

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Part 201

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RIN 0581–AE03

Transparency in Poultry Grower Contracting and Tournaments

AGENCY: Agricultural Marketing Service, USDA.**ACTION:** Final rule.

SUMMARY: This final rule amends the regulations under the Packers and Stockyards Act, 1921 (Act), to add disclosures and information that live poultry dealers engaged in the production of broilers must furnish to poultry growers with whom dealers make poultry growing arrangements. The rule also establishes additional disclosure requirements for live poultry dealers engaged in the production of broilers who use poultry grower ranking systems to determine settlement payments for broiler growers. These requirements add targeted transparency to the market for grower services that will inhibit deceptive practices related to broiler contracting and performance. The Act protects fair trade, financial integrity, and competitive markets for livestock, meat, and poultry.

DATES: This final rule is effective February 12, 2024.

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SUPPLEMENTARY INFORMATION: At the beginning of the 20th century, a small number of meat packing companies dominated the industry and engaged in practices that were deemed anticompetitive and harmful to livestock producers. In response, Congress enacted the Packers and Stockyards Act, 1921 (Act), 7 U.S.C. 181 *et seq.*, which seeks to promote fairness, reasonableness, and transparency in the livestock marketplace by prohibiting practices that are contrary to these goals. In the 100 years since the Act went into effect, livestock business practices have changed significantly, particularly in the poultry industry, for which provisions were added to the law in 1935 (Act of August 14, 1935, 49 Stat. 648).

Within the last 40 years, the poultry industry has become highly integrated,

with most live poultry dealers operating as “integrators” who frequently own or control all segments of the production process except growout, where poultry growers raise young poultry to harvest size under poultry growing arrangements (contracts). Most integrators employ a relative performance or grower ranking system to determine grower payment, as explained later in this section. Thus, AMS’s references to “integrator” in the discussion of this final rule refer specifically to those live poultry dealers who are vertically integrated and generally use a relative performance or grower ranking system to determine grower payment.

Over the same 40-year time span, the industry has also become more concentrated.¹ One measure of industry concentration is the four-firm concentration ratio, which is the combined market share of the four largest firms in the industry. A higher four-firm concentration ratio means a higher level of industry concentration. In 1963, the four firm concentration ratio for chickens was 14 percent.² By 1980, the four-firm concentration ratio for integrators processing broilers was 32 percent.³ By 2022, the four-firm concentration ratio increased to 57 percent.⁴ Concentration is even higher at the local level in which growers operate. In the last available survey of local markets, MacDonald and Key (2011) found that about one quarter of contract growers reported that there was just one live poultry dealer close enough to grow for; another quarter reported two; another quarter reported three; and the rest reported four or more.⁵

¹ One measures of industry concentration is the four-firm concentration ratio, which is the combined market share of the four largest firms in the industry. A higher four-firm concentration ratio means a higher level of industry concentration. Rapid increases in broiler productivity, an important factor driving consolidation, did not begin until after World War II. Charles R. Knoeber, “A Real Game of Chicken: Contracts, Tournaments, and the Production of Broilers,” *Journal of Law, Economics, & Organization*, Vol. 5, No. 2. (Autumn, 1989).

² Michael Ollinger, James MacDonald, and Milton Madison. *Structural Change in U.S. Chicken and Turkey Slaughter*. U.S. Department of Agriculture, Economic Research Service. Agricultural Economic Report No. 787, September 2000, p. 7.

³ John M. Crespi, Tina L. Saitone, and Richard J. Sexton. *Competition in U.S. Farm Product Markets: Do Long-Run Incentives Trump Short-Run Market Power?*, Applied Economic Perspectives and Policy (2012) volume 34, number 4.

⁴ WATT Poultry USA, March 2023. Companies ranked by weekly ready to cook pounds.

⁵ James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, EIB–126, U.S. Department of Agriculture, Economic Research Service, June 2014: 30, https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=0.

There are approximately 16,500 broiler (chicken grown for meat) growers—those who actually raise the chickens from chicks, often under contract with live poultry dealers—in the U.S.⁶ Based on comments from the industry, broiler growers typically have no employees, but some may employ a handful of workers outside themselves and their families.⁷ According to annual reports filed with the Department of Agriculture (USDA), there were 42 live poultry dealers engaged in broiler production in the U.S. in their fiscal year 2021.⁸ Of those, 20 have fewer than 1,250 employees each, and have average annual sales of \$77 million.⁹ Fewer than 5 percent of approximately 20,000 U.S. broiler grower contracts are with these 20 dealers.¹⁰ More than 95 percent of broiler grower contracts are with the 22 larger live poultry dealer companies that employ more than 1,250 employees each and have average annual sales of \$3.6 billion.¹¹ Total U.S. chicken sales for these dealers was \$58.6 billion in 2019.

Most broiler growers raise poultry under a contractual growing arrangement commonly known as a tournament system.¹² Under this system, integrators use a relative performance or grower ranking system for settlement purposes, *i.e.*, to determine grower payment among a group of competing growers. Poultry growers in tournament systems find themselves competing for payment without access to information in the possession of the integrators that would allow growers to manage, as best they can, poultry production under the

⁶ USDA, NASS. 2017 Census of Agriculture: United States Summary and State Data. Volume 1, Part 51. Issued April 2019.

⁷ AMS has no exact data on grower revenues but assumes most broiler growers are small businesses as defined by the Small Business Administration (SBA), with annual sales of less than \$3.5 million.

⁸ 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 on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSF3002.pdf>.

⁹ Live poultry dealers annual report submissions PSD form 3002 “Annual Report of Live Poultry Dealers,” to AMS. OMB control number 0581–0308.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Citing data from the 2011 ARMS survey, MacDonald states “97 percent of broilers were grown under contract, 94 percent of contracts included payment incentives tied to grower performance, and 93 percent of those contracts tied the incentives to relative performance—that is, performance compared to other growers.” See MacDonald, James M. *Technology, Organization, and Financial Performance in U.S. Broiler Production*, EIB–126, U.S. Department of Agriculture, Economic Research Service, June 2014: 27.

payment systems established by the integrators.

Live poultry dealers generally do not provide, and poultry growers and prospective poultry growers find themselves unable to negotiate access to, (1) critical information needed to properly assess farm revenue streams and the operation of poultry growing contracts, and (2) information related to the distribution of inputs delivered to growers affecting performance among tournament participants. Whether from a representation, omission or practice, the inability to secure this information exposes growers to deception and risks of deception that could be reduced or eliminated with the provision of the information. Additionally, live poultry dealers possess or are reasonably expected to possess this information and are able to provide it to growers with minimal costs. For more than two decades, USDA, through the Agricultural Marketing Service (AMS) and its Packers and Stockyards Division (PSD) which now administers the Act, and formerly through Grain Inspection Packers and Stockyard Administration (GIPSA), has received numerous complaints from poultry growers about poultry growing contracting in general and tournament systems particularly. While the complaints cover a range of concerns, a central concern is the gap between expected earnings and the ability to achieve those outcomes through reasonable efforts by the grower. This central concern is manifested specifically where live poultry dealers fail to make transparent the range of financial outcomes possible in these arrangements, where they exert high degrees of discretion that can and do adversely affect growers, and where they fail to provide information necessary for growers to understand and respond to changing factors (*i.e.*, input differences) in the operation of their contracts.

Among other things, the Act protects growers from deceptive practices wherein they can be misled through lack of information from live poultry dealers regarding both potential revenues and the risks growers assume in the course of making and operating their contracts. Accordingly, AMS is establishing rules that will increase transparency in broiler growing contracting, including tournament systems, targeted at key decision points for growers—at the time of contracting and housing upgrades, and at the provision of inputs during tournaments. These are points where live poultry dealers repeatedly and consistently either omit vital information or make misleading statements, which prevents

growers from understanding the risks they are taking on. Such misrepresentations may inhibit growers' ability to choose amongst competing live poultry dealers on a level playing field.

This rulemaking sets forth enforceable transparency requirements under section 202(a) of the Packers and Stockyards Act that will secure a more level playing field for growers and foster a marketplace with fairer contracts and the fairer operation of those contracts under the contract production model. Deception undermines the integrity of the market and deprives producers of the true value of their livestock.

In addition to the prohibitions on deceptive practices set forth this final rule, AMS is also evaluating additional specific prohibitions and regulatory limitations. To facilitate additional input, data, and ideas that may inform further efforts to regulate the poultry tournament system, USDA put forward an Advance Notice of Proposed Rulemaking seeking stakeholder input. Based on that input, AMS has included in the Office of Management and Budget's Spring 2023 Regulatory Agenda an upcoming proposed rule entitled "Poultry Grower Payment Systems and Capital Improvement Systems."¹³ AMS welcomes engagement with interested stakeholders around ideas to be developed in that further rulemaking on poultry tournaments.

I. Overview

On June 8, 2022, AMS published in the **Federal Register** (87 FR 34980; Docket No. AMS–FTPP–21–0044) a proposal to amend the regulations implementing the Packers and Stockyards Act. AMS solicited comments on the proposed rule for an initial period of 60 days and extended the comment period 15 days on August 8, 2022 (87 FR 48091) through August 23, 2022. AMS received 504 comments, some with multiple signatories, from individual poultry growers, trade organizations representing producers, poultry companies, the meat industry, State- and national-level agriculture groups, other associations, and non-profit organizations. After consideration of all comments, AMS adopts the proposed rule, with modification. Section V details the regulatory changes made by this final rule. Modifications to the proposed rulemaking are discussed in Section VI. Public comments are discussed by topic in Section VII.

¹³ RIN: 0581–AE18, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=0581-AE18>.

This rulemaking adds two new sections to PSD regulations under the Act, introducing new disclosure requirements that live poultry dealers engaged in the production of broilers must furnish to broiler growers with whom they establish broiler growing arrangements. In doing so, the final rule builds on existing disclosure concepts under the Act in 7 U.S.C. 197(a) through (c) and in the regulations that effectuate the Act at 9 CFR 201.55; 9 CFR 201.56(d); 9 CFR 201.99; and particularly 9 CFR 201.100, with respect to the poultry industry, which provide for a range of disclosures such as settlement sheets and establish other regulatory requirements. The current disclosure framework has improved transparency in poultry contracting and has helped close the asymmetric information gap between the parties, thus reducing the market failure caused by asymmetric information.¹⁴ However, the modern poultry industry, in particular the broiler chicken segment, now requires increasingly large capital investments; and under the tournament system, growers are subject to intense pressures to perform, as well as financial and operational risks that may exacerbate the dangers of deception.

Section 202(a) (7 U.S.C. 192(a)) of the Act prohibits live poultry dealers from engaging in deceptive practices. This rulemaking establishes prohibitions against specific deceptive practices, such as withholding important information on the economic, financial, and operational risks growers take when entering into and operating their growing agreements. Growers can make more informed business decisions when they know the economic, financial, and operational risks associated with poultry growing. A lack of transparency for growers in poultry growing arrangements also creates an environment where growers are more vulnerable to other marketplace abuses.

Live poultry dealers have possession of key information that is materially useful for growers as they make decisions. This information asymmetry can be exploited by dealers to impede growers' ability to understand, evaluate, and compare contracts offered by dealers, bargain efficiently with competing dealers where and to the extent possible given the highly concentrated nature of the poultry industry, and manage their farm effectively for the risks they confront.

¹⁴ The concept of asymmetric information and associated market failures is discussed in a seminal article: Akerlof, G.A. "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism." *The Quarterly Journal of Economics* Vol. 84, No. 3 (August 1970).

This type of deceptive conduct denies growers the benefits of market and the full value of their services, and results in misallocation of grower resources, heightened live poultry dealer bargaining power, and significant financial risk to growers.

This rule adds a new § 201.102 to the regulations, adding to the list of required disclosures a live poultry dealer must make to broiler growers and prospective broiler growers in connection with poultry growing arrangements. By obtaining these disclosures prior to making the underlying capital investment, growers are better positioned to understand and evaluate growing arrangements. The rule further requires live poultry dealers to specify additional terms in broiler growing contracts about variables that are highly correlated with grower annual revenue. This information is not routinely shared with growers. AMS intends for these new requirements to improve transparency and inhibit deceptive practices in poultry growing arrangements.

Additionally, this rule adds a new § 201.104 to the regulations to require live poultry dealers to provide information related to the integrator-controlled input distribution to poultry growers paid under grower ranking systems (tournaments), where growers are paid based on their performance relative to a grouping of other growers. These disclosures allow growers to evaluate the distribution of inputs affecting performance such as poultry breed, gender ratio, and flock health—of their own flock and as compared to flocks of all tournament participants. These new data points will help growers better understand, evaluate, and compare the relationships between inputs, flock performance, and payment under their poultry growing arrangement. The requirements in this rule are intended to provide greater transparency and inhibit deceptive practices in the operation of poultry grower ranking systems.

Finally, this rule makes conforming changes to the regulations by adding to the list of definitions in § 201.2 to define terms used in new § 201.102 and new § 201.104.

Specifically, this final rule requires the following of live poultry dealers engaged in the production of broilers:

1. A Live Poultry Dealer Disclosure Document (Disclosure Document), to be provided to prospective or current broiler growers that contains critical information about the broiler growing arrangement when seeking to establish, renew, revise, or replace a broiler growing arrangement with the grower,

including when a broiler growing arrangement would or might reasonably require a broiler grower to make an original or additional capital investment to comply with the live poultry dealer's housing specifications. A governance framework and CEO-certification enhances the accuracy and enforceability of the disclosures.

- a. The Disclosure Document includes summaries of the dealer's litigation history with broiler growers and its bankruptcy filings over the past 5 years, the dealer's policies and procedures regarding sale of the grower's farm or assignment of the growing arrangement to another party, and the dealer's average annual turnover rate for broiler growers over the past five years.

- b. The Disclosure Document describes the live poultry dealer's policies and procedures regarding certain instances of heightened discretion or unusual circumstances which would otherwise be opaque—specifically, increased layout times; sick or diseased flocks; natural disasters, weather-related events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks affecting grower payments; feed outages including outage times; grower complaints relating to feed quality, formulation, or suitability; as well as any appeal rights growers may have relating to any of those items.

- c. The Disclosure Document provides a more fulsome set of financial disclosures, including average annual gross payments to growers over the past 5 years broken out by quintiles to reflect the full range of outcomes, and a summary of information pertaining to grower variable costs inherent to broiler production.

2. Mandated disclosures in the contract that also set out the minimum number of placements to be delivered to the broiler grower's farm for each year of the broiler growing arrangement contract, as well as the minimum stocking density of each placement.

3. When a poultry grower ranking system is used, disclosures of critical information about the flock (e.g., stocking density, breed names and ratios, breeder facility identifiers, and breeder flock age) placed with the grower must be disclosed within 24 hours of delivery.

4. When a poultry grower ranking system is used, dealers must provide settlement disclosures regarding critical information about each grower's ranking within the system, in particular the nature of the inputs received (e.g., stocking density, breed names and

ratios, breeder facility identifiers, and breeder flock age) and housing specifications for each growout period, without the identities of the growers to each other.

II. Background

A. Demand for This Rulemaking

For more than two decades, poultry growers have complained to USDA of abuses that arise in the contracting process and the operation of those contracts under poultry grower ranking systems, also known as the tournament system, a payment method which dominates the broiler chicken industry. To address these longstanding concerns regarding the fairness and competitive functioning of the market, Executive Order 14036 “Promoting Competition in the American Economy” (86 FR 36987; July 9, 2021), directs the Secretary of Agriculture (Secretary) to consider rulemaking to address, among other things, unfair treatment of farmers arising from certain practices related to poultry grower ranking systems. AMS has considered that direction in undertaking this rulemaking, as well as in undertaking an Advance Notice of Proposed Rulemaking around ideas to be developed in further rulemaking on poultry tournaments.

USDA's efforts to address grower complaints of malfeasance and abuses in the broiler industry now span more than a decade.¹⁵ In 2010, USDA held a series of workshops in conjunction with the Department of Justice (DOJ) to hear from producers about concentration and trade practice issues in agriculture. At the workshop in Normal, Alabama, poultry growers complained that their success or failure is dependent on factors controlled by their integrators.¹⁶ Further, growers were troubled by the lack of alternative integrators in many regional relevant markets, which further heightens the bargaining position of integrators.¹⁷ Grower public comments at the workshop were consistent with numerous comments submitted to USDA in connection with previous rulemaking efforts, as well as on the June 8, 2022, proposed rulemaking.

Growers expressed concerns about contract dependency, uncertainty of

¹⁵ See, generally, Leonard, Christopher, *The Meat Racket* (2014).

¹⁶ Transcript, United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshop May 21, 2010, Normal, Alabama (<https://youtu.be/j11GXzvA7u0?t=1822>).

¹⁷ See Domina, David A. and Robert Taylor, “The Debilitating Effects of Concentration Markets Affecting Agriculture,” *Drake Journal of Agricultural Law* 15 (May 2010): 61–108. See also Leonard, Christopher, *The Meat Racket* (2014).

pay, and informational asymmetries related to farm revenues and debt. Poultry growers have indicated they lack information about certain crucial production factors controlled by live poultry dealers, such as the anticipated frequency and density of flock placements and bird target weight under poultry growing arrangements, which heavily influence grower payments on an individual flock basis and over the long term.¹⁸

Growers cited the level of control and discretion reserved to integrators under their contracts, remarking how discretionary decisions controlled by integrators related to inputs quality, flock placements, housing specifications, tournament grouping, and other production factors can significantly affect grower revenue and profitability. Many growers were worried that contract terms did not cover the time required to repay the debt on their farms, noting that—sometimes unforeseen—additional capital investments, such as those necessitated by integrators' housing specifications, can plunge growers into further debt without assurances of adequate or stable returns.¹⁹ Growers indicated they do not have adequate information with which to assess original and additional capital investments because pay rates alone are insufficient for long-term revenue estimates without assumptions related to integrator discretionary production decisions.²⁰ Growers have also raised concerns regarding the use of overly rosy “pro forma” financial estimates, including income projections, during the contracting process, which in the growers' experience are not realized.²¹

Finally, poultry growers complained to USDA about being prohibited by dealers from asserting their rights under the current regulations to discuss poultry growing contracts with USDA

government representatives (including PSD), family members, lenders, and other business associates. Some growers allege they have been threatened or retaliated against by integrators for asserting those rights, including for responding to Federal Government requests for information—specifically, the 2010 DOJ Workshop.²² USDA also received comments to the proposed rule that alleged some growers were harassed, intimidated, and retaliated against for refusing to make expensive upgrades to their growing operations.

Similar to the comments received during the 2010 workshop, comments received in response to this proposed rule specifically reaffirmed that one prevalent deceptive practice involves live poultry dealers' omission of key information in the contracts with growers. This omission of information caused growers to believe that they were signing up for a contract that in practice they did not end up receiving or provide providing services under. Numerous comments to the proposed rule described how dealers provide growers with inadequate information on settlement sheets, particularly related to payment, and how, without this information, growers could not make sound business decisions.

Commenters have noted live poultry dealers do not provide critical information about—

- typical upfront associated costs;
- revenues and the full range of possible outcomes thereto;
- sale-of-farm policies;
- dealer bankruptcy and litigation history with poultry growers;
- grower turnover rate;
- how dealers handle—and growers are affected by—depopulation, sick chicks, natural disaster, weather-related events, and impairments to the physical infrastructure of the local complex or the grower's facility; feed outages; feed quality, formulation, and suitability; and appeals processes related thereto;
- minimum flock numbers and stocking densities;
- information about inputs and any differences between them, such as about the breeds, chick weights, breeder facilities, breeder flock age, and bird sexing—both at delivery and at settlement; and
- at settlement, information about housing type. Growers expressed a strong need for such information, as they could use it when deciding how to manage their farms, grow chicks, and

take on—or not take on—additional risks in growing broiler chicken.

B. Market Structure and Production Contracts

Integrated live poultry dealer firms typically own and manage local “complexes” of integrated operations that include hatcheries, feed mills, transportation systems, and processing facilities, and they contract with individual growers within a local region to raise birds for meat and hatchery eggs.²³ As explained earlier, these live poultry dealers that own and manage vertically integrated operations are referred to in the industry as “integrators.”

Through vertical integration, integrators control the complete supply chain from the genetics of breeder stock to slaughter. While integrators own most of the inputs and manage the operation of the supply chain, they outsource the function and major costs of raising poultry to broiler growers—and control much of that process through production contracts. Contracting with individual growers to grow out broilers, rather than procuring broilers from company-owned farms, is advantageous to integrators for two reasons: (1) the rapid pace of technological change in broiler production since the 1950s requires ongoing significant capital investments, and (2) the use of tournaments to compensate growers insulates growers from common production risks (such as disease and extreme weather) and lowers transaction costs.²⁴

Through the poultry growing arrangement, broiler growers provide the growout facilities and the equipment, labor, and management associated with those facilities. Broiler growers are typically responsible for utilities, fuel, maintenance, and repairs. Growers are responsible for ensuring the equipment functions properly and the environment inside the poultry house is satisfactory at all times throughout placement, including waste removal and disposal of deceased birds. These activities are subject to significant discretion and control by the integrator through contract terms and integrator-supplied supervisors or service technicians who oversee growers. Integrators exert significant power over contract poultry grower operations

¹⁸ United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshop May 21, 2010; Normal, Alabama (<https://youtu.be/8CvEGyMQ9v8?t=2156>).

¹⁹ United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshops May 21, 2010; Normal, Alabama (<https://youtu.be/j11GXzvA7u0?t=2422>) (<https://youtu.be/j11GXzvA7u0?t=3032>).

²⁰ United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshops May 21, 2010; Normal, Alabama (<https://youtu.be/j11GXzvA7u0?t=2453>).

²¹ United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshops May 21, 2010; Normal, Alabama (<https://youtu.be/8CvEGyMQ9v8?t=4226>; <https://youtu.be/j11GXzvA7u0?t=3084>; <https://youtu.be/j11GXzvA7u0?t=3091>).

²² United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshops May 2010; Normal, Alabama (https://youtu.be/8QJ_K06lp5M?t=1051).

²³ MacDonald, James M. *Technology, Organization, and Financial Performance in U.S. Broiler Production*, EIB-126, U.S. Department of Agriculture, Economic Research Service, June 2014.

²⁴ Charles R. Knoeber. “A Real Game of Chicken: Contracts, Tournaments, and the Production of Broilers.” *Journal of Law, Economics, & Organization*, Vol. 5, No. 2. (Autumn, 1989).

through individual production contracts and payment systems.

Grower revenue is a function of payment per flock multiplied by the number of flocks over a time period. While the specific formula for flock payment varies among integrators, it typically involves the evaluation of three variables: payrate, farm weight, and feed consumed. Where used to allocate payment, the tournament system is supposed to essentially rank growers on their efficiency in production, with payrates adjusted up or down based upon the growers' deviation from average performance of all growers over the growout period.

Growers' annual revenues are heavily dependent upon the annual number of flock placements and stocking density²⁵ of each placement, which are typically discretionary functions controlled by the integrator. Empty poultry houses do not produce revenue. Additionally, under tournament contract payments, flock performance—and therefore per flock payments—can be influenced by integrator discretionary decisions related to variation in input distributions like poultry breeds,²⁶ bird sex,²⁷ breeder stock age,²⁸ stocking

density,²⁹ consistency of feed availability,³⁰ and the type and administration of veterinary medicines.³¹

Moreover, when integrators encounter problems in performing their contract obligation to provide inputs, they often seek to resolve them via discretionary functions reserved to the integrator under the contract. From growers' points of view, these are operational risks that can result in actual or perceived disparate treatment among growers. When natural disasters or weather events affect the integrators' ability to provide chicks and feed or other key physical infrastructure of the local complex or grower facility, growers are unlikely to be aware of the integrators' policies and procedures that dictate allocation of inputs or determine availability or supplemental pay. Similarly, if a disease outbreak or massive depopulation event affects growers, growers have a right to be informed of the policies and procedures that will be implemented to control the outbreak, assign payment, and reallocate inputs. As feed is a primary input for growout, growers must be made aware of policies and procedures to report issues of feed suitability and quality to company personnel. Integrators do not necessarily share these policies and procedures with growers and often use informal rules with respect to the above-mentioned issues. Without this critical information, growers' ability to understand and evaluate, as well as compare contracts among integrators, is impeded, and the potential for deception in contracting and deceptive practices in the operation of those contracts increases.

Due to market consolidation combined with certain natural factors (such as the fragility of birds, limiting their transport), many integrators

operate as monopsonists³² or oligopsonists³³ in their relevant regional market. Some research³⁴ shows a correlation in local markets between the number of available integrators and grower payments, with payments shrinking as the number of integrators decreases. In local markets, the lack of alternative integrators, coupled with integrator control and discretion over production contracts, leaves growers with little bargaining power to obtain reasonable contract assurances and transparency.

Under the existing poultry industry market structure, growers are dependent on a live poultry dealer and receive only nominal assurances related to production levels and the variables composing farm revenue, while integrators set those production levels and have significantly more data related to grower payment variables, which generate costs integrators seek to minimize. The failure to provide critical information is deceptive given the conditions of asymmetrical information that compound as growers accumulate debt and operate in a tournament they do not control, both of which are discussed in greater detail below.

C. Grower Debt and Hold-Up Risk

Poultry growout operations require significant financial investments on the part of poultry growers, who typically provide the facilities (poultry housing and necessary equipment), utilities (electricity, gas, and water), manure management, compliance with environmental regulations, labor, and day-to-day management of growing poultry. One of the costliest investments is in poultry housing and equipment, the requirements of which are dictated to the poultry grower by the live poultry dealer through the contract. Throughout the term of the contract, live poultry dealers may encourage, incentivize, or even require a poultry grower, at the grower's expense, to upgrade existing

²⁵ Often expressed as a ratio of birds per square foot, or pounds (target weight of poultry at harvest) per square foot, stocking density reflects the number of birds placed on a farm or in a poultry house.

²⁶ Muir, W.M. and SE Aggrey. *Poultry Genetics, Breeding, and Biotechnology* (2003).

²⁷ See Burke, William, and Peter J. Sharp. "Sex Differences in Body Weight of Chicken Embryos." *Poultry Science* 68.6 (1989): 805–810; and Beg, Mah, et al. *Effects of Separate Sex Growing on Performance and Metabolic Disorders of Broilers*. Diss. Faculty of Animal Science and Veterinary Medicine, Sher-e-Bangla Agricultural University, Dhaka, Bangladesh, 2016.

²⁸ See Washburn, K.W., and R.A. Guill. "Relationship of Embryo Weight as a Percent of Egg Weight to Efficiency of Feed Utilization in the Hatched Chick." *Poultry Science* 53.2 (1974): 766–769; Weatherup, S.T.C., and W.H. Foster. "A Description of the Curve Relating Egg Weight and Age of Hen." *British Poultry Science* 21.6 (1980): 511–519; Wilson, H.R. "Interrelationships of Egg Size, Chick Size, Posthatching Growth and Hatchability." *World's Poultry Science Journal* 47.1 (1991): 5–20; Goodwin, K. "Effect of Hatching Egg Size and Chick Size Upon Subsequent Growth Rate in Chickens." *Poultry Science* 40 (1961): 1408–1409; Morris, R.H., D.F. Hessels, and R.J. Bishop. "The Relationship Between Hatching Egg Weight and Subsequent Performance of Broiler Chickens." *British Poultry Science* 9.4 (1968): 305–315; Peebles, E. David, et al. "Effects of Breeder Age and Dietary Fat on Subsequent Broiler Performance. 1. Growth, Mortality, and Feed Conversion." *Poultry Science* 78.4 (1999): 505–511. AMS notes additionally that research in this and related areas has limitations. It is older and results are mixed. AMS is concerned that publically available research has stagnated, despite the introduction of new breed strains in the intervening years. Because integrators now own the genetics companies, AMS has additional concerns that research has, in effect, been privatized, creating informational asymmetries. Based on regulatory experience and

on public comments, growers believe these factors affect performance, highlight its value to growers from disclosure.

²⁹ 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).

³⁰ Dozier III, W.A., et al. "Effects of Early Skip-A-Day Feed Removal on Broiler Live Performance and Carcass Yield." *Journal of Applied Poultry Research* 11.3 (2002): 297–303.

³¹ Treatments may be necessary to mitigate disease within a single poultry house or an entire flock, or to boost the performance of suboptimal progeny from impaired breeder flocks, as described above. These treatments may affect the flock's growth rate or mortality. See Wells, R.G., and C.G. Belyawin. "Egg quality-current problems and recent advances." *Poultry science symposium series*. No. 636.513 W4. 1987. (citing Spackman, D. "The Effects of Disease on Egg Quality.")

