping requirements related to this proposed rule. AMS invites comments on this new information collection. All comments received on this information collection will be summarized and included in the final request for OMB approval. Below is summary information on the burdens of these new information collection and recordkeeping requirements. Additional detail can be found in the Regulatory Impact Analysis (RIA). Comments on this section or the details in the RIA will be considered in the final rule analysis.

Title: Poultry Growing Tournament Systems: Fairness and Related Concerns.

OMB Number: 0581-NEW.

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. Proposed 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, and provide information disclosures to growers when requesting that growers make additional capital investments. Under the proposal, LPDs would develop and document policies and procedures to meet a duty of fair grower comparison in tournaments and prepare written reports based on internal reviews of compliance conducted not less than once every two years. 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 proposed rulemaking would also require that LPDs provide a Capital Improvement Disclosure Document to growers at times when LPDs request that growers make additional capital investments.

The estimates provided below apply only to LPDs that would be 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.

Operation of Broiler Grower Ranking Systems Under § 201.110(b)(1)(i) Through (iii) and (b)(2)

Estimate of Burden: Public burden for this collection of information is estimated to average 301.89 hours per response (first year), 220.66 hours per year thereafter.

Respondents: Live poultry dealers.

Estimated Number of Respondents: 42.

Estimated Number of Responses: 188.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 56,756 hours in the first year, and 41,484 hours per year thereafter.

Communication and Cooperation Under § 201.110(b)(1)(iv)

Estimate of Burden: Public burden for this collection of information is estimated to average 45.24 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: 1,900 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 0.53 hours per response (first year), 0.53 hours per year thereafter.

Respondents: Live poultry dealers.

Estimated Number of Respondents: 42.

Estimated Number of Responses: 990.

Estimated Number of Responses per Respondent: 24.

Estimated Total Annual Burden on Respondents: 526 hours in the first year, and 526 hours per year thereafter.

Comments: Comments are invited on: (1) Whether the proposed collection of the information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

AMS estimates that 42 LPDs would each establish, maintain, and review documentation of written processes designed to operate a poultry grower ranking system that is consistent with a duty of fair comparison as required under proposed § 201.110.⁴⁵ AMS arrived at its estimate that four (4) responses would be produced per LPD in complying with new requirements for broiler tournament fairness policies and procedures by dividing the 188 broiler plants (or complexes) indicated in the fiscal year 2021 Annual Report filed by 42 LPDs with broiler production.⁴⁶ AMS

⁴⁵ Responses and costs related to § 201.110(b)(1)(iv), "Communication and cooperation," are discussed below separately from the other paragraphs of § 201.110. Costs associated with § 201.110(b)(3), "Record retention," are included in cost estimates for § 201.110(b)(1) and (2).

⁴⁶ 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>.

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 301.89 hours for each response, while ongoing annual maintenance, compliance monitoring, compliance review reporting, production, and distribution would take 220.66 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 (56,756 first year hours and 41,484 ongoing hours) by the annual number of responses for all LPDs (188). AMS estimated the number of hours for all LPDs to develop, produce, distribute, monitor, review, and maintain each set of processes from the number of hours estimated and the expected cost estimates in tables 6 and 7 in section VII.C., “Regulatory Impact Analysis.”

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 proposed § 201.110(b)(1)(iv). AMS estimates first year set-up and implementation of the plan, including management, legal, administrative, and information technology time, would require approximately 45.24 hours. AMS estimates ongoing annual implementation of communication, cooperation, and dispute resolution processes would require an average of 16.00 hours. AMS estimated the number of hours for all LPDs to set-up and implement each plan from the number of hours estimated and the expected cost estimates in tables 6 and 7 in section VII.C., “Regulatory Impact Analysis.”

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 ACIs, as required under proposed § 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 2021 Annual Reports with AMS, and their reports indicate that they had 19,808 growing contracts with broiler growers during fiscal year 2021. 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 19,808 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 ACI. 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 0.53 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 (526 first year and annual ongoing hours) by the annual number of responses for all LPDs (990). AMS estimated the number of hours for all LPDs to develop, produce and distribute each disclosure from the number of hours estimated and the expected cost estimates in table 8 in section VII.C., “Regulatory Impact Analysis.”

Proposed § 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. The documentation of processes required under proposed § 201.110 must describe the manner in which the LPD performs the duty to make a fair comparison among growers when using a grower ranking system to determine compensation for broiler growers. The documentation of processes under proposed § 201.110, must also include a plan for communication and cooperation between the LPD and growers. In addition, LPDs are required to ensure compliance with the proposed rule by conducting a compliance review of each complex and producing a written report of findings no less than once every two years. LPDs are required to document, maintain, and comply with all policies and procedures required under proposed § 201.110 on an ongoing basis and provide them to USDA upon request.

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 (\$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 specifications, and analysis of projected returns.

Costs of Proposed §§ 201.110 and 112

The combined costs to LPDs for compliance with the recordkeeping and disclosure requirements of proposed §§ 201.110 and 112 are expected to be \$5,511,000 in the first year, and \$3,821,000 in subsequent years. The total hours estimated for the LPDs to create, produce, distribute, and maintain these documents are 59,182 in the first year, and 42,682 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 2022 U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics for the time values in this analysis.⁴⁷ BLS estimated an average hourly wage for general and operations managers in animal slaughtering and processing to be \$61.24 per hour; \$31.39 per hour for administrative assistants; \$66.07 per hour for IT system managers; and \$103.81 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.

B. Executive Orders 12866, 13563, and 14094

AMS is issuing this proposed rule in conformance with Executive Orders 12866—Regulatory Planning and Review, 13563—Improving Regulation and Regulatory Review, and 14094—Modernizing Regulatory Review, which 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,

⁴⁷ Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available at <https://www.bls.gov/oes/special-requests/oesm22all.zip> (accessed 7/14/2023). Featured OES Searchable Databases: U.S. Bureau of Labor Statistics ([bls.gov](https://www.bls.gov)) (accessed July 2023).

including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means.

In the development of this proposed rule, AMS considered several alternatives, which are described in the Regulatory Impact Analysis below.

The proposed rule is not expected to provide, and AMS did not estimate, any environmental, public health, or safety benefits or impacts associated with the proposed rule. We request comment on potential environmental, public health, or safety impacts of the proposed rule as well as data sources and approaches to measure their economic implications.

This proposed rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore has been reviewed by the Office of Management and Budget (OMB). Details on the estimated costs of this proposed rule can be found in the economic analysis provided in sections III.C. and D. below.

Based on its familiarity with the industry, AMS prepared an economic analysis of the proposed rule as part of the regulatory process. The economic analysis includes a cost-benefit analysis of the proposed rule. AMS then discusses the impact on small businesses.

C. Regulatory Impact Analysis

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

As described previously in the preamble for this proposed 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. Market failures caused by asymmetric information, incomplete contracts, and hold-up in poultry contracting motivate specific interventions as discussed in this proposed rule.

The following analysis describes the anticipated impacts of the proposed

rule. The value of broiler production in the U.S. for 2022 was approximately \$50.4 billion.⁴⁸ Our analysis finds that the total quantified cost of proposed §§ 201.106, 110, and 112 will be greatest in the first year at \$19.8 million or 0.039 percent of revenues. The costs are low in relation to total industry size. The proposed 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 and reduced risk of fraud and deception. AMS expects potential benefits to the industry from proposed §§ 201.106, 110, and 112 to be positive.

Regulatory Alternatives Considered

AMS expects proposed §§ 201.106, 110, and 112 to mitigate costs associated with asymmetric information and grower unfairness and deception by establishing a duty of fair comparison for LPDs in poultry tournament administration, requiring LPDs to establish and document processes, requiring LPDs to adopt transparent methods of presenting grower compensation in broiler grower contracts, and requiring LPDs to provide important information to broiler growers. Proposed § 201.106 would 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. Proposed § 201.110 would 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. Proposed § 201.112 would require LPDs to produce and distribute disclosures when they request growers to make additional capital investments.

AMS considered four alternatives related to the proposed §§ 201.106, 110, and 112, with the second alternative being the proposed 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, proposed §§ 201.106, 110, and 112.

AMS considered a third alternative that would leave all requirements in proposed §§ 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.⁴⁹ 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 proposed §§ 201.106, 110, and 112. AMS considered a fourth alternative similar to proposed §§ 201.106, 110, and 112 that includes all small and large LPDs but would exclude two proposed provisions: § 201.110(b)(1)(iv) for development of new communication policies and § 201.110(b)(2) for conducting compliance reviews. Excluding these sections would reduce estimated costs of the proposed rule but would also reduce the benefits and protections afforded to growers. This fourth alternative could also reduce and limit USDA's ability to monitor and enforce rule compliance. Below, AMS provides estimates and comparisons of the costs and benefits of the alternatives and an explanation for why the Agency selected proposed §§ 201.106, 110, and 112 as the preferred alternative.

Benefits of Proposed §§ 201.106, 110, and 112

AMS expects that proposed §§ 201.106, 110, and 112 would provide benefits to growers by reducing the risk of potential fraud and deception by LPDs, improving clarity in grower payment systems, establishing a duty for fair comparison in the administration of broiler grower tournaments, and making more information available to growers. These benefits are difficult to quantify. They depend on the extent to which proposed 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. The size of benefits will be directly related to the extent to which the proposed 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 proposed §§ 201.106, 110, and 112. The following discussion of non-quantifiable benefits will proceed by proposed rule section.

⁴⁹ 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).

⁴⁸ USDA—NASS. Poultry—Production and Value 2022 Summary (April 2023).

Benefits of Proposed § 201.106

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 prevents growers from comparing competing offers from LPDs for the services of growers.

Proposed § 201.106 would apply to LPDs that determine grower compensation based upon a grouping, ranking, or comparison of growers delivering poultry during a specified period. LPDs using such a system would be prohibited from using that grouping, ranking, or comparison to reduce a rate of compensation disclosed in a broiler growing arrangement. Proposed § 201.106 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). This establishes a *de facto* minimum payment that the grower would receive under the growing arrangement. Growers will benefit from increased certainty about the lowest possible revenue outcome under the growing arrangement. Greater certainty about minimum revenue 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 response to proposed § 201.106, LPDs would 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 proposed rule change. 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.⁵⁰ 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.

Changes to presentation of grower compensation rates as required by proposed § 201.106 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 proposed changes will result from increased clarity as growers will be better informed of minimum compensation outcomes that can occur under the broiler growing arrangement. There is no expectation that aggregate payments to growers will increase. However, clearer presentation of grower compensation methods and 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.

Benefits of Proposed § 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 and completeness in contracts that would likely reduce the potential for deception and unfairness. The proposed 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 grower

compensation, settlement procedures, and tournament administration. 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.

Lack of transparency in tournament administration and methods of determining grower compensation has led to risks of deception and unfairness. Growers are often unable to evaluate how payments under a poultry grower ranking system reflect their individual effort, measure and manage risks, and detect possible discrimination or retaliation for disputes arising under the poultry growing arrangement. Growers reasonably assume that they will be fairly compared to other growers under a broiler tournament ranking system. They will be deceived if LPDs do not make a good faith effort to ensure fair comparison among participating growers when operating broiler tournaments. 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 tournaments. 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 tournament 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. Although such policies are not uncommon, they are not currently required to be universally employed or uniformly applied by LPDs.

Growers also have no means by which to ensure that LPDs consistently carry out their responsibility of the contract or

⁵⁰ All contracts that AMS has previously reviewed include provisions for a minimum grower payment that is greater than zero.

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 essentially “hold up” growers by opportunistically minimizing their costs of delivering a fair comparison at the expense of growers and, as a result, failing to deliver on their obligation for good faith and fair dealing under the contract.

Proposed § 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 proposed § 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. Proposed § 201.110(b) establishes documentation requirements in the form of processes, commonly known as policies and procedures, to facilitate LPD effective tournament operation under that duty, effective recordkeeping of transactions, and facilitates AMS supervision and enforcement. These provisions would benefit growers by reducing deception and unfairness in the operation of poultry grower ranking systems.

Implementation by LPDs of written processes that promote fair comparison of growers, whether through more consistent allocation of inputs and production practices or adjustments to methods and formulas, would foster more transparent, accurate, and reliable tournaments, and greater ability to monitor and hold LPDs accountable for divergences from high standards of market integrity. Growers would benefit from this proposed regulation because they would 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 activities conducted and documented by LPDs to fulfill the duty required by proposed § 201.110(a) would also provide safeguards to prevent growers from being substantially disadvantaged by unintentional or inadvertent outcomes. For example, an LPD would take prescribed corrective action if it discovered that a particular grower had randomly received an unusual share of inferior inputs over multiple flocks. Procedures designed to ensure fair comparison would 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, proposed § 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, compensation for individual growers may more closely match the level of individual grower effort, skill, and investment relative to other growers under a tournament system that guarantees fair comparison. This provision may 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 would 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.⁵¹ A reduction in the occurrence of such harms could potentially lead to reduced grower turnover.

Provisions included in proposed § 201.110(b)(1)(iv) would also require LPDs to 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

⁵¹ The preamble section II of this rulemaking documents decades of grower comments to USDA that highlight concerns of persistent unfairness resulting from unfair comparisons in broiler grower tournaments.

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.

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 would 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.

Benefits of Proposed § 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. The system of ownership of poultry production capital by growers limits incentives for LPDs to carefully consider the extent to which required additional capital investments will improve individual grower production efficiency and whether they will likely 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.⁵² When considering

⁵² AMS sought feedback on proposed rulemaking in a 2022 ANPR. Some commenters noted that LPDs often supply insufficient information with respect

new investment, broiler growers maximize net productivity benefits subject to cost. 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.

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.

Proposed § 201.112 would 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 would 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 (1) through (6)). As such, the Capital Improvement Disclosure Document would clearly state the intended and expected outcome of LPD additional investment requirements.

Requiring LPDs to provide this information to growers would 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

to requested or required upgrades and deceptively induce growers to make costly ACIs. 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.

manufacturers and vendors when making capital improvements. To the extent that disclosures assist growers in understanding the purpose of ACIs, those growers will be more likely to realize any potential benefits from the ACI. For example, growers would be able to tailor ACIs to their particular operation so as to be better positioned to implement the ACI and produce intended production improvements. The clarity provided by ACI disclosure would reduce the likelihood of costly errors caused by miscommunication and misunderstanding and increase the likelihood that growers would be able to correctly implement ACIs. Proposed § 201.112 would 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 that occurred, by addressing asymmetric information this section of the proposed rule would 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.

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

AMS expects that the proposed rule would provide substantial benefits to the industry and address issues of extreme importance to broiler growers. However, these benefits are non-quantifiable. 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 Proposed Regulations

AMS estimates cost for three alternatives. The first is the proposed § 201.106, 110, and 112, which is the

preferred alternative. The second alternative is the same as proposed §§ 201.106, 110, and 112 with a complete exemption for LPDs that are considered small businesses by the Small Business Administration.⁵³ All LPDs are included in the third alternative, but the following two subsections of proposed § 201.110 are excluded: § 201.110(b)(1)(iv) and (b)(2).⁵⁴ All three alternatives are compared against a baseline of *status quo*, which has no costs or benefits.

The quantified costs of proposed §§ 201.106, 110, and 112 primarily consist of the time required for LPDs to: (1) modify grower contracts to determine compensation in a manner consistent with proposed § 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 proposed rules would fall on LPDs as they modify existing contracts, develop and comply with new policies, and collect and disseminate required information. Costs would 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 would 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 ACI 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 2021 Annual Report with AMS, and their reports indicate that they had 19,808 contracts with poultry growers

⁵³ 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.

⁵⁴ Section 201.110(b)(1)(iv) would require LPDs to include written processes related to communication, cooperation, and dispute resolution with growers and § 201.110(b)(2) would require LPDs to conduct regular compliance reviews.

during fiscal year 2021.⁵⁵ Of these, 20 LPDs are considered small businesses according to SBA classification, and these have a total of 950 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.⁵⁶

AMS expects the direct costs of the proposed rule would be small in relation to overall production costs and would not measurably alter poultry supply. AMS also expects that neither LPDs nor poultry growers would measurably change any production practices that would impact the overall supply of poultry.

Expected 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 proposed § 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 proposed § 201.110; and produce and distribute disclosures when LPDs request or require growers to make additional capital investments as required by proposed § 201.112, as well as the time required to create and maintain any necessary additional records. Grower payment systems required by proposed § 201.106 are substantively similar to many current payment systems already in use and will therefore not require large adjustments for most LPDs. The policies and procedures that LPDs would be required to develop in response to proposed § 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 proposed § 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 proposed

⁵⁵ 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 public at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

⁵⁶ Unless otherwise noted, estimated cost or hours estimates for small and large live poultry dealers are the same.

§§ 201.106, 110, and 112, this will not require LPDs to substantially change their existing business practices. Therefore, the overall added costs of adjustments, contract modifications, records creation, and compliance under the proposed rules are still expected 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 2022.⁵⁷

Costs of Proposed § 201.106—Preferred Alternative

Under proposed § 201.106, LPDs would 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 proposed 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 would be required to make one-time changes to existing grower contracts and develop new payment systems that are consistent with these provisions. This process would 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 proposed § 201.106, would require 18,048 legal hours,⁵⁸ 59,400 management hours,

⁵⁷ See U.S. Bureau of Labor Statistics, *May 2022 National Occupational Employment and Wage Estimates*, May 2022. <https://www.bls.gov/oes/special.requests/oesm22all.zip>.

⁵⁸ Small live poultry dealers are estimated to require 50% as many legal hours as large live

7,520 administrative hours, and 7,520 information technology hours, costing a total of \$8,854,000⁵⁹ in the first year.⁶⁰ A more detailed breakdown of the one-time first-year costs associated with proposed § 201.106 is provided in table 5 at the end of this section.

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 proposed § 201.106. 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.

Proposed § 201.106 concerns potential changes to the method of payment calculation used in grower tournament settlement systems. LPDs would then provide new contracts that include these updated provisions for review by broiler growers. AMS expects that for the first time a grower receives a new contract containing these modifications, he or she would require about 4 hours to review and consider all new terms and provisions. At \$65.35⁶¹ per hour, the total one-time cost for all broiler growers to review the new contract is \$5,178,000.⁶² 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

poultry dealers on a per company basis for one-time cost of developing § 201.106 one-time changes to grower contracts and payment systems.

⁵⁹ 18,048 legal hours × \$147.19 per hour + 59,400 management hours × \$86.83 per hour + 7,520 administrative hours × \$44.51 per hour + 7,520 information technology hours × \$93.68 per hour = \$8,853,556.

⁶⁰ Average hourly wage rates used to estimate dealer costs include a 41.79% markup for benefits and are as follows: Management—\$86.83, Legal—\$147.19, Administrative—\$44.51, and Information Technology—\$93.68. 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—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.

⁶¹ The average hourly wage rate of \$65.35 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).

⁶² 4 hours to review each disclosure × \$65.35 per hour × 19,808 contracts = \$5,177,811.

ongoing future costs of grower contract review have been included.

The ten-year aggregate total costs of proposed § 201.106 to LPDs are estimated to be \$8,853,000, the ten-year aggregated total costs of proposed § 201.106 to poultry growers are estimated to be \$5,178,000, and the combined ten-year aggregate total costs of proposed § 201.106 to LPDs and poultry growers are estimated to be \$14,031,000.

Costs of Proposed § 201.110—Preferred Alternative

Proposed § 201.110 would 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.

Proposed § 201.110(a) and (b)(1)(i) through (iii) 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 proposed § 201.110(a) and (b)(1)(i) through (iii), all LPDs would be required to develop formal written processes that meet specific criteria outlined in the proposed regulation.

AMS estimates that the one-time aggregate cost of developing new policies and procedures in response to proposed § 201.110(a) and (b)(1)(i) through (iii) for LPDs will require 4,256 legal hours, 29,000 management hours, 1,504 administrative hours, and 1,504 information technology hours, costing a total of \$3,352,000⁶³ in the first year. Due to differences in their structure,

⁶³ 4,256 legal hours × \$147.19 per hour + 29,000 management hours × \$86.83 per hour + 1,504 administrative hours × \$44.51 per hour + 1,504 information technology hours × \$93.68 per hour = \$3,352,348.

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.⁶⁴ A more detailed breakdown of the one-time first-year costs associated with proposed § 201.110 is in table 6 at the end of this section.

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 1,440 legal hours,⁶⁵ 28,952 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, 752 administrative hours, and 752 information technology hours for an aggregate annual cost of \$2,830,775.⁶⁶ A detailed breakdown of the ongoing costs associated with proposed § 201.110 is in table 7 at the end of this section.

Proposed § 201.110(b)(1)(iv) 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 848 legal hours, 544 management hours, 168 administrative hours, and 340 information technology hours⁶⁷ for an aggregate one-time cost of \$211,000.⁶⁸

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ 1,440 legal hours × \$147.19 per hour + 28,952 management hours × \$86.83 per hour + 752 administrative hours × \$44.51 per hour + 752 information technology hours × \$93.68 per hour = \$2,829,775.

⁶⁷ 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.