³² Merriam-Webster online dictionary: A monopsonist is one who is a single buyer for a product or service of many sellers. <https://www.merriam-webster.com/dictionary/monopsonist>; accessed 3/8/2022.

³³ Merriam-Webster online dictionary: Oligopsony is a market situation in which each of a few buyers exerts a disproportionate influence on the market. An oligopsonist is a member of an oligopsonistic industry or market. <https://www.merriam-webster.com/dictionary/oligopsonist>; accessed 3/8/2022.

³⁴ MacDonald, James M., 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. See also, MacDonald, James M. *Technology, Organization, and Financial Performance in U.S. Broiler Production*, EIB-126, U.S. Department of Agriculture, Economic Research Service, (June 2014): 29–30.

housing or equipment in order to renew or revise an existing contract. Revenue instability and continuing debt accumulation may explain the low returns to equity³⁵ in this space.

1. Construction Costs

A 2011 study estimated a cost of \$924,000 for site preparation, construction, and necessary equipment for four 25,000-square-foot poultry houses (or \$231,000 per house) in rural Georgia at that time, independent of the cost for the land.³⁶ Costs for establishing poultry houses have increased substantially since 2011, due to the advancement of new technologies in poultry housing and the increased cost of materials. AMS estimates current construction costs at nearly \$500,000 per poultry house.³⁷

Poultry growers can incur considerable debt to make the investments necessary for poultry production. Most new broiler housing is debt-financed. According to MacDonald, U.S. contract poultry growers' total debt amounted to \$5.2 billion, or 22 percent of the total value of their assets, in 2011.³⁸ The research cited here found that debt loads—and exposure to liquidity risks, should flock placements and revenues fall—are closely related to the age of the operation, with newer farmers carrying greater debt relative to the value of farm assets. Farmers with fewer than six years of experience in broiler production carried debt equal to 51 percent of assets, on average, and one quarter of those farmers carried debt equal to at least 77 percent of assets.

The weight of poultry grower debt load can be exacerbated by three additional factors: (1) the length, in terms of time, of a poultry growing arrangement is rarely long enough to cover the grower's debt repayment period, and can be as short as one flock; (2) growers may be encouraged or required by live poultry dealers to invest in facility upgrades, which may lead to additional debt; and (3) poultry housing is a specific-use asset with little

salvage or repurpose value.³⁹ In other words, the grower is unlikely to be able to use or sell the facilities for a different purpose should the poultry growing contract be terminated. These “term,” “upgrade,” and “specific use” problems are rooted in asymmetrical information problems at the contracting stage, where live poultry dealers have knowledge and control of production and technical/equipment needs over the useful life of the poultry farm and growers do not. Combined, these factors create classic hold-up risk, where live poultry dealers make contract renewal dependent on further grower investments not disclosed at the time of the original agreements.⁴⁰

Grower debt problems are exacerbated by the limited number of live poultry dealers in most localities and by complex dealer-specific requirements that inhibit grower movement between dealers, particularly for growers with older poultry houses. For example, a grower who currently produces smaller birds for one live poultry dealer may desire to move to a different dealer that wants larger birds. The grower could be required to upgrade their poultry growing facility to include more cooling capacity in order to accommodate larger birds. However, such upgrades may not be economically feasible for the grower, so the grower stays with their current live poultry dealer. Growers also may encounter problems trying to sell their farm to exit the industry. Banks commonly require that a prospective buyer secures a contract with a live poultry dealer to be approved for financing the farm, making the availability of the poultry growing contract a critical element to the farm's sale. Growers have often expressed frustration with live poultry dealer refusals to offer contracts to interested buyers, thwarting farm sales. Growers need to understand how live poultry dealer policies and procedures affect their ability to sell their poultry operation.

Grower debt and dependence on live poultry dealers contribute to additional risks that are enhanced by other

informational disparities. For example, dealers are not required to provide growers information related to the financial condition of the dealer or complex. Complexes that are underperforming financially may be subject to closure or reduced production levels, resulting in negative effects on grower revenue and potential contract termination. Growers also lack insight into other growers' satisfaction with a dealer and how often growers and dealers are involved in disputes, legal or otherwise. Dissension between a grower and their dealer can often result in contract termination and/or litigation between the parties. Dealers have readily available access to information concerning their financial health, grower churn,⁴¹ and frequency of litigation with growers. Disclosure of these items is critically useful information for growers to understand and evaluate risk and compare contracts among competing live poultry dealers. A live poultry dealer's failure to disclose this information to growers is deceptive.

2. Returns to Equity

The substantial debt accumulation, hold-up risk, and lack of competition for grower services, in an environment of opacity and asymmetrical information, is reflected in low grower returns to equity. In 2011, data drawn from a nationally representative sample of growers showed that the median payment received by contract growers was 5.55 cents per pound of farm weight. However, 10 percent of growers earned at least 7.02 cents per pound, while 10 percent earned less than 4.32 cents per pound.⁴² The sample data ranged across all growers and all contract types, but research has also shown that payments can range widely within specific contract types and within individual grower pools, creating revenue uncertainty for growers.⁴³

Perhaps even more concerning than the range of grower contract payments are the low returns on equity for poultry operations. According to USDA's Economic Research Service (ERS),⁴⁴ a

³⁵ MacDonald (June 2014) Op. Cit., pp. 38–40. Data from the *Agricultural Resource Management Survey—Version 4, Financial and Crop Production Practices, 2011*, and U.S. Census Bureau, 2011 Quarterly.

³⁶ Cunningham, Dan L., and Brian D. Fairchild. “Broiler Production Systems in Georgia Costs and Returns Analysis 2011–2012.” *UGA Cooperative Extension Bulletin* 1240 (November 2011), University of Georgia Cooperative Extension.

³⁷ 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).

³⁸ MacDonald (June 2014) Op. Cit.

³⁹ Poultry growing facilities are often characterized by certain expensive attributes, such as temperature and other habitat control systems. A fully equipped poultry growing facility repurposed, for example, as a hay barn or other storage is unlikely to generate the revenue necessary to meet a grower's \$400,000 mortgage obligation. Nor is repurposing it for an alternative livestock usage, such as hogs or dairy cows, possible, at least without retrofitting that would essentially demolish the growout facility. The grower's return on investment is tied to using the facility as intended.

⁴⁰ Vukina, Tom, and Poramet Leegommonchai. “Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry.” *American Journal of Agricultural Economics* 88 (2006).

⁴¹ Grower churn refers to changes in grower make up at a given complex. This metric reflects growers who have been terminated or left on their own accord.

⁴² MacDonald (June 2014) Op. Cit.

⁴³ Knoeber, Charles R. and Walter N. Thurman. “Testing the Theory of Tournaments: An Empirical Analysis of Broiler Production.” *Journal of Labor Economics* 12 (April 1994). Levy, Armando and Tomislav Vukina. “The League Composition Effect in Tournaments with Heterogeneous Players: An Empirical Analysis of Broiler Contracts.” *Journal of Labor Economics* 22 (2004).

⁴⁴ MacDonald (June 2014) Op. Cit., pp. 38–40.

Data from the *Agricultural Resource Management*

Continued

special survey conducted in 2011 showed mean returns on equity were negative for operations with one to two poultry houses, and increased with the size of the operation to positive 2.7 percent among operations with six or more houses. These figures were below mean rates of return on equity for large and midsize U.S. farms.⁴⁵ In AMS's experience, growers are experiencing the ongoing harm of contracting practices that omit critical information, such as certain dealer policies and procedures, input differences, information needed to evaluate returns across quintiles, and more.

D. Tournaments

The majority of growers producing poultry under production contracts are paid under a poultry grower ranking or "tournament" pay system.⁴⁶ Under poultry grower ranking systems, the contract between the live poultry dealer and the poultry grower provides for payment to the grower based on a grouping, ranking, or comparison of poultry growers delivering poultry to the dealer during a specified period based on metrics⁴⁷ created by the integrator. Per flock performance payments under tournament contracts generally depend on three variables: pay rate, farm weight, and feed consumed. In a simplified example, the live poultry dealer places flocks with ten growers under contract to deliver the same size of finished poultry to the dealer's processing plant at the end of a specified growout period. Upon harvest, each grower's performance (e.g., farm weight and feed conversion) is determined by an integrator-determined formula. The integrator then compares individual grower results against average results for all growers in the group, and ranks individual growers according to their relative performance within the group of ten growers. Grower contract payrate is adjusted up or down in relation to the grower's deviation from the average within the tournament grouping for that specific growout period.

Grower experience and skill, the technical specifications and relative sophistication of the housing, and other factors, such as the makeup of tournament groupings or inconsistent grower effort, may all affect performance. However, integrator decisions about inputs provided to tournament growers can also impact growers' relative performance.

Under the tournament system, integrators control the source of inputs and the distribution of those inputs to growers. Key inputs provided by the integrator are not always uniform with respect to quality characteristics across complexes or across time, and variation in these quality characteristics may impact grower performance. Based on AMS's experience, live poultry dealers will select strategies around broad types of inputs to grow at certain complexes, in general, to target customer preferences or to meet product requirements relating to growout or slaughter efficiency. For example, certain genetically tailored birds will be used to grow out more meat in certain areas or with uniformity in larger or smaller sizes to help live poultry dealers tailor their production. Similarly, feed inputs may be tailored based on the availability of grains or to achieve other animal health goals. However, within these broader strategies, there are a wide range of differences to the inputs that growers state are material to the growout process—such as the sex and age of the chicks, age and health of breeder flocks, the feed mix overall based on different grain availability, and more. Timely performance by live poultry dealers and dispute resolution are also relevant to the growout process. For example, improper delivery of feed mix designed for different stages of growout or delayed delivery or pickup of inputs are all potentially relevant.

In comments, dealers have denied or downplayed the significance of input variability and its effect on bird performance. Grower commenters are concerned about input differences and prefer some level of parity in input allocations, or at least mitigation of any disparities. Growers, however, unlike integrators, do not have direct access to the specific input differences, which makes it difficult if not impossible for them to evaluate whether their compensation is related to management and skill or correlated with "favorable" inputs. The lack of information further enables an opaque market environment where integrators may provide different inputs with little check on those actions.

The omission of this known information by integrators—impedes

growers' ability to understand, evaluate, and adjust their performance, management, and skill as growers. In the absence of this information, growers are deprived of known information necessary to understand their performance and payment in operation under contract.

E. Addressing the Omission of Information

As described above, live poultry dealers have engaged in a series of omissions in the contracting process and operation of those contracts that deprives growers of the ability to make contracting and investment decisions and manage the operation and risks of their farms. This rule addresses that deceptive practice with regulatory transparency mandates enforceable under the Act. Eliminating deception will increase the intensity of competition amongst live poultry dealers to the benefit of growers. Growers need this information to understand the market for grower services, to understand and evaluate their performance under the terms of the contract, and to make decisions about their investments and operations of their farms that may improve performance or mitigate risks under those contracts. The additional information will intensify competition in the market for grower services. As a result of more complete and transparent information for all market participants, live poultry dealers will have to compete more vigorously for grower services, allowing growers to benefit from the competition in the market.

The lack of this information further contributes to an opaque market environment that exposes growers to greater risks from actions by live poultry dealers. The deprivation of this information is a deceptive practice under the Act. The final rule addresses that ongoing deception with specific transparency requirements in the contracting process and during the ongoing operation of those contracts, consistent with the FTC's approach to similar problems in franchising. These transparency requirements, together with a governance framework designed to enhance the reliability of the disclosures, are enforceable under the Act by AMS and by growers under section 202(a)'s prohibition on live poultry dealers engaging in deceptive practices.

III. Authority

Congress enacted the Act to promote fairness, reasonableness, and transparency in the marketplace by prohibiting practices that are contrary to

Survey—Version 4, *Financial and Crop Production Practices, 2011*, and U.S. Census Bureau, 2011 Quarterly Financial Report (QFR): Manufacturing, Mining, Trade, and Selected Service Industries. <https://www2.census.gov/econ/qfr/pubs/qfr11q4.pdf>; accessed 1/19/2022.

⁴⁵ MacDonald (June 2014) Op. Cit. p. 40.

⁴⁶ MacDonald (June 2014) Op. Cit. See footnote 20 on page 27 citing ARMS data from 2011 that reported 97% of broilers are grown under contract, with 93% of contracts tied to relative performance.

⁴⁷ Metrics are typically associated with "costs". Formulas to calculate the metric vary among integrators. A high "cost" grower would be a poor performance, as a low "cost" grower would have performed well.

these goals. In 1921, the Act's stated purpose was to "regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs." At that time, poultry was included in the definition of a "packer." Amendments to the law in 1935 added a new type of entity under its jurisdiction, the "live poultry dealer." The poultry industry of that time involved marketing of live animals in large population centers, accompanied by various unfair, deceptive, and fraudulent practices. The 1935 amendments required that live poultry handlers be licensed, and subjected them to criminal penalties for violations. Congress also made sec. 202 (7 U.S.C. 192) applicable to live poultry dealers.⁴⁸ The Poultry Producers Financial Protection Act of 1987 (Pub. L. 100-173), modified and replaced parts of the 1935 amendments. The new provisions further protected growers of live poultry by adding payment provisions (sec. 410), trust provisions (sec. 207), and adding and modifying the liability provisions (secs. 411, 412, and 308), including creating a private cause of action for violations of sec. 202 of the Act.

AMS authority to regulate deception and deceptive practices is well-established.⁴⁹ Sec. 202(a) of the Act (7 U.S.C. 192(a)) prohibits live poultry dealers, with respect to live poultry, from engaging in or using deceptive practices or devices. Further, sec. 410(a) of the Act (7 U.S.C. 228b-1(a)) requires live poultry dealers obtaining live poultry under a poultry growing arrangement to make full payment for such poultry to the poultry grower from whom the dealer obtains the poultry on a timely basis. Sec. 407(a) of the Act (7 U.S.C. 228(a)) authorizes the Secretary to make rules and regulations as necessary to carry out the provisions of the Act. Such regulations are found, in part, at 9 CFR part 201.

Disclosure is a key component of the current regulations in place pursuant to the Act. The current regulations require disclosure of weights in the settlement of sales of livestock and live poultry,⁵⁰ disclosure of certain potential conflicts of interest in the consignment of

livestock at auction,⁵¹ and disclosures for poultry growers at contracting and on settlement, including the payment formula, performance plans, grading certificates, and more.⁵²

Like sec. 202(a) of the Act, sec. 5 of the Federal Trade Commission (FTC) Act also prohibits deceptive practices.⁵³ The FTC has long implemented disclosure requirements under sec. 5 of the FTC Act for the purpose of providing adequate information necessary for parties in imbalanced business relationships to inhibit deceptive practices. In 1981, the FTC adopted a policy statement summarizing its longstanding approach to deception cases, which AMS takes notice of.⁵⁴ For example, FTC's Franchise Rule requires the franchising industry to provide prospective purchasers of franchises information necessary to weigh the risks and benefits of an investment by providing required disclosures in a uniform format.⁵⁵ This rule is designed to similarly provide current and prospective poultry growers with sufficient information prior to entering into an agreement.

Additionally, disclosure requirements are commonly utilized in the regulation of financial markets, housing consumer protection, and other complex markets with significant information imbalances, to prevent deception and other abuses.⁵⁶ In those markets, disclosure commonly yields multiple benefits, starting with correcting the specific information asymmetries that give rise to deception.⁵⁷ For example, disclosure can also function to create reputational disincentives to counter potentially problematic behavior. This rule is designed in part with that in mind. Given the longstanding set of grower complaints about input differences, costly capital investments, and other problematic practices arising from live poultry dealers' high degree of control over growers under a poultry growing arrangement, transparency can

reasonably be expected to contribute, at least in part, to improvements in fair dealing by market participants. Overall, disclosure is recognized as a cost-effective tool to prevent deception and improve market integrity.

IV. Summary of the Proposed Rule

In the June 2022 proposal, AMS proposed to revise current regulations in 9 CFR 201.100 regarding the timing and contents of poultry growing contracts. Currently, that section sets forth the disclosures a live poultry dealer must make to poultry growers and prospective poultry growers in connection with poultry growing arrangements. The proposal would have revised § 201.100 by requiring dealers to disclose additional information to poultry growers and prospective poultry growers in connection with poultry growing arrangements. In the proposal, the regulations also would have required live poultry dealers to specify additional terms in poultry growing contracts to improve transparency and forestall deception in the use of poultry growing arrangements.

AMS also proposed to add a new § 201.214 to the regulations to require live poultry dealers to provide certain information to poultry growers in tournament pay systems about integrator-controlled inputs related to the poultry flocks growers receive for growout. Proposed new § 201.214 also would have added a new level of transparency to grower ranking sheets. The proposal was intended to enable poultry growers to evaluate the distribution of inputs among all tournament participants in order for poultry growers to assess the effect on grower payment.

Finally, AMS proposed to add to the list of definitions in § 201.2 to define terms used in the proposed revisions to § 201.100 and proposed new § 201.214.

Upon consideration of public comments on the proposed rule, AMS modified some of its proposed provisions in this final rule. An overview of the new or revised rule provisions follows in Section V, a discussion of changes from the proposed rulemaking is in Section VI, and a discussion of the public comments on the proposed rulemaking is in Section VII.

V. New or Revised Provisions

AMS addresses concerns related to market power imbalance and asymmetric information in poultry grower contracting by adding two new sections to 9 CFR part 201 that implements the Act. The first section addresses the lack of transparency and

⁴⁸ An Act to Amend the Packers and Stockyards Act, S. 12, 74th Cong. (1935).

⁴⁹ See, e.g., . . . *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 201 (E.D.N.C. 1996) ("[T]he violation of a regulation such as 9 CFR 201.82 is indisputably prohibited by the PSA"); see also *Stafford v. Wallace*, 258 U.S. 495, 515, 42 S. Ct. 397, 401, 66 L. Ed. 735 (1922) (finding the Act Constitutional); *O V Handy Bros Co v. Wallace*, 16 F. Supp. 662, 666 (E.D. Pa. 1936) (finding the regulation of live poultry dealers Constitutional).

⁵⁰ 9 CFR 201.55 and 9 CFR 201.99.

⁵¹ 9 CFR 201.56(d).

⁵² 9 CFR 201.100(a).

⁵³ For a discussion of the Act in relation to the FTC Act, see, e.g., Kades, Michael. "Protecting Livestock Producers and Chicken Growers," Washington Center for Equitable Growth, May 2022, <https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/>.

⁵⁴ Federal Trade Commission, Policy Statement on Deception, 1983, available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

⁵⁵ 16 CFR part 436; 84 FR 9051 (May 2019).

⁵⁶ D.W. Carlton and J.M. Perloff, *Modern Industrial Organization* (1994): 624.

⁵⁷ Paula J. Dalley, "The Use and Misuse of Disclosure as a Regulatory System," 34 *Fla. St. U. L. Rev.* 1089 (2007). <https://ir.law.fsu.edu/lr/vol34/iss4/2>.

associated deceptive practices in broiler grower contracting. The second section addresses the lack of transparency and associated deceptive practices in the use of poultry grower ranking systems to determine tournament grower payment settlements for broiler growers. In both cases, live poultry dealers are required to make disclosures that provide broiler growers more information with which to evaluate poultry growing arrangements.

This rule will better balance the quantity, quality, and type of critical information broiler growers, prospective broiler growers, and live poultry dealers engaged in the production of broilers have as they enter and operate under broiler growing arrangements. Through this rulemaking, the agency requires dealers to provide growers with critical information during the contracting process. This rule gives growers the ability to understand and evaluate contracts from dealers. The rule enhances the integrity of the marketplace overall, helps reduce the risk of other forms of problematic market practices, such as the inappropriate provision of different inputs to different growers, and prevents certain deceptive practices by dealers.

AMS also made conforming changes and changes for clarity in § 201.2, § 201.100(a), and § 201.100(b). This section provides an overview of the new and revised provisions.

A. Definitions

This rule amends § 201.2 by removing the paragraph designations within the section, reorganizing the definitions alphabetically, and adding definitions for new terms. The new terms are: *breeder facility identifier*, *breeder flock age*, *broiler*, *broiler grower*, *broiler growing arrangement*, *complex*, *gross payments*, *grower variable costs*, *housing specifications*, *inputs*, *letter of intent*, *Live Poultry Dealer Disclosure Document*, *minimum number of placements*, *minimum stocking density*, *number of placements*, *original capital investment*, *placement*, *poultry grower ranking system*, *poultry growout*, *poultry growout period*, *prospective broiler grower*, *prospective poultry grower*, and *stocking density*. Additionally, this rule incorporates into § 201.2 the statutory definitions of: *commerce*, *live poultry dealer*, *poultry grower*, and *poultry growing arrangement*.

B. Disclosure

To address concerns related to deception and deceptive practices by dealers in contracting for broiler growing arrangements and in the

operation of such contracts, this final rule adds new, enforceable transparency requirements on live poultry dealers for the benefit of growers. Specifically, it adds a new section at § 201.102,—disclosures for broiler production, and makes conforming changes to § 201.100(a) and (b). Currently, 9 CFR 201.100 describes the documents that live poultry dealers must provide to poultry growers within certain timeframes. Paragraph (a) of § 201.100 requires a dealer to provide the grower with a true written copy of the offered poultry growing arrangement on the date the dealer provides poultry housing specifications to the grower. The final rule retains the requirement for all live poultry dealers but revises the language in paragraph (a) for clarity by replacing “house specifications” with “housing specifications,” replacing the personal pronoun “you” with “the dealer,” and by removing the word “as” from the beginning of the paragraph. Paragraph (b) of § 201.100 requires live poultry dealers to allow growers to discuss the terms of poultry growing arrangement offers with a Federal or State agency, the growers’ legal and financial advisors and lenders, other growers for the same dealer, and family members or other business associates with whom growers have valid business reasons for consulting about the offered poultry growing arrangements. This final rule retains the requirement but revises the language to clarify that the right to discuss the terms of the poultry growing arrangement offer also applies to prospective poultry growers and, if applicable, to the accompanying Disclosure Document described in § 201.102. This rule also revises the language to remove the personal pronoun “you” and replace “must allow poultry growers to discuss the terms of a poultry growing arrangement offer” with “may not prohibit a poultry grower or prospective poultry grower from discussing the terms of a poultry growing arrangement offer” for clarity. The rest of § 201.100 remains unchanged.

This final rule adds new § 201.102—Disclosures for broiler production—establishing new disclosure requirements in addition to those required by § 201.100 for live poultry dealers engaged in the production of broilers. This rule adds new definitions to § 201.2 for: *broiler*, meaning any chicken raised for meat production; *broiler grower*, meaning a poultry grower engaged in the production of broilers; *broiler growing arrangement*, meaning a poultry growing arrangement pertaining to the production of broilers;

and *prospective broiler grower*, meaning a person or entity with whom the live poultry dealer is considering entering into a broiler growing arrangement.

New paragraph 201.102(a)—Obligation to furnish information and documents—requires the live poultry dealer engaged in the production of broilers (“dealer”) to provide the prospective or current broiler grower with the Disclosure Document, as described in paragraph (b) of the section, in addition to the true written copy of the broiler growing arrangement, under three different scenarios.

First, under § 201.102(a)(1), a live poultry dealer engaged in the production of broilers seeking to renew, revise, or replace an existing broiler growing arrangement or to establish a new broiler growing arrangement that does not contemplate modifications to existing housing specifications will be required to provide both the broiler growing arrangement and the Disclosure Document to the grower at least 14 calendar days before the dealer executes the broiler growing arrangement, provided that the grower may waive up to 7 calendar days of that time period. *Housing specifications* is defined as a description of—or a document relating to—a list of equipment, products, systems, and other technical poultry housing components required by a live poultry dealer for the production of live poultry. A live poultry dealer will likely have multiple housing specifications that operate in concert to create housing tiers at a given complex. The housing specifications document or list should accurately reflect the minimum requirements for qualification under a specific housing tier. Growers agree to provide housing that meets the minimum requirements of a live poultry dealer.

Second, under § 201.102(a)(2), a live poultry dealer that requires the grower to make an original capital investment to comply with the dealer’s housing specifications will be required to provide the grower simultaneously with four relevant documents. These documents are a true written copy of the broiler growing arrangement, the housing specifications, the Disclosure Document, and a letter of intent that can be relied upon to obtain financing for the original capital investment.

Finally, under § 201.102(a)(3), a live poultry dealer engaged in the production of broilers seeking to offer or impose modifications to existing housing specifications that could reasonably require the grower to make an additional capital investment will be required to provide the grower

simultaneously with four relevant documents. These documents are a true written copy of the broiler growing arrangement, modified housing specifications, the Disclosure Document, and a letter of intent that can be relied upon to obtain financing for the additional capital investment. AMS expects most growers will seek financing for additional capital investments. The simultaneous production of the three other documents will: (1) provide growers with improved information with which to assess the new capital investment and (2) allow growers to establish appropriate timelines for contemplating the investment.

The required contents and format of the Disclosure Document cover pages are provided in § 201.102(b)—Prominent disclosures. Paragraph 201.102(b) specifies the required elements for the cover pages of the Disclosure Document, including basic information about the live poultry dealer, key points in the broiler growing arrangement, and precise language for certain notices the dealer must make to the grower. AMS has developed downloadable instructions that contain the language required by § 201.102(b) for live poultry dealers. The instructions (Form PSD 6100 (Live Poultry Dealer Disclosure Document Form Instructions, OMB Control No. 0581–0308)) are intended to simplify compliance with these notification requirements and provide guidance for complying with § 201.102(c) and (d). Under § 201.102(b)(1), the required Disclosure Document cover page must include the title “LIVE POULTRY DEALER DISCLOSURE DOCUMENT” in capital letters and bold type. Section 201.102(b)(2) requires live poultry dealers engaged in the production of broilers to list their name, type of business organization, principal business address, telephone number, email address, and if applicable, primary internet website address.

Paragraph 201.102(b)(3) requires the dealer to specify the length of the term of the broiler growing arrangement. Including this information at the front of the Disclosure Document clearly identifies for growers the live poultry dealer and the associated broiler growing arrangement under consideration.

Under § 201.102(b)(4), the live poultry dealer engaged in the production of broilers must include a notice to the grower that highlights that grower income may be significantly affected by decisions made by live poultry dealers, and encourages growers to carefully review the information in the Disclosure

Document. Then, under § 201.102(b)(5), the dealer must state the minimum number of poultry placements on the broiler grower's farm annually and the minimum stocking density for each flock to be placed under the broiler growing arrangement. The minimum stocking density is the ratio that reflects the minimum weight of poultry per facility square foot the live poultry dealer intends to harvest from the grower following each growout.

New broiler growers may not understand how the discretionary actions of live poultry dealers affect grower payments. Many broiler growers are paid based on farm weight multiplied by a feed conversion variable. A live poultry dealer exercising discretion in placements, stocking density, and target weight is directly affecting that farm weight basis. Cautioning growers about the potential impact of dealer-controlled inputs and providing growers with the minimum number of flocks and minimum stocking density of flocks to be placed with the grower annually under the broiler growing arrangement will help growers assess the projected baseline value of their broiler growing arrangement.

Under § 201.102(b)(6), the live poultry dealer engaged in the production of broilers must include one of two alternative statements depending on whether the offered broiler growing arrangement includes housing specifications that require or could reasonably require an original or additional capital investment. If the new, renewed, revised, or replacement broiler growing arrangement does not contemplate modifications to existing housing specifications, the dealer must include the statement in § 201.102(b)(6)(i) in the Disclosure Document cover pages. The dealer's statement explains the grower's right to read the Disclosure Document and all accompanying documents carefully, and notes that the live poultry dealer is required to provide the current or prospective broiler grower with the Disclosure Document and a copy of the broiler growing arrangement at least 14 calendar days before the dealer executes the broiler growing arrangement, provided that the grower may waive up to 7 calendar days of that time period. This timing has been amended to match the revised timing in the final rule, as explained above. Alternatively, if the dealer offers a new broiler growing arrangement that requires the current or prospective broiler grower to make an original capital investment, as in § 201.102(a)(2), or offers or imposes modifications to existing housing specifications that could reasonably

require the current broiler grower to make an additional capital investment, as in § 201.102(a)(3), the dealer must include the statement in § 201.102(b)(6)(ii).

The statement in § 201.102(b)(6)(ii) explains the grower's right to read the Disclosure Document and all accompanying documents carefully, and notes that the live poultry dealer engaged in the production of broilers is required to simultaneously provide the broiler grower with the Disclosure Document, a copy of the broiler growing arrangement, the new or modified housing specifications, and the letter of intent. These required statements in the Disclosure Document cover pages will notify broiler growers of their rights under the regulations and indicate what documents they must receive from the live poultry dealer within the described timeframes.