⁶⁸ 848 legal hours × \$147.19 per hour + 544 management hours × \$86.83 per hour + 168 administrative hours × \$44.51 per hour + 340 information technology hours × \$93.68 per hour = \$211,382.

Proposed § 201.110(b)(3) states the length of time for retaining the records relevant to an LPD's compliance with proposed § 201.110(b)(1) and (2). AMS considered record retention when estimating costs for proposed § 201.110(b)(1) and (2) and proposed § 201.110(b)(3) 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 proposed § 201.110(b)(1)(iv) to require, in aggregate, 336 legal hours, 168 management hours, 84 administrative hours, and 84 information technology hours for an aggregate annual cost of \$76,000.⁶⁹

Under proposed § 201.110(b)(2), LPDs would be required to conduct a compliance review of each complex no less than once every two years to ensure compliance with policies and procedures established under § 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 2,256 legal hours, 15,040 management hours, 752 administrative hours, and 2,444 information technology hours costing \$1,900,000⁷⁰ 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 ongoing 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

⁶⁹ 336 legal hours × \$147.19 per hour + 168 management hours × \$86.83 per hour + 84 administrative hours × \$44.51 per hour + 84 information technology hours × \$93.68 per hour = \$75,651.

⁷⁰ 2,256 legal hours × \$147.19 per hour + 15,040 management hours × \$86.83 per hour + 752 administrative hours × \$44.51 per hour + 2,444 information technology hours × \$93.68 per hour = \$1,900,409.

LPDs will require 752 legal hours, 7,520 management hours, 376 administrative hours, and 940 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 \$868,000.⁷¹

Written processes developed by LPDs are for internal use, to be complied with and maintained, to be provided to USDA, and as part of ongoing compliance review and monitoring. Under proposed § 201.110, LPDs are not required to provide additional disclosures to contract growers.

Therefore, proposed § 201.110 would not impose any additional one-time or ongoing costs on growers to review additional disclosures, and total grower costs of proposed § 201.110 are zero.

The ten-year total costs of proposed § 201.110 to all 42 live broiler poultry dealers are estimated to be \$39,429,000. Since expected grower costs for this section are zero, these also represent the total aggregate costs of § 201.110.

Costs of Proposed § 201.112—Preferred Alternative

The new provisions in 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 (\$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 specifications, and analysis of projected returns.

Proposed § 201.112 would 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 would 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 75 legal hours, 376 management hours, and 75 administrative hours to create and provide a Capital Improvement

Disclosure Document for all growers requiring additional capital improvement upgrades, for an aggregate annual cost of \$47,000.⁷² A detailed breakdown of the ongoing costs associated with proposed § 201.112 is in table 8 at the end of this section.

With the exception of acknowledging receipt, the proposed rule would not impose any requirement on poultry growers to review the information provided by LPDs, but to benefit from the Capital Improvement Disclosure Document, growers would need to review the information provided. For proposed § 201.112, AMS expects that growers would 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 would be required to provide disclosures to growers for any of 19,808 contracts for which additional capital investment requests are made.⁷³ 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 \$65.35 per hour, growers' aggregate annual costs would be \$259,000⁷⁴ for reviewing documents required by § 201.112 in the first year and in each successive year.

The ten-year aggregate total costs of proposed § 201.112 to LPDs are estimated to be \$471,000, the ten-year aggregated total costs of proposed § 201.112 to poultry growers are estimated to be \$2,589,000, and the combined ten-year aggregate total costs of proposed § 201.112 to LPDs and poultry growers are estimated to be \$3,060,000.

Indirect Costs of § 201.112

If AMS enforcement of proposed § 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 ACI requires over-investment, eliminating it benefits society. The benefits to growers and society in such cases would exceed the losses to LPDs.

Combined Costs of Proposed §§ 201.106, 110, and 112—Preferred Alternative

Combined costs to LPDs for proposed §§ 201.106, 110, and 112 are expected to be \$14,365,000 in the first year, and \$3,821,000 in subsequent years. These combined 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 proposed §§ 201.106, 110, and 112. The combined costs for poultry growers are expected to be \$5,437,000 in the first year and \$259,000 in subsequent years.

The ten-year aggregate combined costs of proposed §§ 201.106, 110, and 112 to LPDs are estimated to be \$48,753,000 and the present value of the ten-year total costs to be \$42,830,000 discounted at a three percent rate and \$36,691,000 at a seven percent rate. The annualized aggregate combined costs of the PV of ten-year costs to LPDs discounted at a three percent rate are expected to be \$5,021,000 and \$5,224,000 discounted at a seven percent rate.

The ten-year aggregate combined costs of proposed §§ 201.106, 110, and 112 to poultry growers are estimated to be \$7,767,000 and the present value of the ten-year total costs to be \$7,235,000 discounted at a three percent rate and \$6,657,000 at a seven 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 \$848,000 and \$948,000 discounted at a seven percent rate.

The ten-year aggregate combined costs of proposed §§ 201.106, 110, and 112 to LPDs and poultry growers are estimated to be \$56,520,000 and the present value of the ten-year aggregate combined costs to be \$50,065,000 discounted at a three percent rate and \$43,348,000 at a seven percent rate. The annualized aggregate costs of the PV of ten-year costs to LPDs and poultry growers discounted at a three percent rate are expected to be \$5,869,000 and \$6,172,000 discounted at a seven percent rate. The cost estimates of proposed §§ 201.106, 110,

⁷¹ 752 legal hours × \$147.19 per hour + 7,520 management hours × \$86.83 per hour + 376 administrative hours × \$44.51 per hour + 940 information technology hours × \$93.68 per hour = \$868,443.

⁷² 75 legal hours × \$147.19 per hour + 376 management hours × \$86.83 per hour + 75 administrative hours × \$44.51 per hour = \$47,064.

⁷³ Live poultry dealers reported a combined total of 19,808 contracts for their fiscal year 2021.

⁷⁴ 4 hours to review each disclosure × \$65.35 per hour × 19,808 contracts × 5 percent of growers that require significant housing upgrades = \$258,891.

and 112 presented above appear in the following table.

TABLE 2—ESTIMATED COSTS OF PROPOSED §§ 201.106, 110, AND 112—PREFERRED ALTERNATIVE

Preferred alternative	Expected costs *		
	Live poultry dealers	Poultry growers	Industry total
§ 201.106:			
First-Year	\$8,853,000	\$5,178,000	\$14,031,000
Ten-Year Total	8,853,000	5,178,000	14,031,000
PV of Ten-Year Discounted at 3%	8,596,000	5,027,000	13,623,000
PV of Ten-Year Discounted at 7%	8,274,000	4,839,000	13,113,000
Ten-Year Annualized at 3%	1,008,000	589,000	1,597,000
Ten-Year Annualized at 7%	1,178,000	689,000	1,867,000
§ 201.110:			
First-Year	5,464,000	0	5,464,000
Ten-Year Total	39,429,000	0	39,429,000
PV of Ten-Year Discounted at 3%	33,833,000	0	33,833,000
PV of Ten-Year Discounted at 7%	28,086,000	0	28,086,000
Ten-Year Annualized at 3%	3,966,000	0	3,966,000
Ten-Year Annualized at 7%	3,999,000	0	3,999,000
§ 201.112:			
First-Year	47,000	259,000	306,000
Ten-Year Total	471,000	2,589,000	3,056,000
PV of Ten-Year Discounted at 3%	401,000	2,208,000	2,610,000
PV of Ten-Year Discounted at 7%	331,000	1,818,000	2,149,000
Ten-Year Annualized at 3%	47,000	259,000	306,000
Ten-Year Annualized at 7%	47,000	259,000	306,000
§§ 201.106, 110, and 112:			
First-Year	14,365,000	5,437,000	19,801,000
Ten-Year Total	48,753,000	7,767,000	56,520,000
PV of Ten-Year Discounted at 3%	42,830,000	7,235,000	50,065,000
PV of Ten-Year Discounted at 7%	36,691,000	6,657,000	43,348,000
Ten-Year Annualized at 3%	5,021,000	848,000	5,869,000
Ten-Year Annualized at 7%	5,224,000	948,000	6,172,000

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

Estimated Costs and Expected Benefits of Proposed §§ 201.106, 110, and 112—Preferred Alternative

The value of broiler production in the U.S. for 2022 was approximately \$50.4 billion.⁷⁵ Total quantified cost of proposed §§ 201.106, 110, and 112 is estimated to be greatest in the first year at \$19.8 million, or 0.039 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 cost of this proposed 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 proposed rule. The size of benefits will be directly related to the extent of these reductions. As described previously, AMS expects that the proposed rule will substantially benefit the industry and address issues of extreme importance to broiler

growers. However, these benefits are non-quantifiable.

Potential benefits to the industry from proposed §§ 201.106, 110, and 112 will be positive but 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 proposed rule. It would be the same as proposed §§ 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 proposed rules. In the preferred alternative, the requirements in proposed §§ 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 47.6

percent of all LPDs, but have only 4.8 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 Proposed § 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 proposed § 201.106, would require 16,512 legal hours, 56,760 management hours, 6,880 administrative hours, and 6,880 information technology hours, costing a total of \$8,310,000 in the first year under the small business exemption alternative. A more detailed breakdown of the one-time first-year costs associated with proposed § 201.106 under the small business exemption alternative is in table 9 at the end of this section. Once LPDs have incurred a one-time cost of developing, documenting, and communicating new contracts and a new system of grower payments, AMS

⁷⁵ USDA–NASS. Poultry—Production and Value 2022 Summary (April 2023).

does not expect additional ongoing costs of implementing proposed § 201.106.

For proposed § 201.106, AMS expects that growers would take about 4 hours to review new contract terms and provisions when they are provided in the first year. At \$65.35 per hour, the total one-time cost for all broiler growers to review the new contract under the small business exemption alternative is \$4,929,000.⁷⁶ AMS expects that the updated contract provisions and payment systems developed by LPDs pursuant to proposed § 201.106 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.

The ten-year aggregate total costs to LPDs of proposed § 201.106 under the small business exemption alternative are estimated to be \$8,310,000, the ten-year aggregate total costs to broiler growers of proposed § 201.106 for the small business exemption alternative are estimated to be \$4,929,000, and the first-year and ten-year aggregate total costs to LPDs and poultry growers of proposed § 201.106 for the small business exemption alternative are estimated to be \$13,239,000.

Costs of Proposed § 201.110—Small Business Exemption Alternative

AMS estimates that the one-time aggregate cost of developing new policies and procedures in response to proposed § 201.110(a) and (b)(1)(i) through (iii) for LPDs will require 4,128 legal hours, 25,800 management hours, 1,376 administrative hours, and 1,376 information technology hours, costing a total of \$3,038,000 in the first year for the small business exemption alternative. A detailed breakdown of the one-time first-year costs associated with proposed § 201.110 for the small business exemption alternative is in table 10 at the end of this section.

After new written processes have been developed, LPDs would be required to implement, monitor, and comply to maintain and update them. AMS expects these annual ongoing costs for the small business exemption alternative to require in aggregate 1,376 legal hours, 26,488 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, 688 administrative hours, and 688 information technology

⁷⁶ 4 hours to review each disclosure × \$65.35 per hour × 18,858 contracts = \$4,929,481.

hours for an aggregate annual cost of \$2,598,000.⁷⁷ A detailed breakdown of the ongoing costs associated with proposed § 201.110 for the small business exemption alternative is in table 11 at the end of this section.

Proposed § 201.110(b)(1)(iv) 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)(iv) for the small business exemption alternative will require 528 legal hours, 264 management hours, 88 administrative hours, and 220 information technology hours for an aggregate one-time cost of \$125,000.⁷⁸

Costs associated with proposed § 201.110(b)(3), "Record retention," are included in cost estimates for proposed § 201.110(b)(1) and (2). 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)(iv) to require, for the small business exemption alternative, in aggregate, 176 legal hours, 88 management hours, 44 administrative hours, and 44 information technology hours for an aggregate annual cost of \$40,000.⁷⁹

AMS estimates that the aggregate one-time costs of designing the compliance review for the small business exemption alternative would require 2,064 legal hours, 13,760 management hours, 688 administrative hours, and 2,236 information technology hours costing \$1,739,000⁸⁰ in the first year for LPDs

⁷⁷ 1,376 legal hours × \$147.19 per hour + 26,488 management hours × \$86.83 per hour + 688 administrative hours × \$44.51 per hour + 688 information technology hours × \$93.68 per hour = \$2,597,561.

⁷⁸ 528 legal hours × \$147.19 per hour + 264 management hours × \$86.83 per hour + 88 administrative hours × \$44.51 per hour + 220 information technology hours × \$93.68 per hour = \$125,166.

⁷⁹ 176 legal hours × \$147.19 per hour + 88 management hours × \$86.83 per hour + 44 administrative hours × \$44.51 per hour + 44 information technology hours × \$93.68 per hour = \$39,626.

⁸⁰ 2,064 legal hours × \$147.19 per hour + 13,760 management hours × \$86.83 per hour + 688 administrative hours × \$44.51 per hour + 2,236 information technology hours × \$93.68 per hour = \$1,738,672.

to initially set up their compliance review and policies and procedures.

AMS estimates that total ongoing annual costs for LPDs to conduct and document written reviews of compliance for each complex no less than once every two years will require 688 legal hours, 6,880 management hours, 344 administrative hours, and 860 information technology hours for the small business exemption alternative, for an aggregate annual cost of \$795,000.⁸¹

Because proposed § 201.110 does not require LPDs to provide additional disclosures to contract growers, proposed § 201.110 would not impose any additional one-time or ongoing costs on growers to review additional disclosures, and total grower costs of proposed § 201.110 are also zero under the small business exemption alternative.

The ten-year total costs of proposed § 201.110 to the 52.4 percent of live broiler poultry dealers impacted under the small business exemption alternative are estimated to be \$35,787,000. Since expected grower costs for this section are zero, these also represent the total aggregate costs of proposed § 201.110.

Costs of Proposed § 201.112—Small Business Exemption Alternative

Proposed § 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 69 legal hours, 344 management hours, and 69 administrative hours to create and provide Capital Improvement Disclosure Documents for all growers requiring additional capital improvement upgrades, for an aggregate annual cost of \$43,000⁸² for the small business exemption alternative. A detailed breakdown of the ongoing costs associated with proposed § 201.110 for the small business exemption

⁸¹ 688 legal hours × \$147.19 per hour + 6,880 management hours × \$86.83 per hour + 344 administrative hours × \$44.51 per hour + 860 information technology hours × \$93.68 per hour = \$794,533.

⁸² 69 legal hours × \$147.19 per hour + 344 management hours × \$86.83 per hour + 69 administrative hours × \$44.51 per hour = \$43,058.

alternative is in table 12 at the end of this section.

For proposed § 201.112, AMS expects that growers would take about four hours to 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 18,858 contracts for which additional capital investment requests are made.⁸³ 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 \$65.35 per hour, growers' aggregate annual costs would be \$246,000⁸⁴ for reviewing documents required by proposed § 201.112 in the first year and in each successive year for the small business exemption alternative.

The ten-year aggregate total costs of proposed § 201.112 under the small business exemption alternative for LPDs are estimated to be \$431,000, and the ten-year aggregated total costs to poultry growers of proposed § 201.112 under the small business exemption alternative are estimated to be \$2,465,000. The combined first-year aggregate total costs to LPDs and poultry growers of proposed § 201.112 under the small business exemption alternative are

estimated to be \$290,000, and the ten-year aggregate total costs are estimated to be \$2,895,000.

Combined Costs of Proposed §§ 201.106, 110, and 112—Small Business Exemption Alternative

Aggregate combined costs to LPDs for proposed §§ 201.106, 110, and 112 for the small business exemption alternative are expected to be \$13,254,000 in the first year, and \$3,475,000 in subsequent years. The combined costs for poultry growers are expected to be \$5,176,000 in the first year, \$246,000 in subsequent years.

The aggregate ten-year combined quantified costs to LPDs of proposed §§ 201.106, 110, and 112 for the small business exemption alternative are estimated to be \$44,527,000 and the present value of the ten-year combined costs \$39,135,000 discounted at a three percent rate and \$33,545,000 at a seven percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs discounted at a three percent rate are expected to be \$4,588,000 and \$4,776,000 discounted at a seven percent rate.

The aggregate ten-year combined costs to poultry growers of proposed §§ 201.106, 110, and 112 for the small business exemption alternative are estimated to be \$7,394,000 and the present value of the ten-year combined costs are estimated to be \$6,888,000

discounted at a three percent rate and \$6,338,000 at a seven percent rate. The aggregate annualized costs of the PV of ten-year costs to poultry growers discounted at a three percent rate are expected to be \$808,000 and \$902,000 discounted at a seven percent rate.

The aggregate combined costs of proposed §§ 201.106, 110, and 112 under the small business exemption alternative for LPDs and poultry growers are estimated to be \$18,430,000 in the first year and \$3,721,000 in subsequent years. The aggregate ten-year combined costs to LPDs and poultry growers of proposed §§ 201.106, 110, and 112 for the small business exemption alternative are estimated to be \$51,922,000 and the present value of the ten-year combined costs are estimated to be \$46,024,000 discounted at a three percent rate and \$39,883,000 at a seven percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs and poultry growers discounted at a three percent rate are expected to be \$5,395,000 and \$5,679,000 discounted at a seven percent rate. The aggregate cost estimates of proposed §§ 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 \$18.430 million.

TABLE 3—ESTIMATED COSTS OF PROPOSED §§ 201.106, 110, AND 112—SMALL BUSINESS EXEMPTION ALTERNATIVE

Preferred alternative	Expected cost*		
	Live poultry dealers	Poultry growers	Industry total
§ 201.106:			
First-Year	\$8,310,000	\$4,929,000	\$13,239,000
Ten-Year Total	8,310,000	4,929,000	13,239,000
PV of Ten-Year Discounted at 3%	8,068,000	4,786,000	12,853,000
PV of Ten-Year Discounted at 7%	7,766,000	4,607,000	12,373,000
Ten-Year Annualized at 3%	946,000	561,000	1,507,000
Ten-Year Annualized at 7%	1,106,000	656,000	1,762,000
§ 201.110:			
First-Year	4,902,000	0	4,902,000
Ten-Year Total	35,787,000	0	35,787,000
PV of Ten-Year Discounted at 3%	30,701,000	0	30,701,000
PV of Ten-Year Discounted at 7%	25,477,000	0	25,477,000
Ten-Year Annualized at 3%	3,599,000	0	3,599,000
Ten-Year Annualized at 7%	3,627,000	0	3,627,000
§ 201.112:			
First-Year	43,000	246,000	290,000
Ten-Year Total	431,000	2,465,000	2,895,000
PV of Ten-Year Discounted at 3%	367,000	2,102,000	2,470,000
PV of Ten-Year Discounted at 7%	302,000	1,731,000	2,034,000
Ten-Year Annualized at 3%	43,000	246,000	290,000
Ten-Year Annualized at 7%	43,000	246,000	290,000
§§ 201.106, 110, and 112:			
First-Year	13,254,000	5,176,000	18,430,000
Ten-Year Total	44,527,000	7,394,000	51,922,000

⁸³ Live poultry dealers that exceed SBA classification criteria for small businesses reported

a combined 18,858 poultry contracts in their Annual Reports to AMS.

⁸⁴ 4 hours to review each disclosure × \$65.35 per hour × 18,858 contracts × 5 percent of growers that require significant housing upgrades = \$246,474.

TABLE 3—ESTIMATED COSTS OF PROPOSED §§ 201.106, 110, AND 112—SMALL BUSINESS EXEMPTION ALTERNATIVE—Continued

Preferred alternative	Expected cost*		
	Live poultry dealers	Poultry growers	Industry total
PV of Ten-Year Discounted at 3%	39,135,000	6,888,000	46,024,000
PV of Ten-Year Discounted at 7%	33,545,000	6,338,000	39,883,000
Ten-Year Annualized at 3%	4,588,000	808,000	5,395,000
Ten-Year Annualized at 7%	4,776,000	902,000	5,679,000

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

Estimated Costs and Expected-Benefits of Proposed §§ 201.106, 110, and 112—Small Business Exemption Alternative

According to PSD records, only 4.8 percent of poultry growing contracts are between small LPDs and poultry growers. Thus, 95.2 percent of all poultry growers will receive the benefits of proposed §§ 201.106, 110, and 112 under the small business exemption alternative. AMS expects the value of non-quantified benefits to growers to exceed the costs of proposed §§ 201.106, 110, and 112 under the small business exemption alternative.

As with the preferred option, the expected value of benefits to the industry from proposed §§ 201.106, 110, and 112 will be positive but 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.

Though the small business exemption alternative would reduce costs to the industry, this alternative would deny the benefits offered by proposed §§ 201.106, 110, and 112 to poultry growers who contract with small LPDs. While most poultry are grown under contract with large businesses, there are many small LPDs who would be exempt from the proposed rules under the small business exemption alternative and whose growers would not benefit. Under the small business exemption alternative, these poultry growers would continue to be exposed to the informational asymmetries and other associated costs discussed above. AMS considered all four regulatory alternatives and determined that the preferred alternative is the best alternative because the benefits of the regulations will be captured by all poultry growers, regardless of the size of the LPD with which they contract.