Under § 201.102(b)(7), the live poultry dealer engaged in the production of broilers must include a statement notifying the broiler grower that the terms of the broiler growing arrangement will govern the grower's relationship with the live poultry dealer's company. The statement further notifies broiler growers of their right, notwithstanding any confidentiality provision in the broiler growing arrangement, to discuss the terms of the broiler growing arrangement and the Disclosure Document with a Federal or State agency; the grower's financial advisor, lender, legal advisor, or accounting services representative; other growers for the same live poultry dealer; and a member of the grower's immediate family or a business associate. The statement explains that a business associate is a person not employed by the broiler grower, but with whom the current or prospective grower has a valid business reason for consulting when entering into or operating under a broiler growing arrangement.

Finally, § 201.102(b)(8) requires the live poultry dealer engaged in the production of broilers to include the following statement in bold type in the Disclosure Document cover pages: “Note 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.” With this language, this rule clarifies that the Disclosure Document is not subject to agency review prior to submission to broiler growers, and that legal recourse may be available for some present and future controversies related to the

Disclosure Document and the broiler growing arrangement.

Paragraph 201.102(c)—Required disclosures following the cover page—specifies the information the live poultry dealer engaged in the production of broilers must provide in the Disclosure Document following the cover pages. Under § 201.102(c)(1), the dealer must provide a summary of litigation over the previous 5 years between the live poultry dealer and any broiler grower, including the nature of the litigation, its location, the initiating party, a brief description of the controversy, and any resolution. Information about a live poultry dealer's litigation with poultry growers within the relevant period, particularly the basis of the litigation and the volume of litigation relative to the number of growers with whom the dealer contracts, will help growers identify conflict origins and better assess potential risk of conflict.

Paragraph 201.102(c)(2) requires the live poultry dealer engaged in the production of broilers to provide a summary of all bankruptcy filings in the previous 5 years by the dealer and any parent, subsidiary, or related entity of the live poultry dealer. Bankruptcy of the live poultry dealer poses a very real financial risk to grower financial returns. Recent or current bankruptcy filing is an indicator of the financial health of the live poultry dealer, which a broiler grower may need to consider when deciding whether to enter or continue a contractual relationship with the dealer.

Paragraph 201.102(c)(3) requires the live poultry dealer engaged in the production of broilers to provide a statement that describes the dealer's policies and procedures regarding the potential sale of the broiler grower's farm or assignment of the broiler growing arrangement to another party. This information is important for broiler growers to have when considering a broiler growing arrangement because growers may choose or be forced to exit poultry farming for various reasons, such as the death or disability of the grower or the prospect of other occupational opportunities. However, in some situations, farm sales and assignments might be contingent on approval from the live poultry dealer. Growers informed of these policies and procedures can develop a coherent strategy, should they desire to exit poultry farming.

Paragraph 201.102(c)(4) contains new requirements for the live poultry dealer engaged in the production of broilers to disclose their policies and procedures, as well as any appeal rights, arising

from increased lay-out time; sick, diseased, and high early mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability. If no policy or procedure exists, the live poultry dealer must acknowledge “no policy exists” for each item listed in § 201.102(c)(4)(i)–(vi). The rule is not intended to require live poultry dealers to have policies for every listed occurrence, nor is the rule intended to have a legal consequence for simply not having a policy. Disclosing, however, that no policy exists is important to the poultry grower for risk assessment during the contracting process, and for protection against arbitrary undisclosed policies or procedures when the listed situations arise during the operation of the contract. The live poultry dealer will also be required to describe any policies on grower appeal rights associated with these events should a grower disagree with the live poultry dealer's actions or determinations.

Paragraph 201.102(c)(5) adds a new requirement for live poultry dealers engaged in the production of broilers to disclose broiler grower turnover data. Specifically, the live poultry dealer will be required to provide a table showing the average annual broiler grower turnover rates for the previous calendar year and the average broiler grower turnover rates of the 5 previous calendar years at both a company level and a local complex level. The broiler grower turnover rate is the number of grower separations during the time period divided by the average number of growers during the same period. The broiler grower turnover rate relates to the general risk of contracting with a live poultry dealer. Growers may compare the turnover rates of multiple live poultry dealers as a consideration in assessing relative risk when making contracting decisions. Instructions for calculating and normalizing table values are provided on Form PSD 6100 (OMB Control No. 0581–0308).

Under § 201.102(d)—Financial disclosures—live poultry dealers engaged in the production of broilers must provide certain additional information in the Disclosure Document. Under § 201.102(d)(1), live poultry dealers will be required to provide in the Disclosure Document tables showing quintiles of average annual gross payments to broiler growers at the local complex for each of

the previous 5 years.⁵⁸ If there are nine or fewer growers at a local complex, live poultry dealers will not be required to report quintiles of average annual gross payments as this would result in the disclosure of the unique payment information of one or more growers. Unique payment information is considered confidential business information. For local complexes with nine or fewer growers, live poultry dealers will be required to report only the mean and one standard deviation from the mean of the average annual gross payment to growers at the local complex. Average payments must be shown in U.S. dollars per farm facility square foot. Further, the required tables must be organized by year, housing specification tier, and quintile or mean and standard deviation.⁵⁹ Instructions for calculating and normalizing table values are provided in Form PSD 6100. This rule adds to § 201.2 a definition for *complex*, meaning a group of local facilities under the common management of a live poultry dealer. The definition states that a complex may include, but not be limited to, one or more hatcheries, feed mills, slaughtering facilities, or poultry processing facilities.

The required disclosure of historical revenue information relating to growers in the same local complex will give the current or prospective broiler grower considering entering into a broiler growing arrangement a clear and accurate picture of potential earnings under the arrangement and help the grower evaluate whether those earnings are sufficient. Providing insights into the variability of cash flow within any given year will enable growers to make informed business decisions, manage risk, and improve farm management.

Paragraph 201.102(d)(2) provides that, if the housing specifications for poultry growers under contract with the live poultry dealer in the local complex are modified so that an additional capital

⁵⁸ The word “local” in this discussion is used to differentiate between the complex with which the grower may be considering a contract and all the other complexes a dealer may own.

⁵⁹ Most dealers do not own or operate growout and breeder facilities, but they do own everything else around which the growout facilities are organized—i.e., the complex. The complex commonly includes the processing plant and feed mill and may include other production facilities. Growers produce for a particular local complex, even though the dealer may own more than one local complex and other complexes around the country. Depending on the technical needs for optimizing poultry growth for each product type, the dealer may have multiple different housing specifications for growers who produce different products for the complex. Therefore, the required table will show average payments to growers in each of the different housing specifications at the complex.

investment may be required, or if for some other reason annual gross payment averages for the previous 5 years do not accurately represent expected future grower payment averages, the Disclosure Document must provide additional information. The additional information includes annual payment projections by quintile or mean and standard deviation (depending on the number of growers at the local complex). The projections must reflect anticipated payments to growers under contract with the complex with the same housing specifications for the term of the applicable broiler growing arrangement. The dealer also must explain why the historical data does not provide an accurate representation of future earnings. Live poultry dealers engaged in the production of broilers considering or undertaking actions related to discretionary functions, such as changes in pay rates, pay systems, housing specifications, growout models, stocking densities, or number of annual placements, must provide grower payment projections to allow growers to determine the financial feasibility of the upgrades and make better-informed business decisions. Standardized grower payment projections will include realistic expectations about future earnings.

Paragraph 201.102(d)(3) requires the live poultry dealer engaged in the production of broilers to provide a summary of any information the dealer collects or maintains pertaining to grower variable costs inherent to broiler production. A conforming change, for clarity and emphasis purposes, to § 201.2 adds a definition for *grower variable costs* to mean those costs related to poultry production that may be borne by the poultry grower, which may include, but are not limited to, utilities, fuel, water, labor, repairs and maintenance, and liability insurance. The modified language is intended to help improve readability; the listed costs are not required to be treated as grower variable costs under a poultry growing arrangement if the parties choose to contract for them in some other manner. Receiving information on grower variable costs will allow broiler growers to make informed decisions about their participation in the broiler production business.

Finally, under § 201.102(d)(4), the live poultry dealer engaged in the production of broilers must supply the contact information for the State university extension service office or the county farm advisor's office that can provide relevant information to the current or prospective broiler grower about grower costs and broiler farm

financial management in the grower's geographic area.

Paragraph 201.102(e)—Small live poultry dealer financial disclosures—exempts from the requirement to provide the Disclosure Document required under § 201.102(a)(1) live poultry dealers engaged in the production of broilers that, together with all companies controlled by or under common control with the dealer, slaughter fewer than 2 million live pounds of broilers weekly (104 million pounds annually). The exemption applies to these small operators as long as their housing specifications are static. If their housing specifications are modified, requiring an additional capital investment from growers, these smaller operators will be required to provide the complete Disclosure Documents, as specified in § 201.102(a)(2) or (a)(3), to balance any financial risk of the new investment. AMS proposed—and retains this exemption in the final rule—because, in general, smaller operators are in discrete market segments and not engaged in the same market practices that are as likely to deceive as larger live poultry dealers' practices, which reduces the risks to growers and the need for the disclosures mandated in this rule. Examples of such market practices include allowing growers to be responsible for providing some inputs (e.g., feed), allowing growers to use older growout facilities, or granting growers more discretion in production decisions. Additionally, AMS will continue to monitor the impact of this rule on small businesses to ensure that its analysis is correct and to determine whether enforcement discretion may be appropriate.

This final rule adds new § 201.102(f)—Governance and certification, which requires the live poultry dealer engaged in the production of broilers to establish, maintain, and enforce a governance framework designed to review and ensure the accuracy and completeness of the Disclosure Document, and ensure the live poultry dealer's compliance with all its obligations under the Act and its regulations. The governance framework and anti-fraud protections require oversight by corporate officers and ensure legal accountability. Under § 201.102(f), the framework must be reasonably designed to audit the accuracy and completeness of disclosures under the Disclosure Document and ensure compliance with the Act and associated regulations. The principal executive officer of the live poultry dealer's company, or a person performing similar functions, must certify that the company complies with

the governance framework requirement and that the Disclosure Document is accurate and complete. The certification requirement is tailored to ensure the soundness and accuracy of the procedures used to produce the Disclosure Document and the information contained therein.⁶⁰

The framework requirement helps ensure that the company has in place specific steps that it will take to comply with this rule. It seeks to balance effectiveness at providing the internal controls necessary for reliable disclosure with some degree of flexibility to enable dealers to design a framework appropriate to manage the risks relating to the preparation of complete and accurate disclosures given their own particular operations.

As explained earlier, to simplify compliance with this requirement, AMS has developed instructions for compiling the Disclosure Document, Form PSD 6100, with standardized language that live poultry dealers can use. The language includes a certification statement the principal executive officer of the live poultry dealer's company, or a person performing similar functions, must sign.

Section 201.102(g)—Receipt by growers—requires a live poultry dealer engaged in the production of broilers to include in the Disclosure Document a signature page. The signature page includes a statement highlighting the requirements for timely delivery of the disclosure document, potential liability for a false or misleading statement or a material omission, and how to contact USDA to file a complaint at its website or by telephone.

The live poultry dealer must also obtain the current or prospective grower's dated signature on the signature page, or obtain alternative documentation to evidence delivery and that the dealer used best efforts to obtain grower receipt according to the specified timeframes. The dealer must provide a copy of the dated signature page or alternative documentation to the grower and retain a copy of the dated signature page or alternative documentation in the dealer's records

⁶⁰ Certification of regulatory compliance requirements is found in several regulatory regimes involving important market compliance protocols. These include section 302 of the Sarbanes-Oxley Act (Pub. L. 107-204; 116 Stat. 745) and Title XIII of the Bank Holding Company Act (12 U.S.C. 1851 *et seq.*) and regulations thereunder, commonly known as the Volcker Rule, including revisions designed to simplify the rule. See "Subpart D—Compliance Program Requirements" (12 CFR 248.20 and discussion in 79 FR 5535); "Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds" (84 FR 61974).

for 3 years following expiration, termination, or non-renewal of the broiler growing arrangement. Including the required statement informs growers that false or misleading statements or material omissions contained in the Disclosure Document may form a basis for legal action. Requiring live poultry dealers to collect and retain proof of compliance will ensure compliance with the regulation.

Paragraph 201.102(g) also contains new clear language and translation requirements for the document. Under § 201.102(g)(3), the Disclosure Document must be presented in a clear, concise, and understandable manner for growers, and it references Form PSD 6100 for guidance on the presentation of the information and required calculations. Under § 201.102(g)(4), the live poultry dealer must make reasonable efforts to ensure that growers are aware of their right to request translation assistance, and to assist the grower in translating the Disclosure Document at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement that does not contemplate modifications to the existing housing specifications (provided that the grower may waive up to 7 calendar days of that time period). For a broiler growing arrangement that does contemplate modifications to the existing housing specifications, the translation assistance must be provided when the live poultry dealer provides the Disclosure Document to the grower.

Reasonable efforts include but are not limited to providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the broiler grower's geographic area. Reasonable efforts may also include allowing additional time to review the translated Disclosure Document. A live poultry dealer may not restrict a broiler grower or prospective broiler grower from discussing or sharing the Disclosure Document for purposes of translation with a person or organization that provides language translation services.

AMS also added a provision to § 201.100 preventing live poultry dealers from restricting growers from sharing the Disclosure Documents with legal counsel, accountants, family, business associates, and financial advisors or lenders.

Nothing in the rule prevents companies from providing a translation, provided it is complete, accurate, and not misleading. As indicated previously, this rule is intended to improve

transparency in poultry production contracting by providing poultry growers with relevant information to make more informed business decisions. These new requirements will enable the prospective or current poultry grower to better understand the information provided in the disclosures.

C. Contract Terms

Currently, § 201.100(c)—Contracts; contents—specifies certain information that must be included in a poultry growing arrangement. The live poultry dealer is required to specify the duration of the contract and conditions for termination of the contract by each of the parties, all terms relating to the poultry grower's payment, and information about a performance improvement plan for the grower, if one exists. In the final rule, AMS did not reduce the requirements in § 201.100(c) for all live poultry dealers. AMS adds new § 201.102(h)—Contract terms—introducing additional requirements that apply exclusively to live poultry dealers engaged in the production of broilers. Paragraph 201.102(h) requires live poultry dealers engaged in the production of broilers to specify the minimum number of placements to be delivered to the broiler grower's farm annually in each year of the contract, as well as the minimum stocking density of each of those placements. The minimum number of placements and the minimum stocking density of each placement under the broiler growing arrangement directly impact broiler grower revenues. Both figures are crucial to a current or prospective grower's ability to evaluate potential earnings under the contract and their ability to meet financial obligations. Requiring live poultry dealers engaged in the production of broilers to include this information in broiler growing contracts will improve growers' ability to understand and evaluate contracts offered by dealers, and prevent deceptive practices in the contracting process. Providing such information may also allow lenders and guarantors to better evaluate the desirability of broiler loans they are asked to consider.

D. Poultry Grower Ranking Systems

AMS adds a new § 201.104—Disclosures for broiler grower ranking system payments. This new section applies exclusively to live poultry dealers engaged in the production of broilers who use a poultry grower ranking system to calculate broiler grower payments. New § 201.104 specifies the recordkeeping and disclosure requirements for such dealers. AMS amends § 201.2 to add

definitions for terms used in new § 201.104. In addition, § 201.100(f) of the current regulations, which contains requirements for grouping or ranking sheets and which AMS proposed to remove in the proposed rule, is retained in the final rule to reflect that the existing grouping or ranking sheet requirements continue to apply to all live poultry dealers, while the additional grouping or ranking sheet requirements at § 201.104(c) apply exclusively to live poultry dealers engaged in the production of broilers.

Currently, live poultry dealers are required under the regulations at § 201.100(d) to furnish poultry growers in poultry grower ranking systems with settlement sheets that show the grower's precise position in the ranking for that tournament. AMS adds a requirement in new § 201.104(a)—Poultry grower ranking system records—that requires a live poultry dealer engaged in the production of broilers who calculates payment under a poultry grower ranking system to produce and maintain records showing how certain inputs were distributed among participants. Further, the dealer must maintain those records for 5 years. Maintaining records allows USDA or any other party with the proper legal authority to collect the records and access to records during an investigation or legal action. AMS adds to § 201.2 the term *poultry grower ranking system*, meaning a system where the contract between the live poultry dealer and the poultry grower provides for payment to the poultry grower based upon a grouping, ranking, or comparison of poultry growers delivering poultry during a specified period. AMS also adds the term *inputs* to § 201.2. *Inputs* is defined as the various contributions to be made by the live poultry dealer and the poultry grower as agreed upon by both under a poultry growing arrangement. The definition also states that such inputs may include, but are not limited to, animals, feed, veterinary services, medicines, labor, utilities, and fuel.

Paragraph 201.104(b)—Placement disclosure—requires a live poultry dealer engaged in the production of broilers who uses a poultry grower ranking system to calculate broiler grower payments to provide certain information about the flock placed with the broiler grower within 24 hours of the placement on the grower's farm. Specifically, the dealer must provide the flock's stocking density, expressed as the number of poultry per facility square foot; the names and ratios of breeds of the flock delivered; the ratios of male and female birds in the flock if the sex had been determined; the breeder

facility identifier; the age of the egg-laying breeder flock from which each broiler grower's placement is produced; information regarding any known health impairments of the breeder flock and of the poultry delivered to the broiler grower; and what, if any, adjustments will be made to grower pay to reflect any of these inputs. As explained earlier in this document, each of these inputs may influence farm weight and feed conversion. In some cases, a broiler grower may adjust management practices in response to potential impacts of inputs on flock performance. This requirement provides the broiler grower with basic, accurate information about the placement at the outset of each growout period that may inform the grower's management decisions during growout. Armed with this information, growers may be better able to efficiently allocate resources during flock growout and maximize their individual profitability.

This rule adds definitions to § 201.2. *Breeder facility identifier* is defined as the identification a live poultry dealer permanently assigns to distinguish among breeder facilities supplying eggs for the poultry placed at the poultry grower's facility. As permanent identifiers, these identifiers must be consistent flock to flock. Identifiers that remain the same from one growout period to the next allow growers to observe patterns, if any, related to the performance of flocks originating with different breeders. Live poultry dealers may assign alphabetic, numeric, or other identifiers to each farm to keep the identity of individual breeder facilities private.

Breeder flock age means the age in weeks of the egg-laying flock that is the source of poultry placed at the poultry grower's facility. Depending on the type and breed of poultry being raised, the age of the breeder flock producing the eggs from which poultry for growout are produced may influence the grower's production decisions, for example, whether additional monitoring is necessary, or determining the appropriate height of waterers and feeders.

Under § 201.104(c)—Poultry grower ranking system settlement documents—a live poultry dealer engaged in the production of broilers employing a poultry grower ranking system to calculate settlement payments for broiler growers must provide every grower within the tournament ranking system with settlement documents that show certain information about each grower's ranking within the system, as well as the inputs each broiler grower received, for each growout period.

Paragraph 201.104(c)(1) requires live poultry dealers engaged in the production of broilers to show the housing specifications for each grower grouped or ranked in the system during the specified growout period.

Paragraph 201.104(c)(2) requires live poultry dealers engaged in the production of broilers to make visible to all grower participants in the poultry grower ranking system the distribution of dealer-controlled inputs provided to all participants. Specifically, dealers must disclose the stocking density at each grower's placement, expressed as the number of poultry per facility square foot. The dealer must: disclose the names and ratios of the breeds of poultry and the ratios of male and female poultry, if the sex of the poultry has been identified (*i.e.*, "sexed"), placed at each broiler grower's farm; indicate with the use of breeder facility identifiers the source of poultry placed at each broiler grower's farm; disclose the age of the egg-laying breeder flock from which each broiler grower's placement is produced; and, report the number of feed disruptions of 12 hours or more each grower experienced during the growout period.

As mentioned above, live poultry dealers are currently required to provide settlement sheets showing each grower's ranking within the poultry grower ranking system and to show the actual figures used to rank poultry growers for settlement purposes. However, poultry growers, in particular broiler chicken growers, have complained to USDA that the limited information they receive does not allow them to effectively evaluate their performance compared to others because they do not know how the inputs they receive compare to the inputs other growers receive. Nor do they know how their performance relates to housing specifications. Further, some growers believe other growers within the same poultry grower ranking system receive superior inputs to their own.

The placement and settlement information required under § 201.104 will enable broiler growers to make factual comparisons about their performance relative to other growers' performance within the poultry grower ranking system.

E. Severability

AMS considers some but not all of the provisions of this final rule to be severable. Specifically, changes to § 201.100—Records to be furnished poultry growers and sellers, and the provisions of new §§ 201.102—Disclosures for broiler production, and 201.104—Disclosures for broiler grower

ranking system payments, are generally severable within themselves and from each other. Thus, if a court were to find any of, some combination of, or some portion of those provisions to be unlawful or unenforceable, AMS intends that all other provisions as set forth in this rule would remain in effect to the maximum possible extent.

For example, if a court were to find one of the required disclosure items in § 201.102(c) or (d) unlawful, AMS would nevertheless intend the remaining disclosure requirements in § 201.102 to stand. However, provision of those disclosures to broiler growers is dependent upon the requirement to do so in § 201.102(a), so AMS would intend that paragraph (a) in § 201.102 is not severable from paragraphs (c) or (d). In another example, AMS intends that the reference to Form PSD 6100 instructions in § 201.102 (g)(3) is severable from the requirement in the same paragraph to present Disclosure Document information in a clear, concise, and understandable manner. Thus, if the reference to Form PSD 6100 were to be invalidated, live poultry dealers would nevertheless be required to include all the elements of the Disclosure Document as described § 201.102 in a clear, concise, and understandable manner.

AMS considers the provisions of § 201.104 to be severable, except that the requirement to maintain records related to broiler grower production for 5 years in § 201.104(a) is not intended to be severable from either paragraph (b) or (c) of that section. Records pertaining to the disclosures required in § 201.104(b) and (c) must be maintained and available to PSD for compliance and enforcement purposes.

AMS considers the changes to § 201.1—Terms defined, to be inseverable, inasmuch as the newly defined terms in that section are necessary for the clear application of the provisions of new §§ 201.102 and 201.104. The new definitions clarify the fundamental application of the rule to live poultry dealers, and cannot be severed from the policy effect of the rule.

VI. Changes From the Proposed Rule

After consideration of public comments, AMS determined to adopt the proposed changes with modification. This section provides an overview of how the final rule differs from the proposed rule. Additional discussion about AMS's consideration of public comments is presented in Section VII.

Two significant changes between the proposed rule and the final rule pertain

to the application of the new disclosure requirements and the placement of the new requirements within 9 CFR part 201. Under the proposed rule, AMS proposed additional disclosures that all live poultry dealers would be required to furnish to poultry growers with whom dealers make poultry growing arrangements. AMS also proposed to establish additional disclosure requirements for live poultry dealers who use a poultry ranking system to calculate grower payments. However, comments received noted that the proposed rule was largely based on research into the broiler industry and would be extremely difficult for turkey companies to implement due to differences between turkey and chicken production. AMS subject matter experts analyzed turkey production contracts from across the country and found more variability among them than in broiler contracts.⁶¹ The variability reflects the biological differences found in turkeys and longer placement times with growers, which can impact outcomes for producers.⁶² The variability in contracts results in less uniformity of grower compensation models in the turkey industry. Often, turkey grower compensation models are predicated on static square footage payments, and/or two-stage production, which reduce payment volatility and mitigate input variability. Much of the disclosed information would not be applicable or of significant value to turkey growers. While other turkey compensation models tend to rely on a relative ranking component similar to that for broilers, the benefit of disclosure is diluted, as discretionary dealer actions currently may have less impact on grower payments. As well, grower ranking systems account for a smaller percentage of grower payments.

Other commenters stated the new disclosure requirements are largely meant for the broiler industry where most complaints arise. AMS has received few turkey grower complaints. Other (non-broiler chicken) poultry growers have similarly not expressed

concerns regarding practices in their industry. AMS will continue to evaluate the presentation and operation of contracts and pay systems in the turkey industry, and other forms of poultry production to ensure growers can understand, evaluate, and compare contracts. However, AMS has determined that additional proposed disclosure requirements are not warranted for all live poultry dealers at this time.⁶³ Thus, this final rule's new disclosure requirements cover only live poultry dealers engaged in the production of broiler chickens.

In the final rule, AMS did not revise § 201.100 to require all live poultry dealers to provide certain additional disclosures to prospective or current growers. Instead, disclosure requirements for dealers engaged in broiler production are provided in new § 201.102—Disclosures for broiler production—which applies exclusively to live poultry dealers engaged in the production of broilers. The final rule adds language in § 201.102(a) clarifying that in addition to complying with the existing requirements in § 201.100, live poultry dealers engaged in the production of broilers must comply with additional disclosure requirements in new § 201.102.

The proposed rule in § 201.100(a) would have required a live poultry dealer engaged in the production of broilers seeking to renew, revise, or replace an existing broiler growing arrangement or to establish a new broiler growing arrangement that does not contemplate modifications to existing housing specifications to provide both the broiler growing arrangement and the Disclosure Document to the grower at least 7 calendar days before the dealer executes the broiler growing arrangement. Several commenters from the grower and advocacy sectors said that this time period was inadequate, and urged AMS to require that the documents be provided 14 days or 30 days in advance of the broiler growing arrangement's execution, to enable adequate time for growers to review and act upon the information provided in the documents. AMS also identified ambiguity in whether 7 days was business days or calendar days.

This final rule revises the timing in § 201.102(a)(1) to require that live

poultry dealers provide growers with the required documents at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement, provided that the grower may waive up to 7 calendar days of that time period. AMS is making this change in response to some grower comments stating that growers need additional time to adequately review the documents. A central purpose of the Disclosure Document is to improve the understanding of production agreements to thwart deception, and adequate time to review the document is essential to the rule fulfilling its purpose. The 7-day waiver addresses other grower commenter concerns related to continuity of production. AMS does not wish to inadvertently insert unnecessary time delays into the grower's planning process during contracting, in particular as this provision exclusively addresses the circumstance where the grower is not contemplating modifications to the farm housing specifications. The final rule seeks to maximize the grower's ability to determine the length of time necessary to review the documents, whether that be a full 14 calendar days or a shorter time period if the grower determines that is more appropriate. The rule revises the review period to 14 calendar days, but provides growers the option to waive 7 of those days if they prefer. Seven calendar days remains the minimum review time to provide growers with a guaranteed time to review the documents and thus protects growers from coercion by live poultry dealers—a risk also identified by commenters. Absent the provision, live poultry dealers could press growers to waive their entire review period rights. In AMS's estimation, a 14-calendar-day period is useful to some growers to review and have the time to act on the documents in the circumstance of no contemplated housing modification, and that a 7-calendar-day period is minimally sufficient to enable growers to review the Disclosure Documents, and reduce the potential for coercive behavior where growers so choose that shorter time period.

Where a live poultry dealer contemplates modifications to the housing specifications—such as in the circumstance of a new or additional capital investment or a modification to the housing specification—this rule provides the grower with significantly more time to review the contract and the Disclosure Document than current practice. Currently, growers commonly do not receive their contract until after a capital investment has occurred. In this rule, by requiring notice to the

⁶¹ This corresponds with Hyaena, *et. al.*, who state "There is . . . more variation among production contracts with respect to division of risks and profits from growing turkeys than in the broiler industry." See M. Hayenga, T. Schroeder, J. Lawrence, D. Hayes, T. Vukina, C. Ward, and W. Purcell, "Meat Packer Vertical Integration And Contract Linkages in the Beef and Pork Industries: An Economic Perspective" (2003), available at <http://econ2.econ.iastate.edu/faculty/hayenga/AMJfullreport.pdf> (last accessed April 2023).

⁶² Turkey growers may only produce two flocks per year while broiler growers may produce five or more. See Poultry Industry Manual (2013) available at https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/emergency-management/CT_fadprep_Industry_Manuals.

⁶³ AMS underscores that the principles of full and fair disclosure by live poultry dealers to avoid deceptive practices apply throughout the industry, including with respect to turkey growers. Although the specific disclosure mandates of this rule will, at this time, apply only to the broiler chicken segment, AMS intends to continue to monitor the entire industry.

grower at the same time as the new housing specification, growers receive the critical information embedded in the contract and Disclosure Document *before* the grower decides to engage in any construction or borrowing to make the necessary housing modifications. Capital investments generally take months, not days, and the grower is well positioned to control his or her review of the documents in the course of making any decisions regarding whether to engage in borrowing, construction, or contracting in relation to the potential broiler growing arrangement.