Estimated Costs and Expected Benefits of Excluded Rule Sections Alternative

AMS estimated costs for a third alternative to the “do nothing” option and the last of four total alternatives presented. As for the preferred option, this alternative would include all small and large LPDs, the only difference being the exclusion from the analysis of two provisions that are sub-parts of proposed § 201.110. Specifically, this alternative does not include the provision in proposed § 201.110(b)(1)(iv) requiring LPDs to develop new communications processes or the provision in proposed § 201.110(b)(2) to conduct ongoing compliance reviews. With the removal of these two provisions from the proposed rule, the estimated overall total cost for this alternative is smaller than the preferred option.

The estimation of the costs of the excluded rule sections alternative will follow the same format as the preferred alternative.

Costs of Proposed § 201.106 and § 201.112—Excluded Rule Sections Alternative

No provisions have been removed from proposed § 201.106 or § 201.112 under the excluded rule sections alternative. Therefore, AMS cost estimates are identical to those described under the preferred alternative. Detailed breakdowns of one-time and ongoing costs under this alternative are also in table 13 for proposed § 201.106 and in table 16 for § 201.112 at the end of this section.

Costs of Proposed § 201.110—Excluded Rule Sections Alternative

Proposed § 201.110 would require 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. Two parts of proposed § 201.110 are excluded for purposes of estimating costs of the proposed rule under the

excluded rule sections alternative. These exclusions are proposed § 201.110(b)(1)(iv), dealing with communication, cooperation, and dispute resolution, and proposed § 201.110(b)(2), dealing with compliance reviews.

AMS estimates that the one-time aggregate cost for LPDs to develop new processes as required in proposed § 201.110(a) and (b)(1)(i) through (iii) under the excluded rule sections alternative will require 4,256 legal hours, 29,000 management hours, 1,504 administrative hours, and 1,504 information technology hours, costing a total of \$3,352,000⁸⁵ in the first year. As discussed previously, due 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.⁸⁶ A detailed breakdown of the one-time first-year costs associated with proposed § 201.110 under the excluded rule sections alternative is in table 14 at the end of this section.

AMS expects the annual ongoing costs of implementation, monitoring, and compliance proposed § 201.110(a) and (b)(1)(i) through (iii) under the excluded rule sections alternative to require in aggregate 1,440 legal hours,⁸⁷ 28,952 management hours which include renewal and updating of policies and procedures at the corporate level as well as monitoring activities conducted by managers at each complex

⁸⁵ 4,256 legal hours × \$147.19 per hour + 29,000 management hours × \$86.83 per hour + 1,504 administrative hours × \$44.51 per hour + 1,504 information technology hours × \$93.68 per hour = \$3,352,348.

⁸⁶ Small live poultry dealers are estimated to require 33% as many legal hours and 125% 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.

⁸⁷ 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.

to ensure ongoing compliance, 752 administrative hours, and 752 information technology hours for an aggregate annual cost of \$2,830,000.⁸⁸ A more detailed explanation of the ongoing costs associated with proposed § 201.110 under the excluded rule sections alternative is in table 15 at the end of this section.

Written processes developed by LPDs are for internal use, to be complied with and maintained, to be provided to USDA, and as part of ongoing internal monitoring. Under proposed § 201.110, LPDs would not be required to provide additional disclosures to contract growers. Therefore, proposed § 201.110 would not impose any additional one-time or ongoing costs on growers to review additional disclosures, and total grower costs of proposed § 201.110 under the excluded rule sections alternative are zero.

The first-year aggregate total costs of proposed § 201.110 under the excluded rule sections alternative for LPDs are estimated to be \$3,352,000 and the ten-year aggregate total costs are estimated to be \$28,820,000. Because expected grower costs for proposed § 201.110 are zero, the costs above also represent the total aggregate costs to LPDs of proposed § 201.110 under the excluded rule sections alternative.

Combined Costs of Proposed §§ 201.106, 110, and 112—Excluded Rule Sections Alternative

Aggregate combined costs to LPDs for proposed §§ 201.106, 110, and 112 for the excluded rule sections alternative are expected to be \$12,253,000 in the first year, and \$2,877,000 in subsequent years. The combined costs for poultry growers are expected to be \$5,437,000 in the first year, \$259,000 in subsequent years.

The aggregate ten-year combined quantified costs to LPDs of proposed §§ 201.106, 110, and 112 for the excluded rule sections alternative are estimated to be \$38,144,000 and the present value of the ten-year combined costs is \$33,643,000 discounted at a three percent rate and \$28,968,000 at a seven percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs discounted at a three percent rate are expected to be \$3,944,000 and \$4,124,000 discounted at a seven percent rate.

The aggregate ten-year combined costs to poultry growers of proposed §§ 201.106, 110, and 112 for the excluded rule sections alternative are estimated to be \$7,767,000 and the present value of the ten-year combined costs are estimated to be \$7,235,000 discounted at a three percent rate and

\$6,657,000 at a seven percent rate. The aggregate annualized costs of the PV of ten-year costs to poultry growers discounted at a three percent rate are expected to be \$848,000 and \$948,000 discounted at a seven percent rate.

The aggregate combined costs of proposed §§ 201.106, 110, and 112 under the excluded rule sections alternative for LPDs and poultry growers are estimated to be \$17,689,000 in the first year and \$3,136,000 in subsequent years. The aggregate ten-year combined costs to LPDs and poultry growers of proposed §§ 201.106, 110, and 112 for the excluded rule sections alternative are estimated to be \$45,911,000 and the present value of the ten-year combined costs are estimated to be \$40,878,000 discounted at a three percent rate and \$35,626,000 at a seven percent rate. The aggregate annualized costs of the PV of ten-year costs to LPDs and poultry growers discounted at a three percent rate are expected to be \$4,792,000 and \$5,072,000 discounted at a seven percent rate. The aggregate cost estimates of proposed §§ 201.106, 110, and 112 under the excluded rule sections alternative presented above appear in the following table. The quantified costs to the industry in the first year under the excluded rule sections alternative are \$17.69 million.

TABLE 4—ESTIMATED COSTS OF PROPOSED §§ 201.106, 110, AND 112—EXCLUDED RULE SECTIONS ALTERNATIVE

Preferred alternative	Expected cost *		
	Live poultry dealers	Poultry growers	Industry total
§ 201.106:			
First-Year	\$8,853,000	\$5,178,000	\$14,031,000
Ten-Year Total	8,853,000	5,178,000	14,031,000
PV of Ten-Year Discounted at 3%	8,596,000	5,027,000	13,623,000
PV of Ten-Year Discounted at 7%	8,274,000	4,839,000	13,113,000
Ten-Year Annualized at 3%	1,008,000	589,000	1,597,000
Ten-Year Annualized at 7%	1,178,000	689,000	1,867,000
§ 201.110:			
First-Year	3,352,000	0	3,352,000
Ten-Year Total	28,820,000	0	28,820,000
PV of Ten-Year Discounted at 3%	24,646,000	0	24,646,000
PV of Ten-Year Discounted at 7%	20,364,000	0	20,364,000
Ten-Year Annualized at 3%	2,889,000	0	2,889,000
Ten-Year Annualized at 7%	2,899,000	0	2,899,000
§ 201.112:			
First-Year	47,000	259,000	306,000
Ten-Year Total	471,000	2,589,000	3,060,000
PV of Ten-Year Discounted at 3%	401,000	2,208,000	2,610,000
PV of Ten-Year Discounted at 7%	331,000	1,818,000	2,149,000
Ten-Year Annualized at 3%	47,000	259,000	306,000
Ten-Year Annualized at 7%	47,000	259,000	306,000
§§ 201.106, 110, and 112:			
First-Year	12,253,000	5,437,000	17,689,000
Ten-Year Total	38,144,000	7,767,000	45,911,000
PV of Ten-Year Discounted at 3%	33,643,000	7,235,000	40,878,000
PV of Ten-Year Discounted at 7%	28,968,000	6,657,000	35,626,000
Ten-Year Annualized at 3%	3,944,000	848,000	4,792,000

⁸⁸ 1,440 legal hours × \$147.19 per hour + 28,952 management hours × \$86.83 per hour + 752

administrative hours × \$44.51 per hour + 752

information technology hours × \$93.68 per hour = \$2,829,775.

TABLE 4—ESTIMATED COSTS OF PROPOSED §§ 201.106, 110, AND 112—EXCLUDED RULE SECTIONS ALTERNATIVE—Continued

Preferred alternative	Expected cost*		
	Live poultry dealers	Poultry growers	Industry total
Ten-Year Annualized at 7%	4,124,000	948,000	5,072,000

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

Estimated Costs and Expected-Benefits of Proposed §§ 201.106, 110, and 112—Excluded Rule Sections Alternative

As with the preferred option, the expected value of benefits to the industry from proposed §§ 201.106, 110, and 112 will be positive but 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.

Though the excluded rule sections alternative would reduce costs to the industry, this alternative would deny to poultry growers the benefits offered by proposed § 201.110(b)(1)(iv) and (b)(2). Growers may be denied benefits of improved communication and the ability to pursue dispute resolution directly with LPDs when differences arise with their poultry complex management. Without a requirement for regular compliance reviews, grower confidence that LPDs are complying with policies and procedures developed to ensure fair tournament administration would be diminished. LPDs would not benefit from credibility

gained by ongoing compliance reviews. Further, USDA will have substantial difficulty ensuring that LPDs are maintaining and complying with written processes developed under proposed § 201.110 without conducting specific investigations. Without effective means to enforce compliance, the resulting grower benefits from other sections of proposed § 201.110 may not be realized.

After considering all four regulatory alternatives, AMS determined that the proposed alternative is the best alternative.

Details of the Estimated One-Time, First-Year Costs and On-Going Annual Costs of Providing Disclosure Documents Required in Proposed §§ 201.106, 110, and 112 Under the Preferred Alternative

The tables below provide details of the estimated costs to LPDs to comply with the proposed rule sections. AMS expects that the direct costs will consist entirely of the value of the time required to produce and distribute documentation and implement changes as described in the Regulatory Impact Analysis. AMS subject matter experts provided estimates of the average

amount of time that would be necessary for LPDs to meet the elements listed in the “Regulatory Requirements” column. These experts were auditors and supervisors with many years of experience in auditing LPDs for compliance with the Packers and Stockyards Act. The estimated hours are shown by labor category for two types of LPD: those categorized as either not small or small based on SBA classification. Estimates for the value of the time are U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics estimated released May 2022. Wage estimates are marked up 41.79 percent to account for benefits. The number of poultry processing plants or complexes (172 non-small and 16 small) was tallied from the annual reports, “Annual Report of Live Poultry Dealers,” that LPDs file with AMS.⁸⁹ Expected costs for each “Regulatory Requirement” and are listed in the “Expected Cost” column. Summing the values in the “Expected Cost” column provides the total expected costs to LPDs to comply with the proposed rule under the alternative.