Under proposed § 201.214, AMS proposed to establish recordkeeping and disclosure requirements for all live poultry dealers who use a poultry grower ranking system to calculate grower payments. Again, AMS determined the disclosure requirements proposed in § 201.214 are not warranted for all live poultry dealers who use a poultry grower ranking system to calculate grower payments based on its analysis of poultry contracts and grower complaints, as previously discussed. Therefore, in the final rule, AMS modified the proposed requirements to apply exclusively to live poultry dealers engaged in the production of broilers who use a poultry grower ranking system to calculate grower payments, moved the requirements from proposed new § 201.214 to new § 201.104, and renamed the section “Disclosures for broiler grower ranking system payments.” AMS also retained the requirements in § 201.100(f) of the current regulations, which it had proposed to move to new § 201.214 and modify in the proposed rule. AMS added language to § 201.104(c) to indicate that in addition to complying with the requirements of § 201.100, live poultry dealers engaged in the production of broilers who use a poultry grower ranking system to calculate grower payments must provide additional information in accordance with new § 201.104.

To limit §§ 201.102 and 201.104 in the final rule to broiler contracts, AMS added to § 201.2 the definitions of *broiler* to mean any chicken raised for meat production, *broiler grower* to mean a poultry grower engaged in the production of broilers, *broiler growing arrangement* to mean a poultry growing arrangement pertaining to the production of broilers, and *prospective broiler grower* to mean a person or entity with whom the live poultry dealer is considering entering into a broiler growing arrangement.

AMS proposed in § 201.100(b)(5) to require live poultry dealers to include in the Disclosure Document the minimum

number of placements on the grower’s farm annually and the minimum stocking density of each flock. In the final rule, AMS moved this requirement to § 201.102(b)(5), which only applies to live poultry dealers engaged in the production of broilers. AMS also revised the introductory statement in § 201.102(b)(5) of the final rule to add clarifying language.

AMS proposed to require live poultry dealers to disclose a summary of all litigation with any poultry grower over the prior 6 years, as well as of all bankruptcy filings over the prior 6 years for the dealer and any parent, subsidiary, or related entity. However, commenters representing the poultry industry noted that the 6-year disclosure period associated with these requirements was inconsistent with other disclosure requirements covering the prior 5 years. Therefore, to ensure the uniformity of recordkeeping obligations and to reduce the burden on regulated entities, AMS revised §§ 201.102(c)(1) and (2) to require live poultry dealers engaged in the production of broilers to disclose litigation with any broiler grower over the prior 5 years, as well as bankruptcy filings in the prior 5 years by the dealer and any parent, subsidiary, or related entity.

The proposed rule would have required live poultry dealers to make various financial disclosures to poultry growers, including a table showing “average annual gross payments” made to growers at all complexes owned or operated by the live poultry dealer for the previous calendar year, as well as to growers at the local complex. Poultry and meat trade associations suggested AMS require dealers to disclose average annual gross payments only for the grower’s local complex. These commenters noted that complexes in different geographic areas face different economic conditions, arguing that information about payments at other complexes would not be useful and would potentially confuse growers. This final rule does not include the proposed requirement to disclose payment information for all complexes owned or operated by the dealer. This final rule does maintain the proposed requirement for live poultry dealers engaged in the production of broilers to disclose payment information only relating to the broiler grower’s local complex at § 201.102(d)(1).

Both growers and live poultry dealers also requested that AMS provide more specificity on how to calculate average annual gross payments. While the proposed rule provided detail on calculations, the commenters felt the

instructions lacked sufficient specificity to assure that live poultry dealers could comply and that poultry growers received adequate data on which to base business decisions. Therefore, AMS developed more in-depth instructions on how to calculate average annual gross payments, which are included in Form PSD 6100. This final rule provides that, if there are nine or fewer growers at a local complex, live poultry dealers will be required to report only the mean and one standard deviation from the mean of the average annual gross payment to growers at the local complex rather than average annual gross payments distributed by quintile. This modification from the proposed rule is necessary because disclosing average annual gross payments distributed by quintile in these circumstances would result in disclosure of the unique payment information of one or more growers, which AMS considers to be confidential business information.

AMS added to § 201.2 the definition of *gross payments* to mean the total compensation a poultry grower receives from the live poultry dealer, including but not limited to base payments, new housing allowances, energy allowances, square footage payments, extended lay-out time payments, equipment allowances, bonus payments, additional capital investment payments, poultry litter payments, etc., before deductions or assignments are made.

In the proposed rule, AMS requested comment on proposed disclosures regarding the financial health and integrity of the live poultry dealer, and whether those were adequate to enable growers to make sound business decisions. Commenters suggested that growers could utilize other information in addition to information specified in the proposed rule in making their business decisions. Specifically, commenters recommended that AMS also require disclosure of grower turnover data. Grower turnover rates are among the data growers may find valuable when making business decisions, as they relate to the risk of termination or non-renewal when contracting with a live poultry dealer. Just as growers will be able to rely on other required disclosures to contemplate their production and financial risks, this information would allow growers to compare the turnover rates of multiple live poultry dealers as a risk factor when making contracting decisions. Because grower turnover rates can be used in a manner similar to other required disclosures, AMS added a provision at § 201.102(c)(5) of the final rule requiring live poultry dealers engaged in the production of broilers to

disclose average annual broiler grower turnover rates for the previous calendar year and the average of the 5 previous calendar years at both the company level and the local complex level. Instructions for how to calculate average annual broiler grower turnover rates are included in Form PSD 6100.

AMS proposed requirements for several disclosures of specific data and information advising growers of their rights. AMS did not specifically propose to require live poultry dealers to disclose their policies on grower payment with respect to increased lay-out time, diseased flocks, natural disasters and other depopulation events, feed issues or outages, or policies on grower appeal rights and processes, although in the proposed rule, AMS asked whether the final rule should require disclosures on these types of topics. Multiple commenters suggested AMS include these disclosures. The commenters stated that these disclosures would aid growers in decision making and reduce confusion during times of disease or other disaster. Therefore, this final rule requires live poultry dealers engaged in the production of broilers to disclose policies and procedures on increased lay-out time; sick, diseased, or high early-mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability, as well as any appeal rights arising out of these events.

The proposed rule proposed to exempt live poultry dealers, including all parent and subsidiary companies, slaughtering fewer than 2 million live pounds of poultry weekly (104 million pounds annually) from the Disclosure Document requirements if the new, renewed, or replacement contract offered by one of these dealers does not include revisions to existing housing specifications that would require the grower to make new or additional capital investments. This final rule limits the proposed exemption to clarify that the exemption applies if the live poultry dealer engaged in the production of broilers that together with all companies controlled by or under common control with the dealer slaughter fewer than 2 million live pounds of poultry weekly (104 million pounds annually).

The proposed rule would have required dealers to establish, maintain,

and enforce a governance framework reasonably designed to audit the accuracy and completeness of the disclosures in the Disclosure Document, which must include audits and testing, as well as reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers. AMS determined that the requirement in § 201.102(f)(2) for the principal executive officer or officers to certify the governance framework and the accuracy of the Disclosure Document adequately covers the intended requirement for officers of this level to be focused on the effectiveness of the governance framework. AMS concluded that this level of detail about the audit process for the Disclosure Document was not necessary, because AMS finds the certification requirement regarding the governance framework to be sufficient to ensure a reasonable level of accuracy of these statements. The company will still need to maintain a governance framework for ensuring the reliability of the statements, which the certification attests to. The principal executive officer will need to tailor the framework to the particular levels of complexity of the company and its poultry business, its approach to internal controls, and other factors such as its track record of regulatory compliance, to ensuring the accuracy of statements.

In some circumstances, audit, testing, and reviews by senior officers may be necessary to ensure compliance, but that may not be the case in all circumstances. The requirements of this final rule place the opportunity—and the responsibility—on the principal executive officer to tailor the needs of the compliance program to the particulars of the business and its own compliance culture, as reflected in the governance framework. A “reasonably designed” framework depends on the particular facts and circumstances of the poultry company and its growers, with larger, more complex processors adopting more comprehensive systems appropriate to the scope of their operations. AMS will evaluate the effectiveness of the governance framework in part through examining the reliability of producing accurate disclosures but may also examine a dealer’s internal controls and other factors relevant to the facts and circumstances of the dealer, such as its recent track record of compliance with relevant laws and regulations.

AMS will investigate questions of statement inaccuracy and may take enforcement actions against companies that do not maintain sufficient governance frameworks. Violations may

result in issuance of a Notice of Violation or referral to the Attorney General of the United States for prosecution pursuant to Section 404 of the P&S Act, 7 U.S.C. 224. Growers may also bring private cases in response to inaccurate or misleading disclosures under the Act or under other laws. Therefore, AMS removed the requirement proposed in § 201.100(f)(1)(i) for audit, testing, and reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers.

The proposed rule would have required dealers to include a statement on the Disclosure Document’s grower signature page advising growers that a dealer’s failure to deliver the document within the required timeframe, as well as false or misleading statements or material omissions within the Disclosure Document, may violate Federal and State laws, and that such violations could be determined to be unfair, unjustly discriminatory, or deceptive and unlawful under the Act. The proposed statement further informed growers that allegations of such violations could be reported to AMS’s PSD. The final rule retains the required advisory statements; however, they have been modified to inform growers they may submit complaints to USDA’s Farmer Fairness portal at <https://www.usda.gov/farmerfairness> or by telephone at 1–833–DIAL–PSD (1–833–342–3773) if they suspect a violation of the Act or any other Federal law governing fair and competitive markets, including contract growing, of livestock and poultry.

The proposed rule would have required live poultry dealers to obtain a poultry grower’s signature to verify delivery of the Disclosure Document. Live poultry dealers noted that there may be instances in which obtaining a grower signature is not possible, such as grower unavailability or refusal to sign. AMS recognizes there is no mechanism to require growers to sign for receipt of the Disclosure Document. Commenters said it is appropriate in these instances to have other means available for the live poultry dealer to verify delivery of the Disclosure Document to the grower. AMS agrees it is necessary to have alternative methods of compliance. Therefore, this final rule allows flexibility for live poultry dealers engaged in the production of broilers to have alternative means to prove delivery and to demonstrate that best efforts were used to obtain grower receipt. In those circumstances, this final rule does not require a specific method of delivery but requires dealers to obtain and maintain evidence that the live poultry dealer

delivered the Disclosure Document to the grower or prospective grower in the required timeframe and that best efforts were used to obtain grower receipt.

Based on its experience, AMS expects live poultry dealers to engage in personal communications with the growers in the course of the contracting process, and so expects that best efforts include personal communication with growers in the course of delivering the Disclosure Document and seeking grower receipt. Where a grower refuses to sign or has made him or herself unavailable to the live poultry dealer, alternative documentation includes proof of delivery and statements or affidavits to support the communication and grower's refusal to sign receipt, or the circumstances of the grower's unavailability. AMS expects unavailability to be a rare circumstance requiring exceptional justification, given the nature of the contracting process between live poultry dealers and growers. The proof of delivery and best-efforts requirement, as an alternative, provide the best assurance possible in those circumstances that the grower receives and is able to evaluate in a timely manner the Disclosure Document. The grower receipt requirement, and this alternative, is important to AMS achieving the purposes of the rule because it minimizes the risk that live poultry dealer may deliver the Disclosure Document through means that may, in practice, not be read or noticed by the grower under the time frames provided, and so obstruct the purposes of ensuring the grower can evaluate the information before the grower makes significant decisions. AMS notes that grower and advocacy commenters supported the retention of the grower receipt requirement principally for those purposes.

The proposed rule would have required live poultry dealers to make several disclosures to poultry growers but did not include the exact language and wording they should use. Numerous commenters from the grower and live poultry dealer sectors said that these provisions should be in plain and unambiguous language to avoid discrepancies in interpretation among the various parties, regulators, and courts. One purpose of the Disclosure Document is to improve the understanding of production agreements to thwart deception; thus clear, concise, and understandable language is necessary. Therefore, this final rule adds a new § 201.102(g)(3) to the final rule to require live poultry dealers engaged in the production of broilers to present the information in the Disclosure Document

in a clear, concise, and understandable manner for growers. Paragraph § 201.102(g)(3) also notes that dealers may refer to Form PSD 6100 for further instructions on the presentation of information and certain calculations.

Some commenters also indicated a need to ensure growers who are not native speakers of English can understand the disclosures. As noted by multiple commenters, non-native speakers of English are engaged in poultry growing. For example, in the early 2000s, large numbers of first-generation immigrant Hmong people, many of whom had been farmers in their native Laos, moved from urban areas in California, Minnesota, and North Carolina to the Ozark region in and around southwest Missouri and started growing poultry. Pew Research Center studies show that the English proficiency of the Hmong population in the U.S. in 2019 was only 68% and, among foreign-born Hmong, English proficiency is just 43%.⁶⁴ Data supports the concerns expressed by commenters regarding providing poultry growers information in a manner growers are able to understand. AMS agrees that providing documents in the language growers best understand ensures fairness and reduces the risk of deception. Therefore, AMS added new § 201.102(g)(4) to the final rule to require that live poultry dealers must make reasonable efforts to ensure that growers are aware of their right to request translation assistance and to assist the grower in translating the Disclosure Document. This must be provided at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement that does not contemplate modifications to the existing housing specifications (provided that the grower may waive up to 7 calendar days of that time period). Where modifications to the existing housing specifications are contemplated, it must be provided when the live poultry dealer provides the grower with the Disclosure Document. The timing requirement aligns with the provision of the Disclosure Document by the live poultry dealer as set forth in § 201.102(a) as discussed above. Although they are not required to do so, nothing in the rule prevents companies from providing a translation, provided it is complete, accurate, and not misleading.

⁶⁴ Abby Budimen, "Hmong in the U.S. Fact Sheet," *Pew Research Center's Social & Demographic Trends Project* (May 24, 2022), available at <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-hmong-in-the-u-s/> (last accessed April 2023).

The final rule makes several other changes to the definitions proposed in § 201.2 of the proposed rule. It revises the definitions of *grower variable costs*, *growout*, and *growout period* and changes the latter two terms to *poultry growout* and *poultry growout period*.

The proposed rule would have defined *grower variable costs* as "those costs related to poultry production that may be borne by the poultry grower, including, but not limited to, utilities, fuel, water, labor, repairs and maintenance, and liability insurance." Commenters representing the grower sector shared concern that the definition would mandate that the costs listed were the only ones to potentially be borne by the grower. Commenters stressed that these costs are often the subject of negotiation between grower and live poultry dealer, with some costs being paid by the live poultry dealer. Therefore, AMS modified the definition in § 201.2 of the final rule to replace the words "including, but not limited to" with the words "which may include, but are not limited to." While this does not substantively change the legal standard, this modification emphasizes that these are examples of costs, yet still retains a definition that allows the listed costs to be treated as grower variable costs under a poultry growing arrangement if the parties choose to contract for them in some other manner.

AMS also proposed to define *growout* as "the process of raising and caring for livestock or poultry in anticipation of slaughter" and *growout period* as "the period of time between placement of livestock or poultry at a grower's facility and the harvest or delivery of such animals for slaughter, during which the feeding and care of such livestock or poultry are under the control of the grower." However, a commenter said the references to "livestock or poultry" in the proposed definition of *growout period* may have unintended consequences across other segments of the protein industry that do not use tournament pay systems, as the definition of *livestock* in the Act includes "cattle, sheep, swine, horses, mules, or goats." Therefore, in the final rule, AMS modified the definitions of these two terms to remove references to livestock. In addition, AMS revised these terms to refer to *poultry growout* and *poultry growout period* to clarify that it intends these definitions to apply only in the poultry context for the purposes of this rule.

AMS also made a few minor changes for clarification purposes. One change is found in § 201.104(a), substituting the word "these" for "such" in reference to poultry growing ranking system records.

The change was made to add specificity for the records that are required to be maintained by live poultry dealers. Another change was made in § 201.102(b)(8), substituting the word

“statement” for “sentence”. This is a clarifying change to both maintain uniformity in the language used throughout the regulatory text and to ensure dealers understand the entire

statement provided by 201.102(b)(8) must be disclosed to growers.

Table 1 summarizes key differences between the proposed rule and the final rule.

TABLE 1—KEY DIFFERENCES BETWEEN THE PROPOSED RULE AND FINAL RULE

Provision	Proposed rule	Changes to final rule
Applicability	<p>All proposed requirements related to disclosures and contract terms are in § 201.100—<i>Disclosures and records to be furnished poultry growers and sellers</i> (existing section with proposed revision of heading).</p> <p>§ 201.100(a) All live poultry dealers must provide Live Poultry Dealer Disclosure Document and related documents to prospective or current poultry growers.</p> <p>Removes § 201.100(f)—<i>Grouping or ranking sheets</i> of existing rule.</p> <p>§ 201.100(a)(1) <i>When no modifications to housing specifications are contemplated, a live poultry dealer must provide the poultry growing arrangement and the Disclosure Document at least 7 days before the live poultry dealer executes the poultry growing arrangement.</i></p> <p>§ 201.100(h) Clarifies that the right to discuss the terms of the poultry growing arrangement offer also applies to prospective poultry growers and to the accompanying Disclosure Document.</p> <p>§ 201.100(i)(2) All live poultry dealers must include minimum annual flock placements and minimum stocking density in contract.</p> <p>All provisions related to disclosures upon flock placement or settlement are in proposed new § 201.214—<i>Transparency in poultry grower ranking pay systems.</i></p> <p>§ 201.214(b) All live poultry dealers who use a poultry grower ranking system to calculate grower payments must provide certain disclosures upon flock placement.</p> <p>§ 201.214(c) All live poultry dealers who use a poultry grower ranking system to calculate grower payments must provide certain disclosures upon settlement.</p> <p>§ 201.214(c)(1) Live poultry dealers who use a poultry grower ranking system to calculate grower payments must provide the grower a copy of a grouping or ranking sheet showing the grower's precise position for that period. This sheet does not need to show the names of other growers, but must show their housing specification and the actual figures the grouping or ranking for each grower in the group during the period is based on.</p> <p>Terminology throughout rule refers to poultry, poultry growers, poultry growing arrangements, prospective poultry growers, and live poultry dealers.</p>	<p>Creates new section § 201.102—<i>Disclosures for broiler production</i> covering requirements for live poultry dealers engaged in the production of broilers, while retaining requirements in current § 201.100 for all live poultry dealers.</p> <p>§ 201.102(a) Changes requirements to apply only to live poultry dealers engaged in the production of broilers. Adds wording to emphasize that these requirements apply in addition to the existing requirements in § 201.100(a) for live poultry dealers engaged in the production of broilers.</p> <p>Retains § 201.100(f).</p> <p>§ 201.102(a)(1) <i>Changes the timing to 14 calendar days, provided that the grower may waive up to 7 calendar days of that time period.</i></p> <p><i>Conforming changes made to the prominent disclosures to be provided the grower and to receipt by growers.</i></p> <p>§ 201.102(b)(6)(i), § 201.102(g)(4).</p> <p>§ 201.100(b) Revises wording to emphasize that the right for poultry growers or prospective poultry growers to discuss the terms of the poultry growing arrangement offer applies to the Disclosure Document if that document is applicable.</p> <p>§ 201.102(h) Moves requirements to § 201.102 and revises them to apply only to live poultry dealers engaged in the production of broilers.</p> <p>Renumbers section and revises heading to § 201.104—<i>Disclosures for broiler grower ranking system payments.</i></p> <p>§ 201.104(b) Changes requirements to apply only to live poultry dealers engaged in the production of broilers.</p> <p>§ 201.104(c) Changes requirements to apply only to live poultry dealers engaged in the production of broilers. Clarifies that these dealers also must comply with the existing grouping or ranking sheet requirements in retained § 201.100 and that disclosures need not show the names of other growers.</p> <p>§ 201.104(c)(1) Removes requirements duplicated in retained § 201.100(f), leaving only the requirement for grouping or ranking sheets to show each grower's housing specification as applicable exclusively to live poultry dealers engaged in the production of broilers.</p> <p>Updates terminology to specifically refer to broilers, broiler growers, broiler growing arrangements, prospective broiler growers, and live poultry dealers engaged in the production of broilers where necessary to describe which entities must comply with new requirements.</p>
Required Disclosures Following the Cover Page (§ 201.102(c)).	<p>§ 201.100(c)(1) Live poultry dealers must disclose summary of litigation with any poultry grower over the prior 6 years.</p> <p>§ 201.100(c)(2) Live poultry dealers must disclose summary of bankruptcy filings by dealer and any parent, subsidiary, or related entity over the prior 6 years.</p> <p>Not in proposed rule</p>	<p>§ 201.102(c)(1) Live poultry dealers engaged in the production of broilers must disclose summary of litigation with any broiler grower over the prior 5 years.</p> <p>§ 201.102(c)(2) Live poultry dealers engaged in the production of broilers must disclose summary of bankruptcy filings by dealer and any parent, subsidiary, or related entity over the prior 5 years.</p> <p>§ 201.102(c)(4) Adds requirement that live poultry dealers engaged in the production of broilers must include description of policies, procedures, and appeal rights in Disclosure Document.</p>

TABLE 1—KEY DIFFERENCES BETWEEN THE PROPOSED RULE AND FINAL RULE—Continued

Provision	Proposed rule	Changes to final rule
	Not in proposed rule	§ 201.102(c)(5) Adds requirement that live poultry dealers engaged in the production of broilers must include grower turnover rate data in Disclosure Document. Removed from final rule.
Financial Disclosures (§ 201.102(d)).	§ 201.100(d)(1) As part of required financial disclosures, live poultry dealers must provide 1 year of average annual gross payments to growers for all complexes the dealer owns or operates.	§ 201.102(d)(1) Revises paragraph to specify that live poultry dealers engaged in the production of broilers must only calculate average annual gross payments for growers at the local complex distributed by quintiles for complexes with 10 or more growers, and for complexes with nine or fewer growers, must calculate the mean payment and one standard deviation from the mean.
Small Live Poultry Dealer Financial Disclosures (§ 201.102(e)).	§ 201.100(e) A live poultry dealer, including all parent and subsidiary companies, slaughtering fewer than 2 million live pounds of poultry weekly (104 million pounds annually) is exempt from Disclosure Document requirements if contract does not contemplate revisions to existing housing specifications that would require poultry grower to make capital investments.	§ 201.102(e) Revises provision to provide that exemption applies for live poultry dealers engaged in the production of broilers if the dealer together with all companies controlled by or under common control with the dealer slaughters fewer than 2 million live pounds of broilers weekly (104 million pounds annually).
Governance and Certification (§ 201.102(f)).	§ 201.100(f)(1)(i) Live poultry dealer governance framework must include audits, testing, and review of sample of Disclosure Documents.	Removed from final rule.
Receipt by Growers (§ 201.102(g)).	§ 201.100(g)(1) Disclosure Document must include grower signature page containing specific statement regarding grower rights related to document.	§ 201.100(g)(1) Adds language to statement regarding grower rights to state that growers may report potential violations to USDA and DOJ portal at https://www.farmerfairness.gov or by phone at 1-833-DIAL-PSD (1-833-342-3773) and obtain further information on rights and responsibilities under the Act at www.ams.usda.gov .
	§ 201.100(g)(2) Live poultry dealers must verify grower receipt by obtaining grower's dated signature on signature page of Disclosure Document.	§ 201.102(g)(2) Adds provision allowing live poultry dealers engaged in the production of broilers to obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt.
	Not in proposed rule	§ 201.102(g)(3) Adds requirements for live poultry dealers engaged in the production of broilers to ensure that the Disclosure Document is written in clear, concise, and understandable manner for growers.
	Not in proposed rule	§ 201.102(g)(4) Adds requirement that the dealer must make reasonable efforts to ensure that growers are aware of their right to request translation assistance, and to assist the grower in obtaining a translation or understanding the Disclosure Document at least 14 calendar days before executing a growing arrangement that does not contemplate modifications to the existing housing specifications (provided that the grower may waive up to 7 calendar days of that time period). Where modifications to the existing housing specifications are contemplated, it must be provided when the live poultry dealer provides the grower with the Disclosure Document.
	Not in proposed rule	Adds definitions for <i>broiler</i> , <i>broiler grower</i> , <i>broiler growing arrangement</i> , and <i>prospective broiler grower</i> .
	Not in proposed rule	Adds definition for <i>gross payments</i> .
	<i>Grower variable costs</i> is defined as those costs related to poultry production that may be borne by the poultry grower, including, but not limited to, utilities, fuel, water, labor, repairs and maintenance, and liability insurance.	Revises definition to refer to costs "which may include, but are not limited to" the listed costs rather than "including, but not limited to," these costs.
Terms Defined (§ 201.2).	<i>Growout</i> is defined as the process of raising and caring for livestock or poultry in anticipation of slaughter.	Revises definition to refer to term as <i>poultry growout</i> and exclude livestock.
	<i>Growout period</i> is defined as the period of time between placement of livestock or poultry at a grower's facility and the harvest or delivery of such animals for slaughter, during which the feeding and care of such livestock or poultry are under the control of the grower.	Revises definition to refer to term as <i>poultry growout period</i> and exclude livestock.

VII. Comment Analysis

AMS received 504 comments on the proposed rule, some with multiple signatories. Comments received were generally more supportive of the proposed rule than opposed. Many commenters generally agreed with the proposed rule's justification and implementation. These commenters stated that the proposed rule would be helpful because it would provide for fairer treatment of growers and enable growers to better understand, evaluate, and compare contracts among dealers, enhancing growers' ability to bargain efficiently. Commenters stated further that the proposed rule would reduce the power of large corporations in the industry, improve public trust in agriculture, and increase transparency regarding food products.

Other commenters were generally critical of the proposed rule. These commenters expressed general disagreement with AMS proposing a rule at all, arguing the current system is fair and efficient and that the tournament system rewards growers for efficiency, innovation, and raising the best birds possible. Several commenters stated the proposed rule is not fair and would result in a less efficient industry because it would reward less productive growers, disincentivize hard work, and add more paperwork.

The public comments are summarized by topic below and include AMS's responses.

A. Proposed Definitions

AMS proposed to revise § 201.2 containing relevant definitions by removing the paragraph designations within the section, reorganizing the definitions alphabetically, and adding definitions for new terms used in the proposed rule. In addition, to ensure a common understanding of the use and meaning of certain terms already used in the regulations and included in the revisions, AMS proposed to incorporate the statutory definitions for those terms.

Grower Variable Costs

AMS proposed defining *grower variable costs* as "those costs related to poultry production that may be borne by the poultry grower, including, but not limited to, utilities, fuel, water, labor, repairs and maintenance, and liability insurance."⁶⁵

Comment: Some commenters shared concern that the definition of *grower*

variable costs creates the impression that it is a regulatory requirement or expectation that the costs listed therein are to be borne by the grower, thereby harming growers' ability to negotiate those terms. Commenters stressed that these costs are sometimes the subject of negotiation between grower and live poultry dealer, with some costs being paid by the live poultry dealer.

AMS response: AMS modified the definition of *grower variable costs* to replace the words "including, but not limited to" with the words "which may include, but are not limited to." The modification in the definition, in particular the use of the term "may," underscores that the requirement to provide transparency for any grower costs, including those listed in the definition, do not create a mandate upon the live poultry dealer or grower with respect to who bears any of the specific listed costs. In many, if not most contracts today, based on AMS's experience, the listed examples would be considered grower variable costs.⁶⁶ But the rule does not prevent the parties from negotiating other arrangements, such as the live poultry dealer accepting responsibility for the payment of those cost items. This approach is consistent with the rule's general approach of enhancing transparency.

AMS considered whether to remove the list of potential variable costs, as requested by the commenter. AMS rejected that approach because it poses a risk of complexity or confusion in compliance, as live poultry dealers may not know which types of grower variable costs are generally required to be disclosed under most contracts today. AMS notes that the listing of any particular grower variable cost does not prevent the parties from contracting for other arrangements regarding who bears the burden of any particular grower variable costs.

Growout and Growout Period

AMS proposed to define *growout* as the process of raising and caring for livestock or poultry in anticipation of slaughter and *growout period* as the

period of time between placement of livestock or poultry at a grower's facility and the harvest or delivery of such animals for slaughter, during which the feeding and care of such livestock or poultry are under the control of the grower.

Comment: A meat and poultry industry trade association made up of processors commented that the references to "livestock or poultry" in the proposed definition of *growout period* may have unintended consequences across other segments of the protein industry that do not use tournament pay systems, as the definition of *livestock* in the Act includes "cattle, sheep, swine, horses, mules, or goats." The commenter stated that it is not aware of uses of the tournament system in the production of these species and AMS has not provided any facts to suggest that those species have a *growout period* as the term would be employed in the poultry industry. The commenter recommended AMS revise this definition to eliminate "livestock" and review all definitions to avoid unintended consequences for other protein segments.