⁸⁹ PSD form 3002 “Annual Report of Live Poultry Dealers,” OMB control number 0581-0308. Op. Cit.

TABLE 5—EXPECTED FIRST-YEAR DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.106

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex	Number of complexes	Number of hours required for each complex	Number of complexes			
§ 201.106	Legal	96	172	96	16	18,048	147.19	2,656,000
	Management	330	172	165	16	59,400	86.83	5,158,000
	Administrative	40	172	40	16	7,520	44.51	335,000
	Information Tech	40	172	40	16	7,520	93.68	704,000
Total Cost								8,853,000

* Column may not sum to Total Cost due to rounding.

TABLE 6—ONE TIME FIRST-YEAR COSTS ASSOCIATED WITH PROPOSED § 201.110

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs	Number of hours required for each complex/LPD	Number of complexes/LPDs			
§ 201.110(a) and (b)(1)(i) through (iii).	Legal	24	172	8	16	4,256	147.19	626,000
	Management	150	172	200	16	29,000	86.83	2,518,000
	Administrative	8	172	8	16	1,504	44.51	67,000
	Information Tech	8	172	8	16	1,504	93.68	141,000
§ 201.110(b)(1)(iv)	Legal	24	22	16	20	848	147.19	125,000
	Management	12	22	14	20	544	86.83	47,000
	Administrative	4	22	4	20	168	44.51	7,000
	Information Tech	10	22	6	20	340	93.68	32,000
§ 201.110(b)(2)	Legal	12	172	12	16	2,256	147.19	332,000
	Management	80	172	80	16	15,040	86.83	1,306,000
	Administrative	4	172	4	16	752	44.51	33,000
	Information Tech	13	172	13	16	2,444	93.68	229,000
Total Cost**								5,464,000

* Column may not sum to Total Cost due to rounding.

** Costs associated with § 201.110(b)(3), "Record retention," are included in cost estimates for § 201.110(b)(1)-(2).

TABLE 7—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.110

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs	Number of hours required for each complex/LPD	Number of complexes/LPDs			
§ 201.110(a) and (b)(1)(i) through (iii).	Legal	8	172	4	16	1,440	147.19	212,000
	Management	154	172	154	16	28,952	86.83	2,514,000
	Administrative	4	172	4	16	752	44.51	33,000
	Information Tech	4	172	4	16	752	93.68	70,000
§ 201.110(b)(1)(iv)	Legal	8	22	8	20	336	147.19	49,000
	Management	4	22	4	20	168	86.83	15,000
	Administrative	2	22	2	20	84	44.51	4,000
	Information Tech	2	22	2	20	84	93.68	8,000
§ 201.110(b)(2)	Legal	4	172	4	16	752	147.19	111,000

TABLE 7—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.110—Continued

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs	Number of hours required for each complex/LPD	Number of complexes/LPDs			
Management	40	172	40	16	7,520	86.83	653,000
Administrative	2	172	2	16	376	44.51	17,000
Information Tech	5	172	5	16	940	93.68	88,000
Total Cost**	3,774,000

* Column may not sum to Total Cost due to rounding.

** Costs associated with proposed § 201.110(b)(3), "Record retention," are included in cost estimates for proposed § 201.110(b)(1) and (2).

TABLE 8—EXPECTED FIRST-YEAR AND ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.112

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Adjustment (percent)	Expected cost* (\$)
		Number of hours required for each complex	Number of complexes	Number of hours required for each complex	Number of complexes				
Legal	8	172	8	16	75	147.19	5	11,000
Management	40	172	40	16	376	86.83	5	33,000
Administrative	8	172	8	16	75	44.51	5	3,000
Information Tech	0	172	0	16	0	93.68	5	0
Total Cost	47,000

* Column may not sum to Total Cost due to rounding.

Details of the estimated one-time, first-year costs and on-going annual costs of providing disclosure documents required in proposed §§ 201.106, 110, and 112 under the small business exemption alternative.

Costs for the alternative that would exempt LPDs fall under the SBA definition of small businesses were estimated similarly to costs for the proposed §§ 201.106, 110, and 112. The tables below are set up the same as

before and summarize expected first-year and ongoing direct costs for the 22 LPDs not categorized as small based on SBA classification to comply with each rule section.

TABLE 9—EXPECTED FIRST-YEAR DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.106—SMALL BUSINESS EXEMPTION ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex	Number of complexes			
§ 201.106	Legal	96	172	16,512	147.19	2,430,000
	Management	330	172	56,760	86.83	4,928,000
	Administrative	40	172	6,880	44.51	306,000
	Information Tech	40	172	6,880	93.68	645,000
Total Cost						8,310,000

* Column may not sum to Total Cost due to rounding.

TABLE 10—ONE TIME FIRST-YEAR COSTS ASSOCIATED WITH PROPOSED § 201.110—SMALL BUSINESS EXEMPTION ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs			
§ 201.110(a) and (b)(1)(i) through (iii).	Legal	24	172	4,128	147.19	608,000
	Management	150	172	25,800	86.83	2,240,000
	Administrative	8	172	1,376	44.51	61,000
	Information Tech	8	172	1,376	93.68	129,000
§ 201.110(b)(1)(iv)	Legal	24	22	528	147.19	78,000
	Management	12	22	264	86.83	23,000
	Administrative	4	22	88	44.51	4,000
	Information Tech	10	22	220	93.68	21,000
§ 201.110(b)(2)	Legal	12	172	2,064	147.19	304,000
	Management	80	172	13,760	86.83	1,195,000
	Administrative	4	172	688	44.51	31,000
	Information Tech	13	172	2,236	93.68	209,000
Total Cost**						4,902,000

* Column may not sum to Total Cost due to rounding.

** Costs associated with proposed § 201.110(b)(3), "Record retention," are included in cost estimates for § 201.110(b)(1) and (2).

TABLE 11—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.110—SMALL BUSINESS EXEMPTION ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs			
§ 201.110(a) and (b)(1)(i) through (iii).	Legal	8	172	1,376	147.19	203,000
	Management	154	172	26,488	86.83	2,300,000
	Administrative	4	172	688	44.51	31,000
	Information Tech	4	172	688	93.68	64,000
§ 201.110(b)(1)(iv)	Legal	8	22	176	147.19	26,000
	Management	4	22	88	86.83	8,000
	Administrative	2	22	44	44.51	2,000
	Information Tech	2	22	44	93.68	4,000
§ 201.110(b)(2)	Legal	4	172	688	147.19	101,000
	Management	40	172	6,880	86.83	597,000
	Administrative	2	172	344	44.51	15,000
	Information Tech	5	172	860	93.68	81,000

TABLE 11—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.110—SMALL BUSINESS EXEMPTION ALTERNATIVE—Continued

Regulatory requirement	Profession	Not small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs			
Total Cost**						3,432,000

* Column may not sum to Total Cost due to rounding.

** Costs associated with § 201.110(b)(3), "Record retention," are included in cost estimates for § 201.110(b)(1) and (2).

TABLE 12—EXPECTED FIRST-YEAR AND ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.112—SMALL BUSINESS EXEMPTION ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Adjustment (percent)	Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex	Number of complexes				
§ 201.112	Legal	8	172	5	69	147.19	10,000
	Management	40	172	5	344	86.83	30,000
	Administrative	8	172	5	69	44.51	3,000
	Information Tech	0	172	5	0	93.68	0
Total Cost							43,000

* Column may not sum to Total Cost due to rounding.

Details of the estimated one-time, first-year costs and on-going annual costs of providing disclosure documents required in proposed §§ 201.106, 110, and 112 under the excluded rule sections alternative.

Costs for the third alternative to the *status quo* that would exclude proposed § 201.110(b)(1)(iv) and (2) were estimated similarly to costs for the proposed §§ 201.106, 110, and 112. The tables below provide the details of

estimated one-time, first-year and ongoing costs to LPDs to comply with each non-excluded rule section under the excluded rule sections alternative.

TABLE 13—EXPECTED FIRST-YEAR DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.106—EXCLUDED RULE SECTIONS ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)
		Number of hours required for each complex	Number of complexes	Number of hours required for each complex	Number of complexes		
§ 201.106	Legal	96	172	96	16	18,048	147.19
	Management	330	172	165	16	59,400	86.83
	Administrative	40	172	40	16	7,520	44.51
	Information Tech	40	172	40	16	7,520	93.68
Total Cost							8,853,000

* Column may not sum to Total Cost due to rounding.

TABLE 14—ONE TIME FIRST-YEAR COSTS ASSOCIATED WITH PROPOSED § 201.110—EXCLUDED RULE SECTIONS ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs	Number of hours required for each complex/LPD	Number of complexes/LPDs			
§ 201.110(a) and (b)(1)(i) through (iii).	Legal	24	172	8	16	4,256	147.19	626,000
	Management	150	172	200	16	29,000	86.83	2,518,000
	Administrative	8	172	8	16	1,504	44.51	67,000
	Information Tech	8	172	8	16	1,504	93.68	141,000
§ 201.110(b)(1)(iv)	Legal	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Management	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Administrative	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Information Tech	N/A	N/A	N/A	N/A	N/A	N/A	N/A
§ 201.110(b)(2)	Legal	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Management	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Administrative	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Information Tech	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total Cost**							3,352,000	

* Column may not sum to Total Cost due to rounding.

** Costs associated with § 201.110(b)(3), "Record retention," are included in cost estimates for § 201.110(b)(1) and (2).

TABLE 15—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.110—EXCLUDED RULE SECTIONS ALTERNATIVE

Regulatory requirement	Profession	Not small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Expected cost* (\$)
		Number of hours required for each complex/LPD	Number of complexes/LPDs	Number of hours required for each complex/LPD	Number of complexes/LPDs			
§ 201.110(a) (b)(1)(i)–(iii)	Legal	8	172	4	16	1,440	147.19	212,000
	Management	154	172	154	16	28,952	86.83	2,514,000
	Administrative	4	172	4	16	752	44.51	33,000
	Information Tech	4	172	4	16	752	93.68	70,000
§ 201.110(b)(1)(iv)	Legal	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Management	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Administrative	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Information Tech	N/A	N/A	N/A	N/A	N/A	N/A	N/A
§ 201.110(b)(2)	Legal	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Management	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Administrative	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Information Tech	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total Cost**							2,830,000	

* Column may not sum to Total Cost due to rounding.