AMS response: This final rule modifies the proposed definitions for *growout period* and *growout* to apply only to poultry. The references to livestock in the proposed definitions were offered to provide a more generally applicable definition but are not needed at this time and are therefore removed. To improve clarity, we also changed the proposed terms *growout* and *growout period* in § 201.2 to instead refer to *poultry growout* and *poultry growout period*, respectively.

Housing Specifications

AMS proposed to define *housing specifications* as a description of—or a document relating to—a list of equipment, products, systems, and other technical poultry housing components required by a live poultry dealer for the production of live poultry.

Comment: A poultry industry trade association commented that the proposed definition of *housing specifications* is unnecessarily vague and lends itself to multiple interpretations. The commenter said there are endless combinations of equipment, products, systems, and other technical poultry housing components that could result in dealers having to organize dozens of housing specifications, adding significant complexity for the dealer, and creating confusion for the grower. The commenter stated that because farms are built with the technology in use at the time, the housing types and technology

⁶⁵ Liability insurance may be a fixed cost for many growers, but we include it here because that may not be so in all circumstances, while the purpose of this rule is to provide enhanced information to all growers.

⁶⁶ See Jennifer Rhodes, Extension Educator, et al., University of Maryland, "Broiler Product Management for Potential and Existing Grower," Tables 1 and 2, available at Poultry Budgets, Enterprise Budgets, Agricultural and Resource Economics, North Carolina State University Extension, <https://cals.ncsu.edu/are-extension/business-planning-and-operations/enterprise-budgets/poultry-budgets/> (last accessed April 2023). Also see Dan L. Cunningham and Brian D. Fairchild, University of Georgia Cooperative Extension, "Broiler Production Systems in Georgia Costs and Returns Analysis 2011–2012," Bulletin 1240, and Tomislav Vukina, "Vertical Integration and Contracting in the Poultry Sector," Journal of Food Distribution Research (July 2001).

in use generally correlate with the age of the facility.

To simplify the categorization of housing specifications in Disclosure Documents and settlement sheets, the commenter recommended that AMS revise the definition to clarify that live poultry dealers are permitted to devise their own categories of housing specification for the purposes of the Disclosure Documents and settlement sheets, which will allow dealers to prepare and present data based on the types of housing that their growers use to raise birds for them. The commenter noted, at the least, AMS should revise the definition to narrow the housing specification to key elements of housing, namely, the type of ventilation (for example, curtain or tunnel ventilation) and whether the house is a brood and growout house or only accommodates the growout stage.

AMS response: AMS does not agree and will not revise the proposed definition of *housing specifications* in response to this comment. The definition does not limit dealers' ability to categorize poultry housing. Dealers are free to list the minimum or required equipment or technical specifications that would qualify under a given housing specification category.

Poultry Grower Ranking System

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

Comment: Several commenters argued that the proposed definition of *poultry grower ranking system* lacks sufficient flexibility. These commenters stated that the regulations appear to contemplate only two contract types—flat payment or a tournament system—and do not encompass the many forms of contracting in use in today's market, let alone innovative contracting arrangements.

Comments recommended that AMS revise the definition to exclude from the scope of the proposed rule poultry grower compensation systems where there is a fixed base pay, regardless of how any incentive-based bonus may be calculated. They recommended revising the definition of *poultry grower ranking system* to mean "a system where the contract between the live poultry dealer and the poultry grower provides for base payment to the poultry grower based upon a grouping, ranking, or comparison of poultry growers

delivering poultry during a specified period."

AMS response: AMS has fully considered the applicability of "poultry grower ranking system" to a wide range of possible compensation systems and intends for the relevant provisions of this rule governing comparisons to be applied broadly. AMS recognizes that certain designs of grower comparisons may provide more desirable outcomes for contracting participants in different circumstances, and in issuing this final rule, AMS is creating transparency in payment systems. However, commenters' recommendation would limit the disclosures of this rule only to those instances of variable base pay, even when comparison rankings affect performance pay in a manner that, under current conditions, is opaque and misleading to the grower. Addressing this widespread deceptive practice is squarely the purpose of this final rule.

The definition was developed to be consistent with the approach set forth in current § 201.100(f)—Growing or ranking sheets, that has been in place since 1989,⁶⁷ and provides transparency to growers who are paid based on the live poultry dealer's grouping or ranking of poultry growers delivering poultry during a specified period.

AMS does not agree that it is necessary or appropriate to distinguish between types of ranking systems for the purposes of this rule. Commentors asserted that fix-based pay systems that included bonuses for better rankings are distinguishable from systems that have a variable base pay established by the grower's ranking. Their proposal would limit the disclosures of this rule to those instances of variable base pay, even when there are other comparison rankings. In AMS's view, any comparison of growers is a ranking system because when growers are compared to each other, the basis for grower payment is changed. No longer is payment based only upon the intrinsic work of one particular grower. Instead, payment is based upon a relative outcome between growers, where similarities or differences between them become especially important. For example, under any system of grower ranking, comparative information about inputs may illuminate and magnify differences where those differences can impact performance and payment.

In particular, AMS rejects the suggested limitation of grower ranking systems either to the calculation of base-pay-plus-incentive payment or entirely to base pay. In either circumstance,

growers are exposed to comparisons in the context of performance payments, which could make up a sizable, if not an overwhelming, portion of their compensation and be subject to significant variability for reasons outside of their control or awareness. Regardless of what type of ranking system is used, growers are entitled to know the reasons behind payment differences that may relate to inputs or other important differences affecting the outcome because that information is necessary to avoid deception for the reasons described throughout this final rule.

AMS recognizes that payment systems may evolve and that parties may wish to innovate in payment systems to the extent those systems are transparent and free of potential deception.

Transparency is fully compatible with such innovation because it encourages a responsible, accountable form of that innovation. The rule's required disclosures regarding input differences provide growers with the information they need to be able to adjust to any input differences that may exist, including in advance of input delivery and over time when comparing outcomes of a series of growouts. Accordingly, AMS is not changing the definition of *poultry grower ranking system* as proposed based on these comments. Poultry companies and growers should contact AMS to discuss questions about compensation systems.

AMS provides an estimate of the value of improved transparency in the regulatory analysis section.

Other Comments on Definitions

Comment: Several non-profit organizations suggested AMS add several new definitions to § 201.2. First, the commenters noted that the proposed rule, as well as current regulations under the Act, appear to use the term "facility" to refer to a poultry grower's poultry houses collectively, rather than individually. Therefore, they recommended that AMS add a definition for *poultry house* to allow for clarity in circumstances where it needs to refer to individual poultry houses. Second, the commenters noted that the proposed rule uses the term "tournament system" in a manner that appears to be synonymous with "poultry grower ranking system." Therefore, they recommended that AMS define *tournament system* to be synonymous with *poultry grower ranking system*.

AMS response: This rule applies at the farm level and therefore does not require specification of a separate term to refer to an individual poultry house

⁶⁷ 54 FR 16356, April 24, 1989.

beyond that already provided by *housing specification*. In addition, the term “tournament system” does not appear in the rule text itself. Therefore, AMS made no changes to the definition of *poultry grower ranking system* in the final rule.

B. Applicability

AMS proposed to revise § 201.100(a) to require a live poultry dealer to provide certain documents to a prospective poultry grower when the live poultry dealer seeks to establish a poultry growing arrangement, or to a current poultry grower when a live poultry dealer seeks to modify an existing poultry growing arrangement. AMS proposed to apply this Disclosure Document requirement to live poultry dealers in all segments of the poultry production industry. Poultry is defined in section 182(6) of the Act to include chickens, turkeys, ducks, geese, and other domestic fowl. AMS requested comments on whether the disclosure requirements should apply to all segments of the poultry production industry, or if the requirements should be limited to broiler and turkey production.

Comment: Comments received stated that the disclosure requirements should only apply to contractual agreements within the tournament system of growing poultry and noted the disclosures are largely meant for the broiler industry, where many of the complaints arise.

An association representing the turkey industry noted the provisions of the proposed rule were not based on substantial research into the turkey industry and asserted many of the provisions would be difficult or impossible for turkey companies to implement, citing differences in turkey growing cycles, flock densities, bird gender distributions, and other factors dissimilar to those involved in broiler production.

AMS response: As discussed previously, AMS subject matter experts analyzed turkey production contracts from across the country and found more variability than in broiler contracts. The variability reflects the biological differences found among turkey breeds and longer placement times of turkeys with growers that can impact payments to producers. AMS has not received many complaints from turkey growers. Similarly, other (non-broiler chicken) poultry growers have not expressed concerns regarding practices in their industry. AMS determined it is appropriate at this time to limit the scope of the disclosure requirements in this rule to apply only to broiler

production under a poultry growing arrangement.

This final rule contains a new section § 201.102 containing these disclosure provisions and specifying that they apply exclusively to live poultry dealers engaged in the production of broilers, while maintaining the current requirements at § 201.100, which continue to apply to all live poultry dealers. This rule also makes conforming changes to § 201.2 to define *broiler* as “any chicken raised for meat production,” *broiler grower* as “a poultry grower engaged in the production of broilers,” *broiler growing arrangement* as “a poultry growing arrangement pertaining to the production of broilers,” and *prospective poultry grower* as “a person or entity with whom the live poultry dealer is considering entering into a broiler growing arrangement.” This final rule further clarifies that the right of current or prospective poultry growers to discuss the terms of a poultry growing arrangement offer applies to the Disclosure Document in circumstances that require dealers to provide this document. All poultry growers are protected by the Act’s prohibitions on deceptive practices, and AMS has the authority to address instances or circumstances where poultry growers are not provided sufficient information to make informed decisions on poultry growing arrangements or changes thereto, including additional capital investments.

Because this final rule limits all the new disclosure requirements to broiler production, this rule modifies the proposed requirement for live poultry dealers to include in their contracts the minimum number of flock placements to be delivered to growers annually and the minimum stocking density of those placements, applying it exclusively to live poultry dealers engaged in the production of broilers. This final rule also changes the proposed requirement in § 201.214 to apply exclusively to live poultry dealers engaged in the production of broilers who use a poultry grower ranking system to calculate grower payments. AMS retains the current grouping or ranking sheet requirements for all live poultry dealers in § 201.100(f) of the current rule.

Comment: Several commenters said the rule should apply to pullet and breeder hen growers as well as broiler growers because pullet and breeder hen production is also controlled by live poultry dealers.

AMS response: Although live poultry dealers may control pullet and breeder hen production, those birds are typically raised for egg and chick

production and not for slaughter purposes. The Act’s poultry provisions cover only poultry raised for slaughter. Because there is no provision for doing so under the Act, AMS is not making this rule applicable to pullet and breeder hen production.

C. Disclosure Document and Letter of Intent

AMS proposed to amend § 201.100 to revise the list of disclosures and information live poultry dealers must provide to poultry growers and sellers with whom dealers make poultry growing arrangements. Currently, when a live poultry dealer offers an arrangement with a poultry grower, the dealer must furnish a true written copy of the growing arrangement. In the proposed rule, AMS proposed to require a live poultry dealer who seeks to establish a new growing arrangement; renew, revise, or replace an existing arrangement; or enter an arrangement with a poultry grower or prospective poultry grower that will require original capital investment to also provide a Disclosure Document that contains specific information. When the arrangement requires an original capital investment or modifications to existing housing specifications that could require the poultry grower to make an additional capital investment, AMS proposed to require the dealer to provide a letter of intent that can be relied upon by the grower to obtain additional capital investment.

Utility of Information Provided

Comment: AMS asked whether the information in the proposed rule’s required disclosures would help poultry growers make informed business decisions and better understand poultry growing arrangements, or otherwise better address deceptive practices faced by poultry growers. Most commenters supported requiring the Disclosure Document information as proposed, saying the information will help poultry growers make more informed business decisions and reduce risks of deception. However, some commenters said the rule will be costly and will confuse poultry growers. These commenters stated that relevant information is already provided to growers and the additional proposed disclosures would not be helpful.

AMS response: AMS does not agree with the comments received in opposition to the proposed information disclosures. Requirements for disclosing information to broilers are not new to live poultry dealers. The current regulations at § 201.100 already require disclosures from live poultry dealers.

This final rule expands the information that live poultry dealers are required to provide to broiler growers. AMS's experience in reviewing live poultry dealers' records suggest that live poultry dealers already keep records of most of the information that the final rule would require them to disclose. Although the final rule does impose additional costs on live poultry dealers, the additional costs associated with the disclosures consist primarily of assembling the information and distributing it to growers. AMS expects that the additional costs that live poultry dealers would face will amount to \$2.43 million in the first year and \$6.04 million over ten years.

AMS expects that the benefits or utility of the information disclosed to broiler growers will outweigh the costs of producing and distributing the information. AMS estimated the benefits to broiler growers from reduced revenue uncertainty to be \$2.7 million in the first year and \$26.9 million over ten years. Comments received from growers indicated that with additional information, they might have made different business decisions with regard to poultry growing arrangements.⁶⁸ Further, the information provided in the disclosures should not confuse those currently in the business of growing broilers, provided it is explained in clear language. Prospective broiler growers are expected to benefit from the disclosed information as they more fully appreciate and consider aspects of the business that need their careful attention. Accordingly, AMS made no changes to the rule as proposed based on these comments.

Partial Exemption for Small Dealers

In proposed § 201.100(e)—Small live poultry dealer financial disclosures—AMS proposed to exempt live poultry dealers who, in conjunction with any parent and subsidiary companies, slaughter fewer than 2 million live pounds of poultry weekly (104 million pounds annually) from the requirement to provide the Disclosure Document under proposed § 201.100(a)(1). As proposed, the exemption would apply only if the new, renewed, or replacement contract offered by one of

these dealers does not include revisions to existing housing specifications that would require the grower to make new or additional capital investments. AMS requested comments on the proposed partial exemption, including whether AMS should consider other approaches, such as different thresholds, for applying the small live poultry dealer partial exemption.

Comment: Some commenters said they opposed the proposed rule's partial exemption from the disclosure requirements for live poultry dealers that slaughter fewer than 2 million live pounds of poultry weekly because it would exempt almost half of the live poultry dealer industry from these requirements, arguing that growers and flocks involved with small dealers could suffer the same disadvantages as others in the industry without receiving the benefits of the rule. These commenters noted that, according to AMS's analysis, the exemption would apply to 47 out of 89 live poultry dealers.

AMS response: The total production volume exempted, rather than the number of live poultry dealers, provides a better picture of the extent to which portions of the industry will be affected by the exemption. The exemption pertains to only 0.20% of total broiler production volume and 2.0% of total broiler contracts, as calculated for broiler firms filing an annual report with PSD in 2021.⁶⁹ In § 201.102(e) of the final rule, AMS maintains the partial exemption for small live poultry dealers but revises the language originally proposed to clarify that the partial exemption applies to a live poultry dealer engaged in the production of broilers that, together with all companies controlled by or under common control with the live poultry dealer, slaughters fewer than 2 million live pounds of broilers weekly (104 million pounds annually).

Comment: A meat industry trade association said the partial exemption for small live poultry dealers would result in a non-level playing field based on a live poultry dealer's size. A poultry industry trade association asserted if the need for the rule is valid, then no live poultry dealer should be exempt. This commenter expressed concern that the exemption could result in poultry growers leaving larger live poultry dealers that comply with the rule to join smaller live poultry dealers that do not need to comply. One commenter

representing the turkey sector indicated it had no objection to this provision. One poultry grower commenter said small live poultry dealers should not be exempt, but that there should be a revenue threshold tailored to small dealers because of the expense of recordkeeping.

AMS response: In the spirit of the Regulatory Flexibility Act, AMS is attempting to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." AMS intends for the exemption to reflect the fact that deceptive practices are less likely to be observed among smaller live poultry dealer operations in AMS experience. The exemption is also expected to ease the regulatory compliance burden on live poultry dealers with lower production volume, as described in the previous comment response. Based on AMS's experience, smaller operators tend not to compete directly with the larger live poultry dealers, often have smaller grower pools, generally dictate less complicated or expensive housing requirements, and use different business models.⁷⁰ These smaller dealers tend to fall into two types. In the first type, these smaller operators rely on growers whose facilities have been used in production for many years and who are not usually required to make changes. The growout services they require of their growers are commonly more intermittent. In the other type, specialized operators—often start-ups or companies that focus on certain high-end products—serve discrete markets where dealers often have higher profit margins, which reduces the need for ongoing grower financial investment on the part of growers to achieve greater efficiency, and as a result rely less on certain poultry growout arrangements that have been associated with the types of deception addressed by this rule. Neither commonly employs contracts or practices that require growers to invest in particularized housing specifications—a key reason why the small operator exemption does not include those who do. Also, neither tends to deploy the degree of dealer discretion in the provision of inputs or other operational matters common to larger, more commoditized operations.

⁶⁸ Comments on Proposed Rule: Transparency in Poultry Grower Contracting and Tournaments, (Aug. 2022), <https://www.regulations.gov/comment/AMS-FTTP-21-0044-0479> (See, for instance, Background section in this rulemaking, which cites comments from numerous growers about how they lacked important information to make informed growing decisions and about how required disclosure of such information would greatly benefit them. Moreover, integrators typically already collect such information for their own use without disclosing it to growers.).

⁶⁹ 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>.

⁷⁰ For example, a small organic chicken company started in Virginia using old growout houses that were no longer suitable for use in larger operations. See Andrew Jenner, "In Virginia, an organic chicken empire is growing—using old barns big poultry companies left empty," *The Counter*, (March 9, 2020) available at <https://thecounter.org/organic-chicken-contract-farming-shenandoah-valley/> (last accessed April 2023).

These simpler, more straightforward growing arrangements have less grower payment variability and fewer financial and other risks relating to dealer discretion in the operation of the poultry growing arrangement. As a result of the differences in these markets, growers for these smaller live poultry dealers tend to face reduced risk of deception. Current market realities would not, at present, seem to justify the effort and expense to develop the Disclosure Document required of larger business entities.

To ensure that this smaller business exception captures only the two types of smaller live poultry dealers discussed above, this rule only exempts smaller live poultry dealers from disclosure where no capital investments are contemplated. Based on AMS's experience, the need for original or additional capital investment on the part of the grower suggests the presence of the more intensive performance-based economic pressure from the live poultry dealer on the grower, which in turn characterizes a market where the dealer will exert greater discretion in the operation of the contract and where grower outcomes are more variable due to factors outside of their control and knowledge. The presence of capital investments also raise the risks to growers from any deception that may arise by subjecting growers to debt burdens and making it more difficult for them to change poultry-processing companies. Under the regulation, smaller live poultry dealers face the same disclosure obligations as larger ones when dealing with a new poultry growing arrangement that will require an original capital investment or modifications to existing housing specifications that would reasonably require an additional capital investment.

AMS rejects the argument that the exemption could result in poultry growers leaving larger live poultry dealers that comply with the rule to join smaller live poultry dealers that do not need to comply. The commenter does not provide evidence that this would occur in markets that, in AMS's experience, are structured differently and respond to different incentives. To the extent it did occur in one or more places, some dealers may also grow to become covered by the rule. Regardless, AMS will remain attentive to potential instances of deceptive practices across the poultry industry.

Changes to Requirements

Comment: In the proposed rule, AMS asked what items might be added to or deleted from the Disclosure Document.

Several industry commenters said AMS should not require disclosures for any item that would be included in the poultry grower contract arrangement, as providing information about these items in the Disclosure Document as well would be an unnecessary burden. A commenter noted the live poultry dealer's name, type of business, organization, principal business address, telephone number, primary internet website address, and the length of the term of the arrangement are already provided in dealer contracts. Several non-profit organizations said AMS should require disclosure of all possible variables that could affect a contract grower's settlement pay, along with whether and how the tournament ranking formula compensates for such variables. These commenters also said AMS should require additional disclosures for live poultry dealers proposing or requiring modification to existing infrastructure. A farm bureau commenter said AMS should add language preventing live poultry dealers from requiring name-brand equipment for an equipment mandate when poultry housing is modified, unless the live poultry dealer can demonstrate the mandate is scientifically justified.

AMS response: Together, the Disclosure Document and production agreement will ensure growers are better informed of their obligations and risks. The Disclosure Document refers to and highlights information also contained in the production agreement to emphasize selected important information contained there. Requiring name and contact information assures the grower the Disclosure Documents pertain to the poultry growing arrangement in question, highlights points of contact and their contact information, and underscores certain basic information in the contract, such as its length of term. Providing such information, which is readily available to the live poultry dealer and already included in the contract itself, is not an overly burdensome requirement.

AMS recognizes that the Disclosure Document cannot list all potential variables in poultry production nor properly assess the industry burden of disclosing how the tournament formula compensates for each of those variables. However, AMS has targeted the requirements to disclosure of variables most frequently cited by industry commenters and what the agency understands to be most useful to growers to assess their risks, in the context of the dependent nature of their contractual relationship with live poultry dealers. This includes disclosures at tournament settlement of

information regarding inputs and housing specifications to enable growers to assess the relationship between inputs and housing specifications. AMS intends to monitor the market and may examine in the future whether any additional information may be useful to help growers understand what factors affect tournament outcomes, whether located in the Disclosure Document or in settlement disclosures.

This final rule does not require additional disclosures beyond the requirements of the Disclosure Document for live poultry dealers proposing or requiring modification to existing infrastructure. Nor are we addressing whether requiring name brand equipment without scientific justification is permissible or not, as that would fall outside the scope of this transparency rule. However, AMS is sensitive to grower concerns in these areas and notes that equipment limitations are subject to review under additional capital investment criteria in current § 201.216. Additionally, AMS is considering future rulemaking to address capital improvement programs in poultry growing contracts, as explored in the Advanced Notice of Proposed Rulemaking "Poultry Growing Tournament Systems: Fairness and Related Concerns." (See 87 FR 34814; June 8, 2022.) Accordingly, AMS is making no changes to this transparency rule as proposed based on these comments.

In related comments, grower groups expressed a desire for a disclosure that communicates information about the rate of grower turnover, or grower churn, for live poultry dealers. AMS agrees that knowing the dealer's recent history with respect to grower churn would give current and prospective growers a decision-useful data point with which to evaluate the stability of the live poultry dealer's grower roster, which may serve as an imperfect but adequate proxy for grower satisfaction. Some dealers may be prone to engage in practices that growers broadly dislike, creating dissension between growers and dealers, and often resulting in contract termination and/or litigation between the parties, which is reflected in the turnover rate. Accordingly, in response to comments on the proposed rule, we modified the proposal by adding the requirement in § 201.102(c)(5) of the final rule that dealers must disclose average annual broiler grower turnover rates for the previous calendar year and the 5 previous calendar years at a company level and a local complex level.

Burdens to Dealers

Comment: In the proposed rule, AMS asked what burdens or challenges dealers could face in collecting and disseminating information to include in the Disclosure Document and whether these burdens would require dealers to modify their business model. Multiple poultry industry commenters said live poultry dealers would need to develop new recordkeeping systems, hire additional employees, and implement archival systems to maintain the required records under the rule, leading to increased administrative costs. Commenters argued these burdens will make the U.S. poultry industry less competitive in the global marketplace. An academic institution said large poultry companies may choose to increase prices for consumers to recoup administrative costs associated with the rule but noted the large poultry companies have benefited from their market power and have been making record profits despite global disruptions.

AMS response: AMS does not agree that the recordkeeping required will lead to meaningfully increased administrative costs. Further, AMS does not expect any cost increases from the rule, including recordkeeping costs, to impact consumer chicken prices because the increases in costs are immeasurably small compared to industry revenues. AMS notes in the Regulatory Impact Analysis that Chicken sales in the U.S. for 2019 were approximately \$58.6 billion and that the total quantified cost of §§ 201.102 and 201.104, including recordkeeping costs is estimated at \$3.4 million when it is greatest in the first year, or 0.0006 percent of revenues.

In USDA's extensive experience with live poultry dealer business practices indicates most of this information is already routinely collected by live poultry dealers. The information contained in the Disclosure Document is designed to aid poultry growers in making business decisions by allowing growers to better understand, evaluate, and compare contracts. Information relating to performance and payments of all growers at a particular complex is useful to growers in reducing deceptive practices and allows growers to make more informed business decisions.

Timeline To Provide Disclosure Document

Comment: AMS proposed in § 201.100(a)(1) to require live poultry dealers to provide the Disclosure Document to current or prospective poultry growers at least 7 calendar days

before executing a poultry growing arrangement in several circumstances. These disclosure requirements apply when the live poultry dealer seeks to renew, revise, or replace an existing arrangement or to establish a new arrangement that does not contemplate modifications to the existing housing specifications. Several commenters advocated for lengthening this timeline. These commenters said the 7-day timeline does not give growers enough time to review the contract and consult as needed with relevant entities. One of these commenters suggested AMS implement a 14-day timeline, while another suggested a 30-day timeline.

AMS response: AMS underscores the importance of giving growers the opportunity to meaningfully review and understand the disclosures, as that is an essential part of achieving the purposes of the rule to reduce deception and empower growers to make effective decisions. At the same time, we recognize the importance to both growers and dealers of keeping existing poultry houses in production. The time-based requirement of § 201.102(a)(1) only applies when capital investment is not contemplated; other situations where required investment would expose growers to new risks have different requirements due to the necessary lending and investment process and those timelines (which commonly occur over several months and are more controlled by the grower's decisions around any lending and construction). In most cases, growers considering a new, renewed, revised, or replacement poultry growing arrangement that does not contemplate modifications to existing poultry housing already have a relationship with the live poultry dealer and know whether or not they wish to continue that relationship.

AMS agrees with the comments from the grower and advocacy sectors that said at least 14 calendar days in advance of the broiler growing arrangement's execution would provide a more appropriate length of time for some growers to adequately review and act upon the information provided in the documents. At the same time, AMS recognizes that growers in some circumstances may be under pressure by dealers to execute a contract without fully considering its contents and implications. For instance, AMS is aware that some dealers currently provide only 3 business days for growers to review a contract.

Furthermore, where a grower may be switching dealers without a capital investment, dialogue can be expected to be ongoing. In addition, sec. 208 of the

Act gives poultry growers 3 business days after a poultry growing arrangement is executed to cancel the arrangement.

AMS also recognizes that broiler growers have an interest in continuity of production, and does not wish to inadvertently insert unnecessary time delays into the grower's planning process during contracting, in particular as this provision exclusively addresses the circumstance where the grower is not contemplating modifications to the housing specification of the grow house. Lengthy waiting periods as suggested by some commenters may result in delayed placements and idle farms, and may also expose both dealers and growers to other financial risks relating to changing economic circumstances.

The final rule seeks to maximize the grower's ability to determine the length of time necessary to review the documents. It provides a of full 14 calendar days of notice unless the grower elects to waive 7 calendar days of the period. It also retains the 7-calendar-day minimum review period to mitigate the potential for coercive behavior. Growers expressed that they need more time to review the disclosure, which is a valid concern in some situations, but we are concerned that the additional time might prevent other growers from receiving timely placements in other situations, while the default is now a 14-day period for disclosure, we are allowing growers to elect to reduce that period to 7 calendar days for their convenience. Because we think live poultry dealers may apply undue pressure if the rule permitted a period of less than 7 calendar days, AMS is not permitting growers to waive notice entirely. Accordingly, this final rule revises § 201.102(a)(1) to require that live poultry dealers provide growers with the required documents at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement, provided that the grower may waive up to 7 calendar days of that time period.

Comment: A poultry industry trade association said AMS should require live poultry dealers to furnish the Disclosure Document at the initial signing of a poultry growing arrangement, and then on a periodic basis, such as every year.

AMS response: AMS designed the proposed rule to specifically prevent deception at the time of contracting and thus intends for disclosure information to be tied to the production contract. That is, a new disclosure is required whenever production contracts change, without regard to how much time has passed since any prior disclosures. This

gives the grower a chance to evaluate dealer disclosures in connection with the new, renewed, or revised contract before taking action on it. Requiring dealers to provide the Disclosure Document on a periodic schedule, regardless of whether changes are made to an existing contract, would be unnecessarily burdensome to dealers. Therefore, in the final rule, AMS maintains the requirement for live poultry dealers to furnish the Disclosure Document whenever production contracts change rather than on a periodic basis.

Comment: A poultry industry trade association said AMS should provide additional clarity on how, and in what timeframe, live poultry dealers should communicate changes in disclosure information to growers. For example, this commenter asked whether a change to the placement or stocking density resulting from disease, weather, or changed economic demand would require the live poultry dealer to provide a new Disclosure Document and what the required timeframe would be for providing the document.

AMS response: AMS requires that live poultry dealers provide a new Disclosure Document when a live poultry dealer seeks to renew, revise, or replace an existing broiler growing arrangement, or to establish a new broiler growing arrangement. This is important for providing growers with the information they need because it ties disclosure requirements to the production contract. As dealers must include placements and densities in the contracts, any changes to these terms would necessitate changes to the contracts, and thus the provision of a new Disclosure Document. The provision of such information up front is important for prospective growers, and for current growers that may be making a change based on a new housing specification, to understand, evaluate, and compare contracts. Updating disclosures when there are changes in the production contract provides similar protections for growers when contracts may change. To the extent that growers may not wish to accept the contract, for example, where they may consider growing for another live poultry dealer, the additional transparency at those times is useful. Additionally, while growers may not, as a practical matter, have a choice regarding certain changes to ongoing poultry production contracts, the additional transparency provided by the disclosures will enable growers to better

plan their management of those contracts.⁷¹

Additional Advisories

Comment: In response to AMS's request for information regarding whether additional changes to the Disclosure Document would be appropriate, several non-profit organizations said AMS should require live poultry dealers that revise a signed contract to compensate poultry growers if the revisions lead to losses for the growers. The commenters said the point of the disclosures is to provide transparency about the arrangement; therefore, any changes to the arrangement at the expense of the poultry grower should be compensated or considered fraudulent.

AMS response: The scope of this rule is transparency in agreements between live poultry dealers and poultry growers with whom they contract. AMS recognizes the issue raised by the commenters is a concern because growers rely upon the contract terms when entering the agreement, and it is problematic if subsequent revisions result in financial losses that presumably would not have occurred under the original terms. However, the remedy proposed by the commenters is not within the scope of this rule. If a live poultry dealer deceives a grower through a "bait and switch" agreement as described, remedies may exist through enforcement by USDA and DOJ, or in private actions by the grower in Federal or state court. Therefore, AMS made no changes to the rule as proposed based on these comments.

Readability of Disclosure Document and Provision in Additional Languages

Comment: In the proposed rule, AMS asked whether the wording of the Disclosure Document was clear and what changes could be made to improve clarity. Several groups representing poultry growers said AMS should ensure the Disclosure Document and other disclosures are in plain language and understandable to a wide range of poultry growers. They said the language should also be unambiguous to avoid discrepancies in interpretation between the agency and other regulators, the courts, and live poultry dealers.

AMS also asked whether there are circumstances in which live poultry dealers should be required to provide the Disclosure Document in a language other than English. Commenters representing both poultry growers and

live poultry dealers supported providing disclosures in the preferred language of poultry growers who are not native speakers of English. A commenter said the grower or prospective grower should have the right to request that the dealer provide the Disclosure Document in their primary language and that all time limits be tolled until the dealer provides an adequate translation, noting the burden on non-native English speakers to navigate the arrangement in English is significantly greater than the burden on a dealer to provide the information in the grower's language. Commenters noted the substantial number of farmers who speak languages other than English and stressed the importance of making sure language barriers do not prevent poultry growers from fully understanding the potential costs and benefits of a poultry growing arrangement. In addition, several commenters recommended that AMS provide educational outreach to non-English-speaking communities in their native languages.

AMS response: This rule is intended to promote transparency in poultry production contracting and give poultry growers and prospective poultry growers relevant information with which to make more informed business decisions. For the disclosure information to have value and be of use to a poultry grower, the poultry grower must have basic comprehension of the information's meaning so that the provision of this information can reduce the potential for deception.

Accordingly, in response to comments, AMS added § 201.102(g)(3), which requires live poultry dealers to present Disclosure Document information clearly, concisely, and understandably for growers. More generally, standard plain language practice is to write informational materials in plain, easy to understand language appropriate for the subject and for the intended audience. We expect dealers to ensure that growers can easily understand the disclosures, and in our examinations may test that to determine whether dealers are complying with § 201.102(g)(3). Further, in response to comments, AMS added a requirement in § 201.102(g)(4) that in the event a prospective or current broiler grower notifies the live poultry dealer that they have limited proficiency in the disclosure's written language, or in the event the dealer is already aware of such limited proficiency, the live poultry dealer must make reasonable efforts to assist the grower in translating the Disclosure Document at least 14 calendar days before the live poultry

⁷¹ See <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-chair-lina-m-khan-files-comment-supporting-proposed-usda-protections-poultry-farmers>.

dealer executes the broiler growing arrangement, provided that the grower may waive up to 7 calendar days of that time period.⁷²

As noted by commenters, non-English speaking growers, including U.S. natives and immigrants, have played important roles in the poultry growing market in multiple localities. Grower groups have noted concerns over many years regarding non-English speaking growers' ability to understand and evaluate their contracts and the risks they are taking in poultry growing.⁷³ The intention of this rule is to assist all broiler growers in understanding the information about their poultry growing arrangement. This includes providing the information to growers in a language with which they are familiar. Under this final rule, the live poultry dealer must make reasonable efforts to ensure that growers are aware of their right to request translation assistance, and to assist the grower in translating the Disclosure Document at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement (provided that the grower may waive up to 7 calendar days of that time period). The timing aligns with the requirements on the live poultry dealer under § 201.102(a) to provide the contract and Disclosure Document to the grower. Reasonable efforts include but are not limited to providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the broiler grower's geographic area. A live poultry dealer may not restrict a broiler grower or prospective broiler grower from discussing or sharing the Disclosure Document for purposes of translation with a person or organization that provides language translation services. Live poultry dealers, as parties regularly engaged in executing poultry growing arrangements, can be expected to be able to identify for growers affordable translation services in a timely manner, which will assist the grower in

obtaining any necessary translation services quickly.

AMS is requiring that live poultry dealers take reasonable efforts to ensure that growers are made aware of their right to request translation assistance so that growers can reasonably access the assistance with limited risks of prejudice or discrimination. AMS is not requiring dealers to provide a translation because it would be costly and could deter poultry companies from working with non-English speaking growers. Instead, the requirement to assist growers in obtaining translation services is a more cost-effective and flexible approach that conforms with existing regulatory requirements that protect growers' ability to access other services, such as accounting, financial, and legal advisors, that growers may engage to meet their needs in reviewing what can be multi-hundred-thousand or million-dollar investments and business risks. Accordingly, to ensure grower access to those services, § 201.102(g)(4) prohibits any restriction on growers' ability to share the documentation with translation service providers.

Furthermore, nothing in the rule prevents companies from providing a translation provided it is complete, accurate, and not misleading. Poultry dealers are strongly encouraged to do so.

To preserve the minimum time period for grower review, AMS's requirement that live poultry dealers assist growers with accessing translation services must occur 14 calendar days before executing the poultry growing arrangement (provided that the grower may waive up to 7 calendar days of that time period). AMS has aligned the translation timing with the general requirement that the Disclosure Document be provided 14 calendar days before executing the poultry arrangement to minimize complexity in the rule, provided that the grower may waive up to 7 calendar days of that time period. As discussed elsewhere in this final rule, the 14-day timing requirement only applies where no additional capital investment is being made. Where additional capital investments are being made the Disclosure Document must be delivered with the housing specification, which occurs before the capital investment. As noted elsewhere in this final rule, circumstances where no capital investments are being made tend to reflect continuity and an established relationship between the grower and the live poultry dealer, or circumstances where a grower is switching without capital investment. In either case, the dealer and grower can be expected to be in ongoing dialogue in the run up to the period before review, which should

allow for more flexible timing by both parties.

The suggestion that AMS provide educational outreach to non-English-speaking communities in their native languages is noted, and while a provision for outreach is not included in this rule, AMS will publish educational materials online in multiple commonly spoken languages to provide a basic level of outreach, in addition to exploring more opportunities to provide additional educational outreach.

Other Improvements to Proposed Disclosure Regime

Comment: In the proposed rule, AMS invited comments on what else USDA can do to improve the proposed disclosure regime, including whether AMS should provide more information about the scope of the definition of *deception* under the Act. Several non-profit organizations suggested AMS establish a definition of *deception* to give growers, regulated entities, and courts a clear understanding of the intent of the rule.

AMS response: AMS is making no change based on comments received. While the particular facts and circumstances in any individual case will determine the application of the prohibition on deceptive practices under the Act, well-established principles of deceptive practices under the Act squarely cover the information required to be disclosed in this rule. Taking the formulation set forth in the 1983 FTC Policy Statement on Deception, deception would require that the representation, omission, or practice be likely to mislead the grower, from the perspective of the grower acting reasonably in the circumstances, and be likely to affect their conduct or decision with regard to the poultry growing arrangement.⁷⁴ AMS has crafted this rule to meet that standard in the prevention of deception: to provide information that is important to reasonable poultry growers' decisions relating to contracting and the operation of their contracts and that addresses representations, omissions, and practices that are likely to mislead growers. Accordingly, AMS finds no need to further define deception in this rule.

AMS notes, also, that additional concepts, formulations, or applications of deception may be presented in a separate rulemaking. Other deceptive

⁷² As noted previously, Pew Research Center studies show that the English proficiency of the Hmong population in the U.S. in 2019 was only 68% and among foreign born Hmong, English proficiency is just 43%. Abby Budimen, "Hmong in the U.S. Fact Sheet," Pew Research Center, available at <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-hmong-in-the-u-s/> (last accessed April 2023).

⁷³ Jess Anna Spier, "Hmong Farmers: In the Market and on the Move," (January 1, 2007) Farmers Legal Action Group, available at http://www.flaginc.org/wp-content/uploads/2013/03/CLE_JAS.pdf last accessed 04/06/2023.

⁷⁴ FTC Policy Statement on Deception, Oct. 14, 1983 (Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)), available at <https://www.ftc.gov/system/files/documents/public-statements/410531/831014deceptionstmt.pdf>.

practices are outside the scope of this disclosure-based rulemaking.

D. Disclosure Document Advisories

In proposed § 201.100(b)(6), (7), and (8), AMS proposed the Disclosure Document contain specific verbatim advisories. The advisories would summarize provisions of the poultry grower's poultry growing arrangement, the grower's right to carefully read the Disclosure Document and all accompanying material, and the grower's right to share the document with certain others for counsel. The Disclosure Document advisories would describe the requirement that the live poultry dealer furnish a copy of the Disclosure Document and growing arrangement a minimum of 14 calendar days before the dealer executes the growing arrangement, provided that the grower may waive up to 7 calendar days of that time period. When the live poultry dealer seeks to offer or impose new or additional housing specifications that could lead the poultry grower to make a capital investment, the advisories would describe the requirement to provide the Disclosure Document simultaneously with a copy of the growing arrangement, any new or modified housing specifications that require original or additional capital investment, and a letter of intent. The advisories would also include a provision explaining that the information is not verified by USDA, and that false or misleading statements or material omissions by the live poultry dealer in the disclosure could constitute a violation of Federal law, State law, or both. Inaccurate information provided in disclosure to growers, as well as other bait-and-switch tactics, such as making a material policy change but not through a new or revised contract, would be covered under this section. This is designed to help growers understand that conduct which violates the rule is a violation of sec. 202(a) of the Act and may result in a notice of violation from USDA or prosecution by the Department of Justice and that, furthermore, growers may be able to tap additional remedies for misrepresentations in these disclosures under the Act and other laws as well.

Statement of Grower's Rights

Comment: Several non-profit organizations suggested AMS should add a requirement that dealers provide in the Disclosure Document USDA contact information that would allow current or prospective poultry growers to obtain further guidance regarding their rights and protections.

AMS response: AMS agrees with this comment, and has amended the proposed requirements for the Disclosure Document to include the Packers and Stockyard Division hotline number, along with the address for the AMS complaint portal, which was included in the proposed rule. AMS has additionally included a reference to the AMS website where live poultry dealers and growers may access further information about rights and responsibilities under the Act. Providing this contact information to growers will signal AMS's intent to enforce the rule and further facilitate growers' ability to contact USDA regarding potential violations.

Comment: AMS received several comments about the provision allowing poultry growers to discuss their arrangements with business associates. A non-profit organization suggested that the rule should ensure a grower's right to speak freely about their contracts. Several commenters said the rule should increase transparency by explicitly permitting poultry growers to discuss poultry growing arrangement offers and Disclosure Documents with anyone.

AMS response: AMS continues to agree growers must be able to consult with the entities listed in § 201.100(b) about entering into, renewing, and operating under such contracts because those parties are essential for assisting growers in appreciating the legal, financial, and operational risks that they may face. Moreover, the Disclosure Documents provide critical information that is core to their ability to provide that assistance. However, adding to the particular entities listed in § 201.100(b) is outside the scope of this rulemaking. AMS will monitor whether non-disclosure requirements are impeding the ability of growers to make the most efficient use of the Disclosure Documents, including whether such non-disclosure agreements impede the ability of growers to seek and obtain better offers from competing live poultry dealers. Accordingly, AMS will monitor and evaluate whether rulemaking to expand the entities listed in § 201.100(b) is needed, but made no changes to the rule as proposed based on these comments.

Comment: Several live poultry dealers said the verbatim advisories required by the proposed rule on the right to obtain counsel on a contract from certain trusted advisors and the right to seek redress from AMS for violations of the Act are unnecessary because they distract from the clear terms of the contract and do not require contractual provisions to be effective. These

commenters suggested AMS engage in targeted educational outreach, work with State agriculture extension services, and coordinate with other industry stakeholders as an alternative to these advisories.

AMS Response: Based on AMS's experience, some growers may not be aware of their rights under the Act or may be confused, intimidated, or misled about asserting those rights where contracts include confidentiality clauses. The mandated disclosures promote transparency and allow growers to better understand, evaluate, and compare contracts among dealers. This minimizes the risk of deception in the contracting process by ensuring growers know they have the right to understand and evaluate offered contracts by seeking business, legal, and financial counsel from the entities listed in § 201.100(b). It is true that certain information provided by State extension services, USDA resources, and other poultry growers under contract with the same live poultry dealer can help growers assess the feasibility and operation of new or revised poultry growing arrangements. Grower commenters at listening sessions, however—in response to rulemaking proposals—have reported to USDA they are not sure their contracts allow them to seek advice from others. Growers should be assured that seeking such guidance is not prohibited, regardless of confidentiality clauses in offered contracts. Further, AMS agrees that educational outreach is valuable to the industry and intends to continue and enhance efforts in those areas. Educational outreach, however, is not a replacement for legal protection. This rule provides this protection by requiring inclusion of the advisory disclosures in the Disclosure Document. Accordingly, AMS made no change to the proposed rule based on these comments.

Comment: A poultry industry trade association said AMS should omit requirements that are irrelevant to determining grower income, such as the requirement to provide information about general rights and obligations under the Act.

AMS Response: AMS does not agree that disclosures should focus only on grower income. Each of the disclosure elements required in this final rule will have a meaningful impact on growers' ability to understand and evaluate the production agreement. At earlier listening sessions and competition workshops, USDA heard from growers that certain information is critical to their decision making and ultimate success, and they have urged AMS to

require dealers to provide this information. For example, growers have told us that knowing the live poultry dealer's policies related to the sale or transfer of a poultry growing operation before they enter a contract and make associated capital investments would help them evaluate the long-range risks of doing so. In another example, growers knowing the dealer's policy regarding feed outages will be better prepared to avoid such situations or react appropriately in a timely manner to minimize the impact of an outage on the flock. While having such information forestalls confusion, misunderstanding, and unnecessary delays for growers, live poultry dealers also benefit from providing such information by avoiding potentially misleading or deceptive business communications and by maximizing business outcomes efficiently. Accordingly, AMS made no changes to the rule as proposed in response to this comment.

Comment: A poultry industry trade association said AMS should clarify what constitutes a "material omission" or "misleading statement" for the purposes of proposed § 201.100(b)(8) and asked whether an incorrect forecast or an unforeseen market change not contemplated by a disclosure would be considered "misleading."

AMS Response: The sufficiency and reliability of disclosures depend heavily on the facts and circumstances. Moreover, contract causes of action are, in general, a function of State law, and State courts may have different standards for interpreting "material omission" and "misleading statement." The law around "material omissions" or "misleading statements" is a well-established part of the law of deception under the Act, the FTC Act, and other relevant Federal and State disclosure laws. AMS made no changes to the rule as proposed based on this comment.

Comment: A meat industry trade association said AMS should modify the rule to consider proprietary and confidential information that would be provided to potential growers who would not necessarily end up with a business relationship with the live poultry dealer.

AMS response: AMS has already explained why the information in the Disclosure Document does not give rise to confidential or propriety business information.

Recommendations for Additional Advisories

Comment: Multiple commenters urged AMS to establish that it would be a violation of the Act for a live poultry dealer to threaten to retaliate against a

poultry grower who installs a feed scale to verify the accuracy of feed deliveries, and that live poultry dealers should have to disclose this right in the Disclosure Document. One commenter said this right is important because the tournament system values the growers' feed-to-weight conversion ratio, and if a live poultry dealer reports having provided a higher amount of feed than was actually provided, the grower is improperly penalized for having a lower ratio.

AMS response: This issue is outside the scope of this rule. This rule focuses on providing enhanced transparency to poultry growers and does not address retaliation and related matters. In addition, AMS has proposed a rule that would address retaliation against producers including poultry growers.⁷⁵ AMS is also considering additional steps to address unfair practices as set forth in the June 8, 2022, Advanced Notice of Proposed Rulemaking "Poultry Growing Tournament Systems: Fairness and Related Concerns." Therefore, AMS made no changes to the rule as proposed based on this comment.

Comment: Multiple commenters said the Disclosure Document should include a warning about the dangers of breathing dust and ammonia, as well as information about how poultry growers can protect themselves and their employees from these dangers. Several of these commenters said AMS should provide a fact sheet on respiratory health hazards. Similarly, a commenter said AMS should require disclosures to farmers and to the public of what goes into the feed for poultry, saying poultry growers could be irreparably harmed by handling dangerous chemicals and consumers could be harmed by ingesting these chemicals.

AMS response: This issue is outside the scope of this rule. The rule focuses on transparency regarding the financial risks and benefits of raising poultry under a poultry growing arrangement. AMS does not discount the commenters' concerns here and recognizes there are risks associated with growing poultry that are not directly financial. Nor does AMS discount the possibility that deception and unfair practices may extend to injuries beyond promises of financial gain. Because this comment is outside the scope of the rule, AMS made no changes to the rule based on these comments. AMS, however, encourages

all potential and current poultry growers to educate themselves on the various health and safety risks associated with growing poultry.

E. Financial Disclosures

AMS proposed to require live poultry dealers to provide various financial disclosures to poultry growers, including disclosure of bankruptcy filings, grower terminations, and grower payment history and projections.

Disclosure of Bankruptcy Filings

AMS proposed in § 201.100(c)(2) to require the Disclosure Document to contain a summary of bankruptcy filings in the prior 6 years for the live poultry dealer and any parent, subsidiary, and related entity.

Comment: Several poultry and meat industry trade associations argued that the requirement to disclose past bankruptcy filings is unnecessary. For example, a commenter said bankruptcy filings are rare among live poultry dealers and are already public if interested parties wish to obtain them. Another commenter noted that this information would be difficult to maintain for larger companies with multiple subsidiaries and said it is unclear why disclosing a live poultry dealer's bankruptcy history would be relevant to determining a poultry grower's earnings under a contract, or why this requirement is for a 6-year period rather than 5 years as with other disclosure requirements in the rule.

AMS response: The financial stability of a dealer is a relevant factor for prospective growers to consider. Dealers or complexes that are underperforming financially may be subject to closure or reduced production levels, resulting in negative effects on grower revenue and potential contract termination. For example, numerous grower contracts were terminated as a result of the Pilgrim's Pride bankruptcy in 2008. Had those growers understood the financial state of the company and the risk to their operations, they may have elected to work with a different dealer, not entered the business at all, or taken other measures to protect themselves from the risk of financial loss. In addition, because corporate relationships may not be known to growers, the public nature of filings may be inadequate to effectively communicate this type of risk. However, to improve the uniformity of recordkeeping for this disclosure regime in the final rule, and in response to comments, AMS has elected to adjust the bankruptcy information reporting period required by § 201.102(c)(2) to 5 years.

⁷⁵ Agricultural Marketing Service, "Inclusive Competition and Market Integrity," Proposed Rule, Oct. 3, 2022, 87 FR 60010, available at <https://www.federalregister.gov/documents/2022/10/03/2022-21114/inclusive-competition-and-market-integrity-under-the-packers-and-stockyards-act>.

Grower Termination and Bankruptcy Disclosures

In the proposed rule, AMS asked if it should require dealers to disclose the contractual grounds for termination or suspension of the poultry growing arrangement.

Comment: Several commenters suggested AMS should require live poultry dealers to disclose the contractual grounds for termination or suspension of the poultry growing arrangement. These commenters said it is important for poultry growers to know the circumstances under which the company can terminate the contract and leave the grower without income because growers make a substantial investment under the contract arrangement.

AMS response: Current regulatory requirements adequately cover this issue. Under existing regulations at § 201.100(c)(1), live poultry dealers are required to provide growers a copy of their contract that includes, among other things, “the duration of the contract and conditions for the termination of the contract by each of the parties.” Existing regulations at § 201.100(h) also require live poultry dealers to provide terminated growers with written notice, including the reason for termination and appeal rights. This information is shared between dealers and individual contracted growers only, and is not part of the Disclosure Document required of broiler dealers under § 201.102. AMS made no changes to the current regulations based on these comments.

Comment: In other responses to AMS’s request for input about contract terminations, multiple non-profit organizations asked AMS to require live poultry dealers to disclose the annual percentage of contracts they terminated over a certain period. The commenters said these disclosures would give growers a sense of the nature of the contract relationship, as well as the range of contract cancellation risks. One commenter noted this information is necessary for growers to determine the likelihood of failure. One commenter also suggested AMS require dealers to provide information about the most common reasons for termination. This commenter further suggested that live poultry dealers should include a summary of the average rate of bankruptcies among growers who have worked with that dealer over the past 5 years, as well as information on the most common reasons why growers may have filed for bankruptcy.

AMS response: In the proposed rule, AMS had not required live poultry

dealers to provide information about grower turnover rates. However, AMS agrees with commenters’ suggestions that disclosures related to the rates of contract termination and non-renewal with a live poultry dealer could help current and prospective poultry growers better assess the stability of the dealer’s contract relationships. In requesting disclosure of bankruptcy and litigation, AMS was seeking to capture the risk that might arise from termination or unstable relationships. Grower turnover rates are, in AMS’s views, a useful metric to assess those risks, as well as to assess grower satisfaction with the dealer. In AMS’s experience regulating the industry, grower turnover rates commonly reflect changes to poultry sales in the wholesale and retail marketplace, as well as general live poultry dealer grower management practices. Local turnover rates might stem from regional management practices, local agent practices, or changes in local agricultural or even labor markets. Local turnover rates may also reflect company-wide policy and management of poultry production, suggesting that growers need to understand and compare both local complex and company-wide grower turnover history in order to evaluate offered poultry growing arrangements.⁷⁶ As such, grower turnover rates provide information that is similar to, but also more holistic, than bankruptcy or litigation, and assist the grower in evaluating the risk of termination or an unstable or unsatisfactory relationship.

Accordingly, AMS has added a requirement to incorporate broiler grower turnover rates at the local complex and company level into the Disclosure Document. This information will allow growers to compare the turnover rates of multiple live poultry dealers as a risk factor when making contracting decisions. Section 201.102(c)(5) is added to the final rule and requires live poultry dealers engaged in the production of broilers to disclose average annual broiler grower turnover rates for the previous calendar year and the average of the 5 previous

calendar years at both the company level and the local complex level.

AMS is requiring grower turnover rates for the previous year and the average of the 5 previous years at *both* the complex and company level, whereas it is requiring dealers to provide previous-year average grower payment information only at the complex level and not at the *company* level (as in proposed § 201.100(d)(1)). AMS is adopting this distinction because company-wide grower turnover metrics provide the grower with an important picture of termination or other risks that may arise from company decision-making relating to sales market fluctuations—for example, if a dealer terminates growers quickly in response to sales changes. Complex level turnover rates are also important to growers because they are likely to provide insight into how the company, and in particular its local agents, interact with growers. AMS developed detailed instructions for how to calculate average annual broiler grower turnover rates, which are included in Form PSD 6100, to facilitate ease of compliance by live poultry dealers.

As explained in the previous comment response, live poultry dealers are required to provide individual terminated growers with written notice, including the reason for termination and the grower’s appeal rights. However, AMS has determined that this final rule should not require dealers to explain the reasons for terminations of other grower contracts on a complex- or company-wide basis in the Disclosure Document. AMS knows through experience working with the industry that poultry dealers and growers can have widely different perspectives on the causes and circumstances for contract terminations. Similar to a grower’s evaluation of a dealer’s bankruptcy or litigation history, growers can consider grower turnover rates when evaluating offered contracts, but live poultry dealers cannot reasonably be expected to convey the varying reasons that may be the basis for terminating contracts as that would at a minimum be burdensome and may in some circumstances reveal proprietary business information or create litigation risks to the company.

AMS also does not agree that dealers should be required to furnish information about the rates and causes for grower bankruptcies. AMS does not expect live poultry dealers to know all the rates or reasons for individual growers’ personal or business decisions to file for bankruptcy, which may or may not have anything to do with the poultry growing arrangement. Accordingly, no changes to the rule as

⁷⁶ In a case involving Arkansas growers, Judge Higginson wrote “[c]iting a downturn in the poultry industry, PPC terminated its contracts with the Growers and filed for bankruptcy.” *Growers v. Pilgrim’s Pride Corp. (In re Pilgrim’s Pride Corp.)*, 706 F.3d 636, 638 (5th Cir. 2013). In a case involving terminated Florida growers, a Pilgrim’s Pride executive was reported to have testified that “terminating the contracts (was) necessary and the best option . . . slowing or stopping operations at Pilgrim’s Pride plants is expected to save the company \$250 million this year,” from “Pilgrim’s Pride cut growers based on production factors,” *Meat + Poultry* (March 11, 2009).

proposed were made on the basis of these comments.

Facilitating Harmful Coordination by Integrators

In the proposed rule, AMS asked whether certain types of financial disclosures could facilitate harmful coordination by integrators and, if so, how this risk could be mitigated.

Comment: A non-profit organization said the large market share held by a few large companies, along with the existence of specialized data companies that service large integrators, has already led to harmful coordination to reduce both contract grower payments and wages for poultry industry workers. This commenter said the solution to avoid harmful coordination by integrators would be for USDA to work with DOJ to crack down on anticompetitive practices, rather than to limit disclosure of information to prospective and current contract growers.

AMS response: AMS is committed to working with DOJ to curb illegal trade practices, including antitrust violations, but antitrust violations are not the only behavior regulated by the Act. This rule is focused on providing enhanced transparency to current and prospective poultry growers because of the persistent challenges they have faced for many years with respect to their poultry growing arrangements. Enhancing transparency and reducing information asymmetry through this rule will allow growers to better understand evaluate, and compare contracts to reduce deceptive practices. AMS made no changes to the rule as proposed based on this comment.

Effect of Financial Disclosures on Lending System

In the proposed rule, AMS requested comment on the effect the proposed financial disclosures would have on the lending system and on the provision of credit to growers.

Comment: A non-profit organization said poultry growers finance the barns they use through loans, which are often guaranteed through USDA's Farm Services Agency (FSA) or the Small Business Administration (SBA). According to this commenter, when growers are unable to pay their loans because of inadequate pay from the tournament system, taxpayers end up paying for them. This commenter said FSA should use the information disclosed under the proposed rule to refuse to guarantee loans unless the contract terms are at least as long as the life of the loan.

AMS response: AMS noted in the proposed rule that FSA has recognized repayment reliability concerns related to informational asymmetries and their effect on poultry grower payments and total revenues. Under the loan repayment program, FSA assesses the "dependability" of poultry production contracts and requires contracts to provide assurance of the grower's opportunity to generate enough income to ensure repayment of the loan by incorporating requirements such as a minimum number of flocks per year or similar quantifiable requirements.⁷⁷

The commenter's request that FSA require contract length match repayment term is outside the scope of this rulemaking. However, AMS is committed to working with FSA and SBA on poultry industry lending practices. AMS made no changes to the rule as proposed based on this comment.

Disclosure of Grower Payment History and Projections

In § 201.100(d) (1), (2), and (3) of the proposed rule, AMS proposed to require the Disclosure Document to contain two tables. One table would show the average annual gross payments, in U.S. dollars per farm facility square foot, to poultry growers for the previous calendar year for all complexes owned or operated by the live poultry dealer. The second table would show the average annual payments, in U.S. dollars per farm facility square foot, to poultry growers at the local complex. The proposed rule also specified how the tables should be organized and how values should be calculated.