** Costs associated with § 201.110(b)(3), "Record retention," are included in cost estimates for § 201.110(b)(1) and (2).

TABLE 16—EXPECTED FIRST-YEAR AND ONGOING DIRECT COSTS ASSOCIATED WITH PROPOSED § 201.112—EXCLUDED RULE SECTIONS ALTERNATIVE

Regulatory requirement	Profession	Not Small LPDs		Small LPDs		Number of total hours	Expected wage (\$)	Adjustment (percent)	Expected cost* (\$)
		Number of hours required for each complex	Number of complexes	Number of hours required for each complex	Number of complexes				
§ 201.112	Legal	8	172	8	16	75	147.19	5	11,000
	Management	40	172	40	16	376	86.83	5	33,000
	Administrative	8	172	8	16	75	44.51	5	3,000
	Information Tech	0	172	0	16	0	93.68	5	0
Total Cost	47,000

* Column may not sum to Total Cost due to rounding.

D. Regulatory Flexibility Analysis

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

AMS is proposing adding new §§ 201.106, 110, and 112 to the regulations under the Packers and Stockyards Act. The proposed § 201.106 would require live poultry dealers (LPDs) to develop and implement new broiler grower contracts and grower payment systems. Proposed § 201.110 would impose a duty on LPDs 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. Proposed § 201.112 would require LPDs to produce and distribute disclosures when they request growers to make additional capital investments.

Proposed § 201.106 would require that the LPD not use a grower's grouping, ranking, or comparison to others to reduce a rate of compensation disclosed in a broiler growing arrangement. As a result, AMS expects that most LPDs would be required to make one-time changes to existing grower contracts and develop new payment systems that are consistent with these provisions. This process would 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 is aware that some LPDs already have contracts in place that meet the proposed requirements.

Proposed § 201.110(a)(1) would require LPDs to provide a fair comparison among growers when basing compensation on a upon a grouping or ranking of growers delivering during a specified period. Proposed § 201.110(a)(2)(i) through (vi) describe 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. Proposed § 201.110(a)(3) would 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.

Proposed § 201.110(b) would 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.

Under proposed § 201.110(a) and (b)(1)(i) through (iii), all LPDs would be required to develop policies and procedures that meet specific criteria outlined in the proposed regulation. Information obtained during previous AMS investigations suggests that LPDs may already have some formal or informal policies and practices or perhaps even some contract provisions in place to address and attempt to remedy situations in which growers have been disadvantaged by such factors. For example, an LPD might remove a grower that has received an unreasonable share of lower quality inputs from the grower pool and pay them by some other method that does not penalize relative performance (e.g., a five-flock average).

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

The new provisions in proposed § 201.112 would 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 (\$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. Based on information provided by subject matter experts, AMS estimates a 5 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.

AMS expects the requirements in proposed §§ 201.106, 110, and 112 will protect growers from some degree of unfairness and deception by establishing a duty of fair comparison for LPDs in poultry tournament administration and requiring LPDs to establish and document policies, adopt transparent methods of presenting grower compensation in broiler grower contracts, and provide important information to broiler growers to effectuate their legal rights. By increasing transparency at key decision points and establishing a duty of fair grower comparison for LPDs, the proposed regulation would secure a more level playing field among growers. The proposed rules address key decision or financial leverage points for growers and LPDs. These include points in time when LPDs and growers agree to contracts, when LPDs present compensation schedules to growers, when LPDs allocate inputs and production practices during tournaments, and when LPDs request or require growers to make ACIs.

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 and completeness in contracts and adequate LPD effort to ensure fair comparison in tournament administration that would likely reduce the potential for deception and unfairness. Currently, most broiler production contracts are incomplete in that they fail to clearly state important terms and provisions related to grower compensation, settlement procedures, and tournament administration. Providing more clear information for growers and establishing a duty for LPDs in administering tournaments would increase transparency of potential grower compensation outcomes and reduce some deception and unfairness in the operation of poultry grower ranking systems, including by enabling AMS and growers

management time at \$86.83 per hour costing \$3,000, and 6 hours of administrative time at \$44.51 per hour costing \$300. Total aggregate ongoing costs to small LPDs for proposed § 201.110 are expected to be \$4,000 annually.⁹⁸

Expected costs of proposed §§ 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. Proposed §§ 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 proposed §§ 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 proposed 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 proposed §§ 201.106 and 201.112 combined to be \$261,000 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 \$12,000 each year. This amounts to \$300 per grower in the first year. The table below summarizes costs of proposed §§ 201.106, 110, and 112 to small LPDs and small poultry growers.

TABLE 17—ESTIMATED COSTS TO SMALL BUSINESSES OF PROPOSED §§ 201.106, 110, AND 112

Type of cost	Regulated live poultry dealers	Unregulated growers	Total *
Proposed § 201.106:			
First-year Cost	\$544,000	\$248,000	\$792,000
First-year Cost per Firm	27,000	300	N/A
PV of Ten-year Cost Discounted at 3%	528,000	241,000	769,000
PV of Ten-year Cost Discounted at 7%	508,000	232,000	740,000
Ten-year Cost Annualized at 3%	62,000	28,000	90,000
Ten-year Cost Annualized at 7%	72,000	33,000	326,000
Average Ten-Year Cost per Firm Annualized at 3%	3,000	36	N/A
Average Ten-Year Cost per Firm Annualized at 7%	4,000	42	N/A
Proposed § 201.110:			
First-year Cost	562,000	0	562,000
First-year Cost per Firm	28,000	0	N/A
PV of Ten-year Cost Discounted at 3%	3,132,000	0	3,132,000
PV of Ten-year Cost Discounted at 7%	2,609,000	0	2,609,000
Ten-year Cost Annualized at 3%	367,000	0	367,000
Ten-year Cost Annualized at 7%	371,000	0	371,000
Average Ten-Year Cost per Firm Annualized at 3%	18,000	0	N/A
Average Ten-Year Cost per Firm Annualized at 7%	19,000	0	N/A
Proposed § 201.112:			
First-year Cost	4,000	12,000	16,000
First-year Cost per Firm	200	20	N/A
PV of Ten-year Cost Discounted at 3%	34,000	106,000	140,000
PV of Ten-year Cost Discounted at 7%	28,000	87,000	115,000
Ten-year Cost Annualized at 3%	4,000	12,000	16,000
Ten-year Cost Annualized at 7%	4,000	12,000	16,000
Average Ten-Year Cost per Firm Annualized at 3%	200	20	N/A
Average Ten-Year Cost per Firm Annualized at 7%	200	20	N/A
Proposed §§ 201.106, 110, and 112:			
First-year Cost	1,110,000	261,000	1,371,000
First-year Cost per Firm	56,000	300	N/A
PV of Ten-year Cost Discounted at 3%	3,694,000	347,000	4,041,000
PV of Ten-year Cost Discounted at 7%	3,145,000	319,000	3,465,000
Ten-year Cost Annualized at 3%	433,000	41,000	474,000
Ten-year Cost Annualized at 7%	448,000	45,000	493,000
Average Ten-Year Cost per Firm Annualized at 3%	22,000	50	N/A
Average Ten-Year Cost per Firm Annualized at 7%	22,000	60	N/A

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

LPDs report net sales in Annual Reports to AMS. Table 2 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 costs per

firm for each of proposed §§ 201.106, 110, and 112 and total first-year costs.⁹⁹ Estimated first-year costs are higher

⁹⁸ 6 legal hours × \$147.19 per hour + 32 management hours × \$86.83 per hour + 6 administrative hours × \$44.51 per hour = \$4,005.

⁹⁹ AMS 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.

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 costs to net sales is lower than their corresponding first-year cost ratios listed in Table 2. If estimated costs meet the threshold in the first year, they will in the following years as well.

Estimated first-year costs per firm are less than 1 percent of average net sales in the three largest quartiles. Total first year costs as a percent of net sales are estimated to be about 0.5 percent for the

smallest quartile. However, average first year cost per entity in Table 2 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 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 proposed §§ 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 proposed §§ 201.106 and 201.110. Their costs are likely only costs associated with proposed § 201.112, which, as percentage of net sales would be 0.002 percent. Because the smallest LPDs have fewer contracts than the other small LPDs, their costs associated with proposed § 201.112 are also likely less than average.

TABLE 18—COMPARISON OF SMALL LIVE POULTRY DEALERS’ NET SALES TO EXPECTED ANNUALIZED COSTS OF PROPOSED §§ 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%	\$11,173,037	0.242	0.251	0.002	0.501
25 to 50%	30,021,116	0.090	0.093	0.001	0.187
50 to 75%	73,471,776	0.037	0.038	0.000	0.076
75 to 100%	193,207,736	0.014	0.014	0.000	0.029

*Numbers in the table may not sum to one due to rounding.

AMS also estimated costs of an alternative proposal that excludes two sections of proposed § 201.110 from the requirements for LPDs under the proposed regulations. The alternative would not include the requirements, and therefore the associated costs, of § 201.110(b)(1)(iv) dealing with communication and cooperation and § 201.110(b)(2) dealing with compliance reviews. All sections of § 201.106 were included under the proposed alternative. AMS estimated that proposed alternative § 201.106 would require a one-time first-year investment of 1,536 legal hours at \$147.19 per hour costing \$226,000, 2,640 hours of management time at \$86.83 per hour costing \$229,000, 640 hours of administrative time at \$44.51 per hour costing \$28,000, and 640 hours of information technology staff time at \$93.68 per hour costing \$60,000. Aggregate total first-year setup costs are expected to be \$544,000. AMS does not expect additional ongoing costs of implementing proposed § 201.106 under the alternative.

Two parts of § 201.110 are excluded for purposes of estimating costs of the proposed rule under the alternative for

small LPDs: § 201.110(1)(iv), dealing with communication and cooperation and § 201.110(b)(2), dealing with compliance reviews. AMS estimated that proposed alternative § 201.110 would require a one-time first year aggregate investment of 128 legal hours at \$147.19 per hour costing \$19,000, 3,200 hours of management time at \$86.83 per hour costing \$278,000, 128 hours of administrative time at \$44.51 per hour costing \$6,000, and 128 hours of information technology staff time at \$93.68 per hour costing \$12,000. Total aggregate first-year setup costs for small LPDs under the alternative are expected to be \$314,000.

AMS expects proposed alternative § 201.110 would annually require an additional 64 legal hours at \$147.19 per hour costing \$9,000, 2,464 hours of management time at \$86.83 per hour costing \$214,000, 64 hours of administrative time at \$44.51 per hour costing \$3,000, and 64 hours of information technology staff time at \$93.68 per hour costing \$6,000. Total aggregate ongoing costs to small LPDs for proposed § 201.110 are expected to be \$232,000 annually.