Under the proposed rule, if a live poultry dealer modified the building specifications such that the grower would be required to make additional capital investment, or the tables of payment history would not accurately represent projected grower annual payments, the live poultry dealer would be required to provide additional information. The dealer would be required to provide tables presenting projections of average annual gross payments to growers under contract with the complex, and having the same housing specifications, for the term of the poultry growing arrangement, at five quintile levels expressed as dollars per farm facility square foot. Dealers would further be required to explain why the payment history information would not

accurately represent projected future payments.

AMS asked whether the proposed grower payment history and projection disclosures were adequate to enable growers to make sound business decisions.

Comment: Several grower groups and State attorneys general indicated support for the proposed grower payment history information and projection disclosures. Commenters said the information should increase transparency for growers and that having information about real growers' outcomes in the region would help potential growers make decisions about entering into poultry growing arrangements. Commenters said that reporting average grower pay in quintiles helps prospective growers understand and compare income variations and evaluate their own income variation risk accordingly. On commenter explained that having realistic payment information would allow farmers to plan financing more accurately and avoid such predicaments as revenue shortfall in the face of equipment replacement and repair costs.

AMS Response: AMS notes widespread support among commenters for the utility of the proposed disclosures for growers. In this industry as well as many others, past performance is a commonly relied-upon predictor of future performance. As explained in this section and elsewhere in this document, dealer discretion with respect to production inputs, and grower discretion with respect to flock management decisions and applied skills, are also determinative factors in grower outcomes. Thus, historical payment data and future projections become the baseline upon which growers can evaluate likelihood of their success or failure under poultry growing arrangements.

Comment: A number of industry groups said providing the disclosures would impose significant costs on dealers but would be of little value to poultry growers.

AMS response: As detailed in the Regulatory Impact Analysis below, AMS has determined that except for the first year that the rule is effective, the benefits of this rule to growers exceed costs to dealers. Benefits include reduced uncertainty in the broiler grower's revenue stream, reduced risk of retaliation and potential for fraud and deception, and more optimal allocation of capital and labor resources, leading to improved efficiencies across the entire industry. First-year costs to live poultry dealers—following the effective date of

⁷⁷ USDA Farm Service Agency, *Guaranteed Loan Making and Servicing 2-FLP (Revision 1)* pp.8–86 (October 2008). https://www.fsa.usda.gov/internet/FSA_File/2-flp.pdf; accessed 1/3/2022.

the rule—include expenses for setting up new reporting and recordkeeping processes, which will decrease in succeeding years. Additionally, in economic terms, AMS expects total costs to the industry from the rule—as with total benefits—will be very small in relation to the total value of industry production. Significant benefits in the form of decision-making tools will nevertheless accrue to individual growers given the opportunity to understand, evaluate, and compare contract data provided by live poultry dealers in Disclosure Documents pertaining to their poultry growing arrangements.

Comment: One commenter said that the disclosures would be of little value to growers because past economic performance is not a reliable predictor of future economic conditions. The commenter asserted that the grower's income is determined as specified in the contract and driven primarily by the grower's skill and care.

AMS Response: AMS acknowledges that items specified in the contract, and the grower's skill and care, play important roles in grower performance. However, the live poultry dealer determines many items not specified in the contract that significantly impact the grower's income, such as how many flocks a grower receives annually and the number of birds in those flocks. In addition, in tournament systems, the grower's skill and care are supposed to be rewarded in reference to the skill and care provided by other growers settling with them under relative performance payment contracts. The disclosed information provides a history of past grower performances representing the range of skill and care of the pool of growers with whom they will be settled, and who operate under the same contract at the same complex. This information will provide the potential grower a firmer basis for forming performance expectations than a copy of the contract and a self-estimation of their skill and commitment in isolation. It is true that past economic performance may not always be a reliable predictor of future economic conditions. For example, past economic performance could not have predicted U.S. economic conditions following unanticipated events like a worldwide pandemic, foreign conflicts, social upheaval, or an avian flu epidemic. Nevertheless, past economic performance is commonly used in many industries to help predict and plan for future economic performance.

Actual payment information from the recent past illustrates how a live poultry dealer wields its discretion in the

contract. It offers one of, if not the, best pieces of available information to provide growers with a reasonable range of what their incomes may be, reflecting the range of grower skills and other factors present in the marketplace.⁷⁸ Further, providing only the average, or no information regarding variability, is deceptive in the face of payment variability—a significant complaint that AMS has received over the years from growers. Based on AMS's experience monitoring these markets, payments to growers frequently encompass a wide range above and below the mean payment level, as well as significant variation between specific contracts and grower pools.

In data drawn from a 2011 nationally representative sample of broiler growers, the mean payment received by contract growers was 5.77 cents per pound, but 10 percent of growers earned at least 7.02 cents per pound, while 10 percent earned less than 4.32 cents per pound.⁷⁹ While the data reported above range across all growers and all contracts, payments also range widely for specific contracts and grower pools.⁸⁰ Presenting payment history information broken out by quintiles (or, for very small complexes, by mean and standard deviation) gives insight into the variability of cash flow within recent years. As commenters pointed out, not even the best economic models can predict the future with a high degree of certainty, so presenting recent payment information broken out by quintiles (or, for very small complexes, mean and standard deviation) to share the range of performance is designed to enable growers to evaluate whether their potential earnings would be sufficient to meet personal and business financial obligations, as well as to better handle risk and improve farm management. The rule also recognizes that economic conditions may vary, and so provides the opportunity for live poultry dealers to explain why any future projections may differ from past outcomes.

Comment: Several commenters representing poultry industry interests

⁷⁸ Forecasts of a variable are often based on past values of that variable. J.C. Brocklebank, D.A. Dickey, and B.S. Choi, *SAS for Forecasting Time Series* (2018): 23.

⁷⁹ 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).

⁸⁰ Charles R. Knoeber and Walter N. Thurman. "Testing the Theory of Tournaments: An Empirical Analysis of Broiler Production." *Journal of Labor Economics* 12 (April 1994). Armando Levy and Tomislav Vukina. "The League Composition Effect in Tournaments with Heterogeneous Players: An Empirical Analysis of Broiler Contracts." *Journal of Labor Economics* 22 (2004).

expressed concerns that any data on potential future payments is misleading to growers, given the number of factors that affect payments and the role of a grower's own skill.

AMS response: Grower skill does play a role in flock performance and therefore per-flock payments. The projection quintiles required in this rule are specifically designed to capture a wide range of grower performance. Therefore, the bulk of variability in future projections—and presumably the reason for offering projections in lieu of historical information in the first place—would be due to anticipated changes in dealer-controlled factors such as flock placement frequency and flock density, changes in production needs, and changes to the length of grower contracts. The supposition that payment disclosures would be misleading would only be true to the extent that dealers supply misleading data related to factors they control. To do so would be deceptive and a violation of the Act. Accordingly, AMS made no changes to the rule as proposed based on these comments.

Comment: Several poultry and meat industry trade associations requested that AMS require only grower payment history information for the grower's complex rather than for all complexes owned by the live poultry dealer. These commenters noted that complexes in other geographic areas face different economic conditions, such as cost of living, labor costs, and State and local taxes, arguing that payment information for these complexes would not be useful to poultry growers and would potentially confuse them.

AMS response: Payment history for complexes in other geographic areas may be useful to growers in some circumstances, in particular, in areas with only one or two live poultry dealers where there may not be the ready availability for growers to compare what they might earn from providing poultry growout services.⁸¹ However, some factors may vary regionally, such as labor costs, which could reduce the usability of the information. This rule does not require payment information for complexes in other geographic areas. Therefore, in the

⁸¹ In the last available survey of local markets (2011), MacDonald and Key found that about one quarter of contract growers reported that there was just one live poultry dealer in their area; another quarter reported two; another quarter reported three; and the rest reported four or more. James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, EIB-126, U.S. Department of Agriculture, Economic Research Service, June 2014: 30, https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=0.

final rule, AMS removed the proposed requirement in § 201.100(d)(1) that live poultry dealers provide grower payment history information for all complexes they own, instead requiring in § 201.102(d)(1) that live poultry dealers engaged in the production of broilers provide only tables showing average annual gross payments to broiler growers at the local complex.

Comment: A poultry industry trade association urged AMS not to require future projections, saying it would be difficult for dealers to accurately make such projections, given that they depend in part on the economic climate and on other factors that cannot reasonably be foreseen. This commenter said if AMS requires projections, they should be qualified and exempt from certifications. A trade association suggested disclosure should include a disclaimer that past income does not guarantee future results and that income will be governed by the terms of the contract, the party's performance, and additional factors neither party has control over.

AMS response: AMS intends for live poultry dealers to make and disclose assumptions relating to projections, allowing poultry growers to better assess the context behind them. This final rule does not require disclosure of projections to include a disclaimer that past performance is not likely to reflect future results but does not prohibit it either. AMS will carefully monitor the use of disclaimers to prevent confusion and deception. To the extent that a disclaimer is provided in a manner that helps the growers understand that past income is not a contractual guarantee to the grower of such income, it may be acceptable. But such a disclaimer is not required, as the Disclosure Document should already clearly differentiate between past income and future projections that are made *because* past performance is not likely to reflect future results. AMS underscores that a live poultry dealer may not disclaim or absolve itself of any obligation to disclose information required to be disclosed in this rule, waive any liability under this rule, or confuse or discourage growers from reviewing the disclosures set forth under this rule.

Additionally, in the final rule, AMS has clarified that certifications by principal executives are made with respect to the sufficiency of the governance framework for delivering accurate and reliable disclosures, rather than to the specific accuracy of disclosures to particular growers because, as discussed elsewhere, such a certification is more appropriate with respect to the role of the principal

executive in providing the necessary governance and controls to reasonably provide for accuracy in disclosures.

Comment: Commenters from both the grower and live poultry dealer sectors requested more specificity on how to calculate average annual gross payments. Although the proposed rule provided detail on calculations, commenters stated the instructions lacked sufficient specificity to assure that live poultry dealers could comply and that poultry growers would receive adequate data on which to base business decisions.

AMS response: In response to commenters' request for specificity on how to calculate average annual gross payments, AMS developed detailed instructions for how to calculate average annual broiler grower turnover rates, which are included in Form PSD 6100. AMS also added a definition in § 201.2 for *gross payments*, which means the total compensation a poultry grower receives from the live poultry dealer, including, but not limited to, base payments, new housing allowances, energy allowances, square footage payments, extended lay-out time payments, equipment allowances, bonus payments, additional capital investment payments, poultry litter payments, etc., before deductions or assignments are made.

Comment: Multiple commenters asked AMS to require the Disclosure Document to include a maximum percentage variance from the base pay rate under the contract. These commenters said this information would give growers a better idea of the true range of potential incomes.

AMS response: The disclosure of payment quintiles or mean and standard deviation provides substantially more data points useful to assess payment variance and range of potential outcomes compared to maximum percentage variance, as quintiles show pay broken down into five bands. Live poultry dealers will report only a mean and standard deviation if there are nine or fewer growers, which provides a measure of expected outcome and expected volatility around that outcome. The base price and the maximum variance would not give an expected outcome or volatility measure, nor would it provide context useful to establish probabilities of where a grower would fall in the range. While AMS understands that growers have expressed concerns regarding the maximum variability of pay from the base pay, the financial disclosures in § 201.102(d) provide objectively more data points and create a more appropriate context for assessment

compared to a maximum variance. While outside the scope of this rule, AMS is considering other changes to the poultry grower payment systems. See June 2022 Advance Notice of Proposed Rulemaking on "Poultry Growing Tournament Systems: Fairness and Related Concerns."⁸² Therefore, AMS has not required in this final rule disclosure of maximum percentage variance from the base pay under the contract in the financial disclosures.

Grower Variable Costs

Proposed § 201.100(d)(4) would have required the live poultry dealer to provide a summary of the information it collects or maintains relating to grower variable costs inherent to poultry production, or costs that may be borne by the grower. AMS asked whether the proposed rule listed the appropriate items regarding grower variable costs that dealers should list and disclose to growers. AMS asked whether it should require dealers to disclose, for example, information about costs related to compliance with environmental regulations, energy, water, and waste disposal and whether the timing of housing upgrades is reasonably predictable enough for those costs to be included in grower variable costs during the poultry growing arrangement.

Comment: Several farm bureau commenters suggested AMS consider variable costs in different regions, as these costs vary from region to region rather than being a "one size fits all" disclosure. These commenters also said the rule should require disclosure of all information a dealer intends to collect, and that all information should be housed in an encrypted system and not subject to Freedom of Information Act requests to protect the privacy of the grower. A live poultry dealer said different farms would have different views on which variable costs are inherent in poultry production, offering as examples labor and insurance costs. A poultry industry trade association said it is inappropriate for a live poultry dealer to be required to collect, produce, or certify the accuracy of information about grower variable costs, arguing that growers are responsible for understanding and controlling their costs of production. A poultry grower said AMS should require live poultry dealers to disclose variable costs including livestock, housing upgrades,

⁸² Agricultural Marketing Service, USDA, "Poultry Growing Tournament Systems: Fairness and Related Concerns," 87 FR 34814, June 8, 2022, available at <https://www.federalregister.gov/documents/2022/06/08/2022-11998/poultry-growing-tournament-systems-fairness-and-related-concerns>.

financing costs, and any cost related to environmental compliance.

AMS response: Growers benefit from the disclosure of this information on a local or regional level because it will better enable them to analyze the potential profitability of their poultry growing arrangement or changes thereto. Such information may be available to growers through market research services or in some cases USDA resources, but to the extent that live poultry dealers have this information, it would facilitate growers' ability to access it and, consequently, also reduce information asymmetry, which creates risks in the contracting process. Based on AMS's experience auditing and investigating live poultry dealers, and the observation that dealers provide grower allowances from time to time, such as for energy, AMS knows that many live poultry dealers already are cognizant of factors affecting local and regional cost structures. This rule does not require live poultry dealers to collect the information, but rather requires that information be disclosed to growers if live poultry dealers do in fact collect it. AMS encourages dealers to disclose the information at the most granular level that is reasonable and will work with live poultry dealers to address questions during implementation. No changes to the rule as proposed were made in response to these comments.

Comment: Multiple commenters requested that AMS take action to prevent growers from having to bear the costs of environmental compliance and waste disposal, saying that these costs are related to the system of production the live poultry dealers dictate and should not be treated as grower variable costs.

AMS response: The contractual distribution of liabilities related to environmental compliance and waste disposal are outside the scope of this rule. To the extent that the costs of environmental compliance and waste disposal are grower variable costs under particular poultry growing arrangements, they should be disclosed by the live poultry dealer under the requirement to disclose information relating to grower variable costs. Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: Several non-profit organizations said AMS should impose a recordkeeping requirement to ensure that live poultry dealers cannot skirt the rules on grower variable costs by failing to maintain information relating to these costs. A meat industry trade association said the proposed requirement to

produce a summary of information the live poultry dealer collects or maintains relating to grower variable costs inherent in poultry production is arbitrary and capricious because it lacks a cost-benefit justification. The commenter said further that dealers may have concerns about sharing such data because they use it for confidential or proprietary business purposes, and that dealers are not the best source of information on grower variable costs since they do not experience such costs themselves. A poultry industry trade association commented that live poultry dealers do not systematically maintain all this information. Several non-profit organizations contended that poultry companies share detailed market and grower information with each other through private data collection firms.

AMS response: The final rule adopts the proposal that requires live poultry dealers to include in Disclosure Documents a summary of information that is collected by live poultry dealers pertaining to grower variable costs. The grower variable cost information is general, not specific to an individual grower; thus, if a live poultry dealer collects this information, they will need to disclose a summary of it.

Variable costs play a role in grower profitability, and understanding the information helps the grower manage cash flow. Improved grower cash flow management allows growers to continue in a productive capacity, benefiting live poultry dealers as well as themselves. These costs are directly attributable to grower production. AMS does not understand how summarized information related to these costs could be construed as confidential business information. The benefits of disclosing these costs to growers outweigh the potential business confidentiality issues.

Often this type of information takes the form of sample cash flow budgets or similar documents, which live poultry dealers can use to show differences in variable costs between housing specifications, allowing growers to assess differences in fixed costs against changes in variable costs. In balancing the live poultry dealer burden against the grower benefits, AMS sought to ensure growers have access to this type of information to the extent that dealers collect it. For growers contracted with dealers who do not collect this information, there are other resources via the extension service and producer organizations that may be able to provide similar types of information. Section 401 of the Act provides for recordkeeping requirements of this type;

no new requirements are necessary for this provision.

This type of information has value to many dealers, and AMS does not want to discourage its collection with inflexible requirements. AMS will investigate failures to provide these summaries where data is collected. Accordingly, no changes to the rule as proposed were made in response to these comments.

Comment: One commenter asked whether grower variable cost information has been used collusively, suggesting that AMS and DOJ investigate this information and that poultry growers receive access to it.

AMS Response: Whether live poultry dealers have used grower variable cost information collusively is outside the scope of this final rule, and AMS has made no changes to the rule as proposed based on this comment.

Informational Service Contact Information

Comment: Poultry grower groups expressed support for the proposed rule's requirement that the Disclosure Document include current contact information for the State university extension service office or county farm advisor's office that can provide information about poultry grower costs and poultry farm financial management in the grower's geographic area. Other commenters from the poultry industry said this information is already provided and should not be mandated by regulation.

AMS response: The Act affords growers the right to understand, evaluate, and compare contracts among dealers to inhibit deceptive practices. Access to any information about poultry grower costs and farm financial management can help growers make informed business decisions and avoid their being misled regarding the advisability of offered contracts. Based on its experience with record reviews, AMS is aware and appreciates that some dealers already include the required contact information in their contracts, and wants all growers to have access to the same information. Further, the additional burden to dealers associated with providing this information is small, as described in the *costs* section of the Regulatory Impact Analysis below. Accordingly, AMS made no changes to the rule as proposed based on these comments.

Other Financial Disclosures Not Currently Included

Comment: A State farm bureau commenter said that companies should disclose any requirements for a poultry

grower to make additional capital investments and whether the grower is being paid enough to cover these costs. According to the commenter, requiring these disclosures are important because equipment and housing upgrades typically benefit the live poultry dealer at the expense of the poultry grower.

AMS response: The Act requires all poultry growing contracts to contain the following language: “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). Additionally, § 201.102(d)(2) of this rule requires live poultry dealers to provide a new Disclosure Document, which includes revenue projections, when “housing specifications are modified such that an additional capital investment may be required.” The required revenue projections are intended to help growers and their business advisers evaluate the proposed capital improvements to determine feasibility of the contract. With adequate information, growers should be capable of determining whether the projected revenues are likely adequate to cover the costs of capital improvements. Dealers, for whom there is a potential conflict of interest, should not be expected to advise growers about whether projected revenues will cover capital improvement costs. AMS agrees with the concerns raised by growers and has addressed them.

F. Other Disclosures

Sale-of-Farm Disclosures

In proposed § 201.100(c)(3), AMS proposed to require the live poultry dealer to include in the Disclosure Document a statement that describes the dealer’s procedures regarding the potential sale or reassignment of the poultry grower’s facility. AMS requested comment on whether the proposed sale-of-farm policies are adequate to ensure transparency and effective grower decision making.

Comment: Poultry grower groups expressed support for requiring live poultry dealers to include a statement regarding the potential sale or reassignment of the poultry grower’s facility. These commenters stated significant financial harm comes from dealers revoking the contract for a grower’s farm, making it unsellable. Poultry industry groups opposed the sale-of-farm disclosures, contending the requirement does not have any bearing on how much a grower can expect to earn, is not feasible because a dealer must consider numerous factors when

deciding to offer a poultry growing arrangement to a successive buyer of a farm, and would require disclosure of confidential information about dealer business practices.

AMS response: The ability to exit an industry or a particular farm location for whatever reason is an important factor in understanding and evaluating a contractual relationship. Although a dealer’s sale-of-farm policies may not affect the grower’s immediate earnings from poultry production, those policies could very well affect the value of the grower’s capital investment upon retirement, for example if the grower anticipating retirement is unable to sell the farm to a prospective poultry grower at a fair price. A grower considering a poultry growing arrangement must not be deceived into believing they would be free to transfer their operations to prospective buyers or heirs if the live poultry dealer would not be willing to consider offering a poultry growing arrangement to the grower’s successor. Thus, growers need to understand dealers’ policies regarding sale or transfer of the farm and poultry growing operation before entering contracts with dealers and before encountering future scenarios where they choose or are forced to exit poultry farming. Growers informed of dealers’ policies and procedures will have the opportunity to develop a coherent exit strategy.

Markets become more competitive with lower hurdles for participants to enter and exit an industry. If extra profits are to be made, new entrants will be attracted. If profits are too low, some participants will exit the industry. Greater transparency into the relevant factors that live poultry dealers use to evaluate entry and exit from the industry will aid both growers and live poultry dealers by providing additional certainty to growers about the conditions under which they can enter and exit. This will enable growers to better align their sale-of-farm choices to the needs of live poultry dealers. More information about the conditions to exit the industry allows growers to understand, evaluate, and compare contracts, preventing deceptive practices.

AMS does not require that dealers establish a policy and procedure where no consistent policy or procedure truly exists in practice. However, when there is in fact no policy or procedure—an assertion which AMS may scrutinize to ensure compliance with the rule—the lack of such a policy and procedure should be disclosed. Similarly, where the dealer looks to certain facts and circumstances in practice to evaluate sale-of-farm circumstances, those facts

and circumstances should be disclosed as the dealer’s policies and procedures. AMS recognizes that dealers must consider a number of factors when deciding whether to offer a poultry growing arrangement to a grower’s successor, and that not every factor may be known at the time the original grower is offered a contract. The rule simply requires dealers to accurately disclose their policies or procedures as a safeguard against grower deception. Thus, in the final rule AMS is maintaining the sale-of-farm disclosure requirement.

Finally, AMS is not requiring the disclosure of dealers’ potentially sensitive confidential business information, such as expansion or reduction strategies. However, to the extent that a grower’s ability to exit, including through retirement, depends upon such factors at any given time, the implications of those factors should be disclosed. Accordingly, AMS made no changes to the rule based on these comments.

Policies and Procedures Disclosures

AMS requested comment on whether it should require live poultry dealers to disclose policies and procedures for determining whether a disaster or sick flock was caused by the dealer or grower, and how a grower is compensated under each of these scenarios. It further sought comment on whether it should require disclosure of sick-flock risk when a dealer maintains policies that do not remove sick flocks from the tournament.

Comment: Multiple commenters suggested AMS include requirements for disclosing live poultry dealer policies on dealing with sick or diseased flocks, natural disasters, and other depopulation events, as well as policies on grower appeal rights and processes. These commenters cited the inherent risk of disease spread among confined poultry, the potential for growers to face financial impact from depopulation events outside of their control, and the effects of low-quality inputs on tournament performance. Several commenters also expressed the need for clarity regarding processes to address issues such as feed quality or delivery timing discrepancies.

AMS response: AMS notes the significant impact on grower performance and resulting incomes due to sick or diseased flocks, natural disasters, and other depopulation events, e.g., the COVID-19 pandemic, avian influenza, weather events, or other possibly impactful events outside the grower’s control. Although the event itself is not under the dealer’s control,

the dealer may have and apply formal company policies to management of those events. For example, a dealer may follow a company policy of increased layout time or special treatment for sick, diseased, or high early-mortality flocks. However, growers may be unaware of these policies, in which case they have agreed to grow poultry for the dealer without fully receiving key information. Dealers are in the best position to inform growers about both the disastrous events that may occur in connection with poultry growing and how the dealers' policy decisions in those situations will impact growers' income. Without up-front clarity about this information, the dealers' practices may be deceptive. AMS has in the past received a range of complaints regarding differential treatment between growers under the same live poultry dealer in these circumstances. If dealers disclose their formal disaster response policies—or the lack of such policies—to growers, growers can be better prepared for the possibility that they may be impacted differentially in certain situations. Such transparency is intended to mitigate potential deception.

The types of disclosures requested by the commenters will provide critical information up front to growers and safeguard against such deception. Therefore, this final rule adds a provision at § 201.102(c)(4) requiring live poultry dealers engaged in the production of broilers to disclose their policies and procedures to address key events to growers. These events include: increased layout time; sick, diseased, or high early-mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events that could result in significant flock depopulation, affecting grower payments; feed outages, including outage times; and grower complaints relating to feed quality, formulation, or suitability; as well as any appeal rights arising out of these events. The policies and procedures that live poultry dealers disclose and implement may vary. For example, a live poultry dealer may establish an adjusted calculated payment to growers due to sick, diseased, or high early mortality flocks, or the dealer may have a policy that clarifies an appeals process. AMS does not require that dealers establish or follow any one policy and procedure, but does require dealer's accurate disclosure and implementation of any such policy or procedure as a safeguard against grower deception. Live poultry dealers that modify or replace a

disclosed policy would be required to provide new disclosures to remain compliant with the rule.

Comment: A commenter recommended that AMS require live poultry dealers to disclose both their own animal welfare policies and those of the relevant industry trade groups to give poultry growers a more holistic view of their obligations when entering into the contract and to reduce potential animal welfare concerns.

AMS response: To the extent live poultry dealers seek to incorporate animal welfare and other special growout requirements, such as for sustainability or other premium products, those obligations would need to be reflected in the contract if they are to be enforced, and under current regulations must be provided to the grower before entering into the poultry growing arrangement. The Disclosure Document does not seek to reproduce the entire contract. Instead, it will highlight aspects of the contract or poultry growing arrangement that are generally not disclosed or are presented in ways that may be misleading or otherwise create risks of deception. The information in the Disclosure Document will allow growers to analyze the profitability and financial risks of the poultry growing arrangement. If animal welfare and other special growout requirements give rise to profitability and financial risks, they would be considered variable costs for growers and are required to be disclosed in accordance with the variable cost disclosure requirements of this rule. In addition, the disclosures of average annual gross payments to broiler growers would also aid growers in identification of profitability and financial risk holistically, which would incorporate impacts from animal welfare policies and procedures. Accordingly, AMS made no changes to the rule in response to this comment.

Legal Disclosures

In proposed § 201.100(c)(1), AMS proposed to require the live poultry dealer to disclose in the Disclosure Document a summary of litigation over the prior 6 years between the live poultry dealer and any poultry grower. This summary would include the nature of the litigation, the party that initiated the litigation, a brief description of the controversy, and any resolution to the litigation. AMS also requested comment on whether legal violations or other matters that could call into question the financial integrity of the live poultry dealer should be disclosed.

Comment: Poultry grower groups and State attorneys general expressed

support for the proposed requirement for live poultry dealers to disclose a summary of litigation with any poultry grower in the previous 6 years. Commenters indicated that access to live poultry dealers' ongoing and previous litigation would increase transparency in the poultry industry and lead to more economic stability for growers. Several commenters also suggested requiring disclosure of additional litigation, such as litigation accusing the dealer or any of its growers of poultry mistreatment; litigation by employees; litigation the dealer has been subject to from DOJ, USDA, or other Federal agencies; and litigation brought against corporate successors and assignees of the dealer.

Multiple poultry industry commenters raised concerns about the litigation disclosure requirement, including that it is overly broad and does not consider the merits of the litigation or the reality that cases with little or no merit often settle. Several industry commenters also noted the proposed 6-year period for litigation disclosures is inconsistent with other disclosure periods in the rule, suggesting AMS should limit this period to 5 years.

AMS response: AMS agrees that disclosure of litigation between the live poultry dealer and other poultry growers is an important piece of information for growers. AMS does not agree that this disclosure is overly burdensome because it is known by the company and may be disclosed in other contexts. The litigation disclosure is important for appreciating the financial and performance risks that growers may face, as litigation reflects the company's approach to compliance and performance as they relate to treatment of growers. AMS is unconvinced litigation related to animal welfare issues and employees is correlated with grower risks and treatment. For grower disclosure purposes AMS sees advantages in limiting this disclosure to grower and live poultry dealer actions. Similar to the reasoning above, adding governmental actions would likely capture controversies unrelated to grower risks and treatment, and where overlap exists, very often a private case will run parallel to a government case. No changes were made to the rule based on these comments.

However, to improve the uniformity of recordkeeping for this disclosure regime, this final rule changes the period for which a dealer's litigation must be summarized to 5 years, instead of 6 years as originally proposed. Because contracts and grower relationships evolve over time, litigation

history covering the prior 5 years would provide information related to the most current contracts and contract terms. Requiring additional disclosures regarding litigation beyond a 5-year period would be overly burdensome and costly to dealers.

Comment: A poultry grower group and an individual said AMS should require disclosure of any past government investigations, charges, arrests, or convictions of a dealer or its growers or agents for violations of animal-welfare-related law, such as State laws against animal cruelty, neglect, or abandonment.