All sections of § 201.112 were included under the proposed alternative. AMS estimated that first-year and ongoing annual costs of proposed § 201.112 to small LPDs would require on average an additional 6 legal hours at \$147.19 per hour costing \$1,000, 32 hours of management time at \$86.83 per hour costing \$3,000, and 6 hours of administrative time at \$44.51 per hour costing \$300. Total aggregate ongoing costs to small LPDs for proposed § 201.110 are expected to be \$4,000 annually.

The proposed 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 proposed §§ 201.106 and 201.112 combined to be \$261,000 in the initial year. AMS expects the annual aggregate cost to growers making additional capital investments to be \$12,000 each year. Table 3 below summarizes costs of proposed alternative §§ 201.106, 110, and 112 to small LPDs and small poultry growers.

TABLE 19—ESTIMATED COSTS TO SMALL BUSINESSES OF PROPOSED ALTERNATIVE §§ 201.106, 110, AND 112

Type of cost	Regulated live poultry dealers	Unregulated growers	Total *
Proposed § 201.106:			
First-year Cost	\$544,000	\$248,000	\$792,000
First-year Cost per Firm	27,000	300	N/A
PV of Ten-year Cost Discounted at 3%	528,000	241,000	769,000
PV of Ten-year Cost Discounted at 7%	508,000	232,000	740,000
Ten-year Cost Annualized at 3%	62,000	28,000	90,000
Ten-year Cost Annualized at 7%	72,000	33,000	105,000
Average Ten-Year Cost per Firm Annualized at 3%	3,000	40	N/A
Average Ten-Year Cost per Firm Annualized at 7%	4,000	40	N/A
Proposed § 201.110:			
First-year Cost	314,000	0	314,000
First-year Cost per Firm	16,000	0	N/A
PV of Ten-year Cost Discounted at 3%	2,061,000	0	2,061,000
PV of Ten-year Cost Discounted at 7%	1,708,000	0	1,708,000
Ten-year Cost Annualized at 3%	242,000	0	242,000
Ten-year Cost Annualized at 7%	243,000	0	243,000
Average Ten-Year Cost per Firm Annualized at 3%	12,000	0	N/A
Average Ten-Year Cost per Firm Annualized at 7%	12,000	0	N/A
Proposed § 201.112:			
First-year Cost	4,000	12,000	16,000
First-year Cost per Firm	200	20	N/A
PV of Ten-year Cost Discounted at 3%	34,000	106,000	140,000
PV of Ten-year Cost Discounted at 7%	28,000	87,000	115,000
Ten-year Cost Annualized at 3%	4,000	12,000	16,000
Ten-year Cost Annualized at 7%	4,000	12,000	16,000
Average Ten-Year Cost per Firm Annualized at 3%	200	20	N/A
Average Ten-Year Cost per Firm Annualized at 7%	200	20	N/A
Proposed §§ 201.106, 110, and 112:			
First-year Cost	862,000	261,000	1,123,000
First-year Cost per Firm	43,000	300	N/A
PV of Ten-year Cost Discounted at 3%	2,623,000	347,000	2,970,000
PV of Ten-year Cost Discounted at 7%	2,244,000	319,000	2,563,000
Ten-year Cost Annualized at 3%	307,000	41,000	348,000
Ten-year Cost Annualized at 7%	320,000	45,000	365,000
Average Ten-Year Cost per Firm Annualized at 3%	15,000	50	N/A
Average Ten-Year Cost per Firm Annualized at 7%	16,000	60	N/A

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

Net sales for small LPDs that would be required to make disclosure under proposed alternative §§ 201.106, 110, and 112 averaged \$77 million for their fiscal year 2021. Expected first-year cost per LPD would be well below 0.1 percent.¹⁰⁰

TABLE 20—COMPARISON OF SMALL LIVE POULTRY DEALERS' NET SALES TO EXPECTED ANNUALIZED COSTS OF PROPOSED 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%	\$11,173,037	0.242	0.143	0.002	0.385
25 to 50%	30,021,116	0.090	0.053	0.001	0.143
50 to 75%	73,471,776	0.037	0.022	0.000	0.059
75 to 100%	193,207,736	0.014	0.008	0.000	0.022

Clearly, excluding §§ 201.110(b)(1)(iv) and (b)(2) would reduce cost to small LPDs, but the benefits of the proposed rule would also be less. AMS prefers §§ 201.106, 110, and 112 as proposed because it considers grower dispute resolution policies and ongoing compliance reviews to be important for

ensuring the successful ongoing implementation of new policies and procedures that are designed to promote fair comparison among growers in poultry grower ranking systems. In addition, many of the smallest LPDs that do not use contracts involving poultry

grower ranking systems contracts would be unaffected by proposed § 201.110.

Although costs would be smaller with the alternative, the estimated costs associated with proposed §§ 201.106, 110, and 112 are relatively small. The proposed rule seeks to require LPDs to include standardized grower

¹⁰⁰ The first-year cost per small live poultry dealer of \$43,000 divided by the average net sales

for all small live poultry dealers of \$77 million is equal to 0.056 percent.

compensation information when using poultry grower ranking systems, formalize and follow policies and procedures to ensure fair comparisons in the administration of broiler tournaments (many or most of which will resemble existing practices), and require LPDs to provide its contract growers with information relevant to additional investment decisions. AMS has made an effort to limit disclosures to information that LPD already possessed. While proposed §§ 201.106, 110, and 112 would have an effect on a substantial number (20) of small businesses, the economic impact would be significant for only a few, if any, LPDs.

Costs to growers would be limited to the time required to review and acknowledge receipt of updated grower contracts and disclosures. AMS expects that proposed §§ 201.106, 110, and 112 would have effects on a substantial number of growers, however, the costs would 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. AMS invites comments concerning the sizes of poultry growing businesses and whether the costs associated with proposed §§ 201.106, 110, and 112 would have a significant effect on any of them.

Based on the above analyses regarding proposed §§ 201.106, 110, and 112, this proposed rule is not expected to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). While confident in this assertion, AMS acknowledges that individual businesses may have relevant data to supplement our analysis. We would encourage small stakeholders to submit any relevant data during the comment period.

E. 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 proposed rule also under the Act (Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010) 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 proposed regulation. This proposed rule provides additional standards for individual live poultry dealers or growers, and AMS does not find that this proposed 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.

F. Executive Order 12988—Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988—Civil Justice Reform. This proposed rule is not intended to have a retroactive effect. If adopted, this proposed rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this proposed rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this proposed rule.

G. Civil Rights Impact Analysis

AMS has considered the potential civil rights implications of this proposed 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 proposed 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 Asian Americans, Pacific Islanders, and Native Hawaiians were disproportionately impacted by the proposed 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 from the enhanced transparency provided by the proposed rule. The proposed regulations would provide benefits to all poultry growers. AMS will institute enhanced 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 outreach will specifically target several organizations that regularly engage with or otherwise may represent the interests of these 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 sector. UMRA generally requires agencies to consider alternatives and

adopt the more cost effective or least burdensome alternative that achieves the objectives of the proposed rule. This rulemaking contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments, or the private sector. Therefore, this rulemaking is not subject to the requirements of sections 202 and 205 of UMRA.

VIII. Request for Comments

AMS invites comments on this proposed rule. Comments submitted on or before August 9, 2024 will be considered. Comments should reference Docket No. AMS–FTPP–22–0046 and the date and page number of this issue of the **Federal Register**. Comments can be submitted by either of the following methods:

- *Federal eRulemaking Portal*: Go to <https://www.regulations.gov>. Enter AMS–FTPP–22–0046 in the Search filed. Select the Documents tab, then select the Comment button in the list of documents.

- *Postal Mail/Commercial Delivery*: Send your comment to Docket No. AMS–FTPP–21–0046, S. Brett Offutt, Chief Legal Officer, Packers and Stockyards Division, USDA, AMS, FTPP; Room 2097–S, Mail Stop 3601, 1400 Independence Ave. SW, Washington, DC 20250–3601.

List of Subjects in 9 CFR Part 201

Confidential business information, Reporting and recordkeeping requirements, Stockyards, Surety bonds, Trade practices.

For the reasons set forth in the preamble, AMS proposes to amend 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.

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.

■ 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*. Processes for selecting and distributing inputs, including:

(A) How and when the live poultry dealer delivers birds, feed, medication, and any other inputs supplied by the live poultry dealer to the growers.

(B) How and when the live poultry dealer manages similarities and differences of quality and quantity in the delivery of inputs to growers.

(C) How and when the live poultry dealer identifies differences in inputs and the potential effects of those differences on grower performance.

(D) How and when the live poultry dealer adjusts the inputs the grower receives.

(E) How and when the live poultry dealer adjusts compensation calculations based on inputs the grower receives.

(ii) *Flock production practices under live poultry dealer control*. Processes regarding the production of live poultry, including:

(A) How and when the live poultry dealer assigns density at delivery.

(B) How and when the live poultry dealer manages pickup of birds with respect to slaughter weight and bird age, including documenting any variation by pounds and number of growout days.

(C) How and when the live poultry dealer 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.

(D) How and when the live poultry dealer adjusts compensation calculations based on the flock production practices the grower receives.

(E) How and when the live poultry dealer minimizes, adjusts, or otherwise accounts for differences in production practices.

(iii) *Comparison flexibility*. Processes describing the live poultry dealer's grower comparison flexibility, including:

(A) If the live poultry dealer evaluates fair comparison of growers over one or more groupings or rankings (rather than within each grouping or ranking), how the dealer sets a reasonable time period over which the duty of fair comparison is fulfilled.

(B) If the live poultry dealer removes growers from a ranking group, the dealer must describe when growers are removed and how the live poultry dealer compensates the growers to satisfy the non-comparison

compensation method under paragraph (a)(3) of this section.

(C) 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.

(iv) *Communication and cooperation.* Processes for 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) *Compliance review.* Not less than once every 2 years, the live poultry dealer must review its compliance with the processes set forth in paragraph (b)(1) of this section.

(i) The reviewer must be independent of the management chain of a particular complex and qualified to conduct the review.

(ii) The review must include examination of compliance practices of the complex management, production supervision, and all agents that have discretion in contract implementation.

(iii) The live poultry dealer must prepare a written report with the conclusions of the review, which must be based on work papers of the review and other documentation relevant to the review.

(3) *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) 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) 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 any relevant research or other supporting material that the live poultry dealer 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.

(3) All relevant 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.

(6) An analysis—including any assumptions, risks, or uncertainties—of projected returns the grower can expect related to the additional capital investment 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.”

■ 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.

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