AMS response: While a live poultry dealer's compliance with animal welfare-related laws could be relevant to the financial risks of the poultry growing, AMS does not agree that these additional suggested disclosures are necessary. AMS is not presently aware of such a pattern or practice of intentional or reckless noncompliance with animal welfare standards and makes no changes to the proposed rule based on these comments.

Grower Appeals

Comment: Multiple commenters representing poultry growers recommended that AMS require live poultry dealers to maintain an appeals process for growers to report any issues that affect how their flocks perform or how their pay is calculated. They also recommended the Disclosure Document disclose the details of the dealer's appeals process, including the method for submitting an informal appeal of a live poultry dealer's contract performance and how these appeals will be resolved. The commenters said such requirements would increase fairness and transparency for poultry growers.

AMS response: As described in the preceding comment summaries, this final rule requires disclosure of live poultry dealers' policies and procedures regarding certain matters or circumstances, including any grower rights to challenge or appeal dealer determinations arising from those matters or circumstances. This final rule also requires dealers to disclose policies regarding growers' appeals procedures if they exist. AMS supports the creation of appeals policies; however, mandating their creation is outside the scope of this rulemaking. However, if a dealer has no such policies or procedures, this should be disclosed. Understanding whether and how growers may report issues affecting flock performance, or to challenge or appeal dealer determinations will aid growers in decision making and reduce confusion that may arise in times of disease or

other disaster, or from uncertainty or the exercise of discretion by live poultry dealers and their agents in the field.

Accordingly, in response to comments, AMS added a provision in § 201.102(c)(4) of this final rule that requires live poultry dealers engaged in the production of broilers to disclose their policies and procedures on a number of specific matters or circumstances and to disclose any policies regarding grower appeal rights and processes arising out of these matters or circumstances.

Other Comments About Disclosures

Comment: Several organizations representing poultry growers suggested AMS require other types of disclosures that would provide more transparency for current and prospective poultry growers. These commenters said AMS should require live poultry dealers to prominently disclose the risk of entering a poultry contract in that area if there are fewer than three options. Some commenters suggested AMS should alert poultry growers to the business risks proposed by regional monopsony and provide integrator options within a 50-mile radius of the prospective or current poultry grower's facility.

AMS response: AMS does not agree that further warnings are needed at this time, as the required disclosures aim to give poultry growers the information needed to understand the risks of entering into a poultry growing arrangement in any market, including where there are only a small number of dealers. No changes to the rule were made in response to these comments.

Comment: Some commenters said a live poultry dealer should be required to disclose known health risks associated with birds that the live poultry dealer has supplied, the expected pre-slaughter mortality rate of the birds based on the live poultry dealer's experience with similar growers, the most common causes of pre-slaughter death, and other aggregated health data known to the dealer.

AMS response: AMS is maintaining without change in the final rule the proposed requirement that live poultry dealers disclose known flock health impairments. AMS does not agree with comments that disclosure of an expected mortality rate or information about the causes of pre-slaughter death or other aggregated health data should be included. The expected mortality rate is not data a dealer can readily determine, and the benefit to growers is not clear. This final rule requires live poultry dealers to include in the Disclosure Document contact information for local extension service

offices that may be able to provide the type of information commenters seek. No changes to the rule as proposed were made based upon this comment.

Comment: A commenter urged AMS to require disclosure of any poultry-welfare advocacy campaign launched against the live poultry dealer in the previous 6 years, along with a summary of the types of animal health and welfare-related complaints lodged against either the dealer or its growers. This commenter also recommended that AMS require dealers to disclose their animal health and welfare policies in pre-contract disclosures, saying that such policies affect potential grower earnings. The commenter stated further that health and welfare policy and litigation disclosure would let prospective growers make informed decisions about legal and reputational risk and potential animal suffering they might face.

AMS response: It would be difficult for AMS—and possibly even for live poultry dealers—to determine what constitutes an animal welfare campaign or whether such a campaign has any validity. Presumably, such campaigns launched against live poultry dealers, including any associated litigation, are highlighted in the public media and available to interested growers. Whether or how such campaigns should be disclosed to growers is not contemplated in this final rule, which focuses on the information AMS knows to be essential for informed grower decision making.

Most live poultry dealers require growers to follow prescribed animal welfare guidelines or policies, and dealers must include those policies in the poultry growing contracts if growers are to be held accountable for them. To minimize additional burden on live poultry dealers, the final rule requires the Disclosure Document to highlight only that contract information AMS finds to be most essential to grower decision making related to poultry grower contracting to ensure those provisions are transparent for growers. Under § 201.102 of the final rule, growers are provided with the Disclosure Document simultaneously with the offered poultry growing arrangement, and growers are given adequate time to review both prior to entering into or renewing contracts.

Accordingly, AMS made no changes to the proposed disclosure requirements based on this comment.

G. Governance and Certification

The proposed rule included provisions on governance and certification in §§ 201.100(f) and (g).

AMS proposed to create a new § 201.100(f) to require live poultry dealers to establish, maintain, and enforce a governance framework that is reasonably designed to ensure the accuracy and completeness of the Disclosure Document, and to ensure that live poultry dealers comply with all their obligations under the Act and its regulations. This proposed framework included audits and testing, as well as reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers. AMS also proposed to require officers of the live poultry dealer's company to certify that the company complies with the governance framework requirement and that the Disclosure Document is accurate and complete. In addition, AMS proposed to require live poultry dealers to include a signature page in the Disclosure Document containing a statement informing current and prospective growers of the potential for violations. The live poultry dealer would be required to obtain a grower's dated signature on the signature page and to retain a copy of the dated signature page for 3 years following expiration, termination, or non-renewal of the poultry growing arrangement.

In the proposed rule, AMS invited comments on whether the proposed governance structure is appropriate and sufficient for ensuring the accuracy of information provided in the Disclosure Document, whether it is appropriate for dealers, and whether there were other ways it could sufficiently ensure the completeness and accuracy of the Disclosure Document. AMS also invited comments on whether it should collect disclosure data and, if so, how it might use such data to enhance compliance and accuracy and monitor for possibly deceptive practices. AMS also proposed to require the principal executive officer or officers of the live poultry dealer's company to certify accuracy and compliance and to require dealers to obtain a poultry grower's dated signature to show receipt.

Governance Structure Adequacy for Accurate Information

Comment: Several commenters suggested USDA conduct audits, with some commenters also suggesting the audits be random or unannounced. These commenters indicated conducting audits would help ensure that live poultry dealers make accurate disclosures.

AMS response: AMS agrees that regular compliance reviews are important tools to ensure compliance with the Act and regulations thereunder. Regular AMS audits and

compliance reviews encourage live poultry dealers to put in place the oversight and internal procedures necessary to ensure compliance. Audits and compliance reviews may also enhance compliance by catching problems at an early stage, before they become violations that result in larger scale impacts. They also enhance AMS's familiarity with industry practices, which enables more effective regulatory guidance and enforcement. AMS already conducts regular reviews of live poultry dealers' compliance with regulations under the Act—as reported in AMS's Packers and Stockyards Division Annual Report—and AMS intends to incorporate compliance with this final rule into those existing regular audits.⁸³ Currently, a portion of those compliance reviews are unannounced. Therefore, AMS made no changes to the proposed rule based on these comments.

Governance Structure Burden on Dealers

Comment: Poultry industry commenters expressed concern about the necessity and costs of the proposed governance structure and its potential for creating liability issues. For instance, commenters noted that live poultry dealers already are required to meet fair dealing requirements under the Act and have incentive to provide accurate information to current or potential growers, making the proposed provisions redundant. Commenters asserted the proposed scheme would take away dealer flexibility to implement compliance programs that meet their needs. Commenters also state that the “principal executive officer or officers” of many companies are remote from day-to-day responsibilities related to the information proposed for inclusion in the Disclosure Document and are thus not in a position to certify it. Commenters suggested that AMS underestimated the costs of the proposed governance framework because it did not take into account its requirement that firms evaluate their obligations under all regulatory requirements contained in the Act rather than just those contained in the proposal. An industry association asserted the agency cannot point to an authority within the Act that allows it to impose a “burdensome and unnecessary governance and audit framework” on live poultry dealers. This commenter also argued the

proposed governance requirements are arbitrary and capricious as they reflect a fundamental lack of understanding of the management structure and governance of live poultry dealers.

AMS response: Section 401 of the Act requires every poultry dealer to “keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business.” Under the Act, the Secretary may “prescribe the manner and form in which such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business.” The proposed rule requires that poultry dealers disclose important information to growers to prevent deception. Information furnished by dealers under the rule must be accurate and complete. In order to ensure that dealers can provide such required information accurately and continuously, AMS prescribes that dealers must at minimum establish a reasonably designed underlying governance framework and processes. Without such an established framework and processes, dealers would be providing this information to growers in an inconsistent manner that would increase the likelihood of inaccuracy and incompleteness and hence increase deception.

In building on longstanding, existing requirements under the Act to maintain books and records, AMS recognizes that additional steps are necessary owing to the more complex disclosure process contemplated by this final rule and the reliance that growers will place on it in avoiding deception. To help strike the right balance between stringency in the controls necessary to achieve accuracy and the flexibility necessary to accommodate diverse business operations, AMS takes note of the experience of—and mandates governing—other Federal regulatory agencies engaged in setting requirements for companies to provide disclosures to market participants that depend upon them. It also considers similar compliance mandates, such as the certification mandates set forth under the Sarbanes-Oxley Act of 2002 (section 302) and the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 named after former Federal Reserve chairman Paul Volcker, commonly known as the Volcker Rule (section 619). In the case of those financial and market regulatory reforms, Congress and regulators saw it necessary to enhance the accountability of senior officers to achieve the goal of effective and reliable disclosure and compliance by larger companies for the benefit of smaller, more diffuse market

⁸³ U.S. Department of Agriculture, Agricultural Marketing Service—Packers and Stockyards Division. (2020). P&SP 2020 Annual Report. Retrieved from <https://www.ams.usda.gov/sites/default/files/media/PackersandStockyardsAnnualReport2020.pdf>.

participants. Large-scale financial scandals highlighted the insufficiency of relying on generic fair dealing or liability requirements or other market-driven incentives to provide accurate information. Criminal and civil price fixing in the poultry sector, including a guilty plea in 2021 by one of the largest poultry processors and civil consent decrees relating to a conspiracy to suppress wages under Section 1 of the Sherman Act, 15 U.S.C. 1, and deception under the Packers and Stockyards Act,⁸⁴ underscores the presence of similar risks in the poultry sector. The sizable imbalance of power between poultry processors and growers—including as reflected in the longstanding series of concerns around retaliation—further underscores the need for heightened accountability requirements set forth preemptively through a governance framework as provided for in this rule.⁸⁵

The role of the governance framework required by this final rule is to ensure that the company has in place specific steps that it will take to comply with this rule. The governance framework is intended to be strict enough to achieve its intended compliance goal of

ensuring accurate and reliable disclosures that are necessary for growers to understand, evaluate, and compare contracts and operational risk. Yet AMS also intended for the requirement to be flexible enough to provide a framework that works for differently situated businesses. To ensure they are flexible yet effective measures to promote accuracy in the provision of disclosures to growers, AMS included language in the rule providing that the governance framework should be “reasonably designed” to audit the required disclosures and ensure compliance with obligations under the Act. Consistent with other regulatory frameworks that ask for forward-looking statements in disclosures, such as the FTC’s Franchise Rule and the Federal securities laws, AMS also intended for forward-looking projections to be subject to less stringent standards of precision and verification than past or present factual matters. For example, the assumptions or beliefs that form reasoned bases of the projections need to be accurately disclosed, reasonable, and then reasonably used to make the projections.⁸⁶ Also consistent with the approach of other regulatory regimes with respect to internal controls, one goal of the governance provisions is to ensure that live poultry dealers adopt and follow processes that are appropriately tailored to the scope and nature of their operation.

However, AMS determined that the requirement in proposed § 201.100(f)(2) for the principal executive officer or officers to certify the governance framework and the accuracy of the Disclosure Document adequately covers the intended requirement for officers of this level to be focused on the effectiveness of the governance framework. AMS concluded that the level of detail in proposed § 201.100(f)(1)(i) about the Disclosure Document audit process was not necessary, particularly as AMS seeks to balance the need to ensure reliability of these statements with the burden on the principal executive officers with respect to particular details of the governance process. Therefore, AMS removed from the final rule the requirements proposed in § 201.100(f)(1)(i) for principal executive officers to audit, test, and review an appropriate sampling of Disclosure Documents. AMS underscores that the accuracy of the information disclosed (including the reasonableness of the projections based on the honest and accurately disclosed assumptions) and the design and

compliance with the governance framework (including the reasonableness of its design and compliance with it) remain fully enforceable under the final rule. AMS will also monitor implementation and expects to examine governance frameworks to assess their effectiveness in delivering accuracy and reliability of information to growers. In the event that information is found to be inaccurate or incomplete, AMS will investigate. Violations may result in issuance of a Notice of Violation or referral to the Attorney General of the United States for prosecution pursuant to Section 404 of the P&S Act, 7 U.S.C. 224. Growers may also bring private cases in response to inaccurate or misleading disclosures under the Act or under other laws.

Other AMS Actions To Ensure Completeness and Accuracy

Comment: State attorneys general contended the proposed audit process does not go far enough, stating that the stipulation in proposed § 201.100(f) that poultry processors establish a governance framework might present a problem by giving processors too much control over the governance structure. The State attorneys general recommended mandating either government or external auditor involvement in a company’s audit and testing program, saying this step would increase the likelihood that the program is rigorous and that the financial disclosures provide useful and accurate information to poultry growers. The commenters also suggested strengthening the language in proposed § 201.100(f) to provide clearer requirements for governance systems and increase live poultry dealer accountability to USDA and to State attorneys general for the initial years after their implementation. Poultry grower organizations urged AMS to be more specific about the procedures it will use to ensure the completeness and accuracy of the disclosure data, suggesting that the final rule should include more details on the auditing process to ensure accurate information and prevent circumvention by live poultry dealers. Commenters recommended measures such as specifying the minimum number of live poultry dealer audits USDA will conduct per year and requiring dealers to submit Disclosure Documents annually to PSD. Several commenters also mentioned other resources that might be a model for governance actions. A poultry industry trade association said AMS should simplify and clarify the requirements for a governance framework, including

⁸⁴ Plea Agreement: *U.S. v. Pilgrim’s Pride Corp.*, Feb. 23, 2021, 20-cr-00330-RM, available at <https://www.justice.gov/atr/case-document/file/1373956/download>. Consent Decree: *U.S. v. Cargill Meat Solutions, Corp., et al.* (Sanderson Farms, Inc., Wayne Farms, LLC), July 25, 2022, 1:22-cv-01821-ELH, available at <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

⁸⁵ On the other hand, as they facilitate packers and live poultry dealers’ control across the supply chain, contracts can shift certain risks onto or between producers. See, e.g., Michael Kades, “Protecting Livestock Producers and Chicken Growers,” *Washington Center for Equitable Growth* (May 5, 2022), available at <https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/>; Steven Y. Wu and James MacDonald, “Economics of Agricultural Contract Grower Protection Legislation,” *Choices*, Third Quarter, 2015: 1–6, available at <http://choicesmagazine.org/choices-magazine/theme-articles/current-issues-in-agricultural-contracts/economics-of-agricultural-contract-grower-protection-legislation>; Department of Justice, “Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward,” May 2012. Available at <https://www.justice.gov/atr/page/file/1534736/download>; Mary K. Hendrickson, et al., “The Food System: Concentration and Its Impacts,” A Special Report for Farm Family Action Alliance, May 2021, available at <https://farmaction.us/concentrationreport/>; C. Robert Taylor, “Harvested Cattle, Slaughtered Markets,” April 27, 2022, available at <https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/>; Peter Carstensen, “Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue,” 14 U. Pa. J. Bus. L. 775 (2012), available at <https://repository.law.wisc.edu/suwlaw/item/29746>.

⁸⁶ See generally 15 U.S.C. 78u–5(c); 17 CFR 229.303.

providing details on what “reasonably designed” means and on how AMS will inspect the disclosure and auditing framework.

AMS response: In establishing a governance framework, AMS sought to balance rigor in internal controls and audit systems so that growers receive reliable information with flexibility in design to accommodate compliance by live poultry dealers with different scales and types of operations. As discussed above, AMS took note of the approach of other regulatory frameworks⁸⁷ that mandate disclosures and sought to tailor approaches to compliance to the particular circumstances of the poultry markets and risks relating to these markets. A “reasonably designed” framework depends on the particular facts and circumstances of the poultry company and its growers, with larger, more complex processors adopting more comprehensive systems appropriate to the scope of their operations. AMS will evaluate the effectiveness of the governance framework in part through examining how accurate and comprehensive the disclosures are, and may also examine a dealer’s internal controls and other factors relevant to the facts and circumstances of the dealer, such as its recent track record of compliance with relevant laws and regulations.

AMS views the governance framework as an essential element of enforceability, as it will provide a framework including an external audit that will strengthen the accuracy of internal processes. The governance framework does not in any way absolve the live poultry dealer of its obligations to provide accurate disclosures to comply with the rule’s requirements, which are designed to correct deception against growers. Rather, the governance framework is intended to strengthen those obligations upfront before a disclosure failure occurs.

Governance frameworks, as a general matter, are not novel. Publicly listed companies—which several of the largest live poultry dealers are—must already maintain a range of internal controls related to their audit and disclosure functions.⁸⁸ The reasons why public-

facing companies must maintain internal control regimes to ensure the quality of their disclosures are similar to why live poultry dealers that are subject to this rule must maintain a governance framework—to ensure that the disclosures to growers are reliable.

AMS also intends to improve compliance over time through compliance reviews, industry training, and other mechanisms, including enforcement where necessary. Repeated compliance violations may necessitate proportionate agency enforcement and deterrence actions. In most circumstances, and as would be expected to be the case in the enforcement of good faith compliance with this final rule, AMS initially delivers a Notice of Violation that provides the live poultry dealer with the opportunity to engage with AMS around the nature of the violation and take compliance steps necessary to cure the violation before formal remedial actions are commenced. AMS also has provided, in this final rule and the associated form, additional detail regarding the methods for calculating certain disclosure data, which we believe will enhance completeness and accuracy of data.

AMS Collection of Disclosure Data

Comment: In response to AMS’s request for comments on whether it should collect disclosure data and how it might use such data to enhance compliance and monitor for potential deceptive practices, poultry grower groups and farmers unions expressed support for data collection. The commenters said this data would help inform producers, lenders, and regulatory authorities, given the industry’s consolidation and geographic monopolistic environments. Commenters recommended AMS require dealers to annually disclose the data they are calculating and disclosing within the Disclosure Document, especially regarding grower incomes and grower cost. The commenters also suggested that USDA dedicate staff to analyzing this data in the context of industry consolidation and fair competition to identify patterns early on that may require corrective or enforcement action.

AMS response: AMS agrees that data-driven approaches can be expected to provide valuable information for monitoring compliance with this rule and with other rules under the Act. AMS notes that it has the authority to request Disclosure Document data under existing requirements in the Act. AMS

will further consider the extent to which some Disclosure Document data may be incorporated into annual report requirements to AMS. Thus, there is no need for this rule to contain a particular requirement for submitting the data to AMS. Therefore, AMS made no changes to the rule as proposed based on these comments.

Requirement of Dealers To Certify Documents

Comment: Several poultry and meat industry trade associations urged AMS to omit the requirement for certification by an executive officer. One commenter argued that expecting this officer to be in a position to certify the required information is unreasonable because the principal officer or officers of many companies have responsibilities for many areas in addition to live poultry and contract with thousands of growers, and because much of the information produced in conjunction with a Disclosure Document would be maintained at the local poultry complex level with multiple layers of management between that level and the “principal executive.” Another commenter said a poultry grower could have recourse if an agreement made deceptive statements regardless of whether someone certifies the information and that including this requirement appears to be motivated by an effort to establish individual liability for what should be a commercial contracting issue.

AMS response: AMS refers to the response provided earlier on the governance framework and the rationale for chief executive officer (CEO) certification. In multiple circumstances, Congress and regulators saw it necessary to enhance the accountability of senior officers to achieve the goal of effective and reliable disclosure and compliance by larger companies for the benefit of smaller, more diffuse market participants. CEOs set the “tone at the top,” which is critical for fostering a culture of compliance at companies.⁸⁹ Additionally, AMS already requires signatures on required annual reports (see 9 CFR 201.97), typically by the CEO or another high-ranking official, creating a precedent for the certification as proposed. In addition, CEOs may rely on sub-certifications by relevant officers

⁸⁷ As noted above, AMS has looked to the certification mandates set forth under the Sarbanes-Oxley Act of 2002 (section 302) and the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 named after former Federal Reserve chairman Paul Volcker, commonly known as the Volcker Rule (section 619).

⁸⁸ “Management’s Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports,” SEC Release No. 33-8238 (June 5, 2003) (“SEC Final Rule 2003,” which required disclosure of material

weakness and other assessments in annual reports for publicly traded securities).

⁸⁹ See, e.g., William C. Dudley, “Enhancing Financial Stability by Improving Culture in the Financial Services Industry,” Federal Reserve Bank of New York, October 20, 2014, available at <https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a>; Group of Thirty, “Banking Conduct and Culture: A Call for Sustained and Comprehensive Reform,” 2015, available at <https://group30.org/publications/detail/166>.

or senior officials, thus reducing the burden CEOs may face while still creating the appropriate level of executive engagement to underscore the importance of compliance and address any issues early and effectively. AMS agrees that recourse exists against live poultry dealers for deceptive practices under the Act and for violations of the final rule regardless of the certification. Violations may result in issuance of a Notice of Violation or referral to the Attorney General of the United States for prosecution pursuant to Section 404 of the Act, 7 U.S.C. 224. Growers may also bring private cases in response to inaccurate or misleading disclosures or bait-and-switch tactics under the Act or under other laws. The purpose of the governance framework and certification requirement is to minimize the need to rely on legal recourse in order to obtain accurate, reliable disclosure, and thus to enhance the reliability of the information provided to growers at the outset. Therefore, AMS made no changes to the rule as proposed based on these comments.

Requirement of Growers To Sign Documents

Comment: Live poultry dealers noted that there may be instances in which obtaining a grower signature is not possible, such as grower unavailability or refusal to sign. These commenters indicated it is appropriate to have other means available for the live poultry dealer to verify delivery of the Disclosure Document to the grower in these instances.

AMS response: AMS recognizes that some growers may not sign the form verifying that they received the Disclosure Document, for reasons unrelated to whether the live poultry dealer made reasonable efforts to obtain such signature. AMS intends to place the requirement for disclosure and delivery on the live poultry dealer, and not on the grower. If the grower refuses to sign the Disclosure Document, such decision should not affect whether the live poultry dealer has fulfilled its obligations. Accordingly, in the final rule, AMS revised the delivery verification provision in § 201.102(g)(2) to allow live poultry dealers engaged in the production of broilers to obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt. The rule does not limit the mode of delivery, whether by regular mail, certified mail, registered mail, overnight mail, email, facsimile, or personal service, provided that the dealer obtains and maintains evidence that the grower or prospective grower received the Disclosure

Document in the required timeframe and that best efforts were made to obtain grower receipt. AMS expects that best efforts will include personal communications with the grower. The revised provision requires live poultry dealers engaged in the production of broilers to document and certify in their records that delivery occurred, as well as by what method the delivery took place.

H. Contract Provisions on Variables Controlled by Live Poultry Dealer

Current § 201.100(c) specifies the contents of live poultry dealer contracts with poultry growers. This subsection requires dealers to specify the duration of the contract and conditions for its termination by each of the parties, all terms relating to the poultry grower's payment, and information about a performance improvement plan for the grower, if one exists. In the proposed rule, AMS proposed to redesignate § 201.100(c) as § 201.100(i) and amend it to require dealers to specify the minimum number of placements to be delivered to the grower's farm annually in each year of the contract, as well as the minimum stocking density of each placement. In the final rule, the existing requirements at § 201.100(c) are retained for all live poultry dealers, while the minimum placement and stocking density requirements are at § 201.102(h) and apply only to live poultry dealers engaged in the production of broilers.

Utility of Proposed Requirements in Addressing Need for Transparency

Comment: Several live poultry dealers and industry groups expressed opposition to the proposed requirements to specify a minimum number of flocks annually and a minimum stocking density for each flock. These commenters contended that requiring these minimum values would make it harder to adjust supply chains for factors largely outside of the parties' control, take away dealer flexibility to adjust production plans as market conditions change, and lead to substantial costs associated with changing existing contracts to incorporate this requirement. A commenter suggested that the Disclosure Document provide tentative projections regarding flock placements rather than guaranteed minimums. Conversely, growers and grower groups expressed support for these guaranteed minimums, saying they would allow for more accurate and predictable income projections.

AMS response: AMS intends for disclosure of these guaranteed minimums to improve the competitive

environment for poultry growers by allowing growers to make decisions based on minimum flock offerings disclosed by different dealers. AMS recognizes that dealers may wish to adjust flock placements or density based on external factors, and this rule does not prevent such adjustments. The rule also does not prohibit setting guaranteed minimums that are lower than projected placements to allow for such adjustments. Indeed, should dealers wish to indicate that the guaranteed value is zero, this rule would not prohibit such a disclosure, provided that such disclosure is accurate and not misleading. The purpose of this rule is to provide the information that growers need regarding flock placements and density to enable them to make decisions regarding their farm operations and manage risks, and AMS underscores the views of growers, farm bureaus, and others that minimum flock placements and stocking density are valuable to growers. Minimum flock placements are different from tentative placements, in that they provide growers with information well in advance of the actual placements, which aligns better with longer-term obligations that farmers must make with respect to borrowing and capital investment, equipment investment, labor contracts, and other longer-term arrangements on the farm. Therefore, AMS made no changes to the rule as proposed based on these comments.

Alternative Approaches

Comment: Several non-profit organizations said that AMS should require disclosure of the maximum amount of money that could be added to or deducted from the contract's stated base price within the live poultry dealer's tournament ranking formula in addition to the guaranteed minimum placement number and stocking density of flocks, saying this information would be useful in allowing poultry growers to better predict their income based on the minimum flock placement and stocking density guarantees.

AMS response: The poultry growing arrangement will dictate maximum pay variance to the extent it exists. Because additions and deductions from base pay are generally associated with deviations from average performance, the range of payments for individual settlements can fluctuate. That is, to the extent that a minimum and maximum exists, its occurrence is rarely observed. For the purposes of projection, the disclosure of payment quintiles or mean and standard deviation provided in § 201.102(d) provides substantially more data points useful to assess payment variance

compared to maximum and minimum pay terms, as quintiles show pay broken down into five bands. Live poultry dealers will only report a mean and standard deviation if there are nine or fewer growers. This reporting will provide a measure of an expected outcome and an expected volatility around that outcome. The minimum and maximum pay terms would not give an expected outcome or volatility measure. AMS acknowledges some growers have expressed concerns about excessive pay variability. As noted above, AMS is considering rulemaking for the purpose of more direct changes to the poultry grower payment systems. That is outside of the scope of this rule. Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: A farm bureau suggested AMS conduct additional rulemaking in relation to stocking density to account for changes in target weights after birds have been placed, citing examples of poultry growers who were stocked at an appropriate density but lost significant income after adjustments in bird pick-up timing. This commenter and other farm bureaus supported grower compensation for loss of income when target weights are modified after placement.

AMS response: The issue raised by the commenters is a concern in that the growers relied on the contract terms when entering the agreement and subsequent revisions to target weights result in financial losses that presumably would not have occurred under the original terms. The remedy proposed by the commenters, however, is not within the scope of this rule, which is focused on increasing transparency in live poultry dealer communications with poultry growers. If a live poultry dealer deceives a grower through a “bait and switch” agreement as described, remedies may exist through enforcement by the USDA and DOJ, or in private actions by the grower in Federal court. AMS encourages growers to report specific instances of potential occurrences directly to AMS. Growers may also file a complaint at [farmerfairness.gov](https://www.farmerfairness.gov) or by calling 1-833-DIAL-PSD (1-833-342-3773) if they suspect a violation of the Act or any other Federal law governing fair and competitive marketing, including contract growing, of livestock and poultry. Therefore, AMS made no changes to the rule as proposed based on these comments.

Other Comments About Contract Provisions

Comment: A poultry grower group suggested AMS require live poultry dealers to provide enough flocks to allow poultry growers to pay their debts and be profitable. The commenter also suggested AMS require contracts with growers to extend to the term of the loan. Several farmers unions recommended that AMS modify the contract provisions to clearly state what recourse poultry growers have under the Act if live poultry dealers fail to meet the contract terms. A farm bureau noted that under the current contracting system, companies promise profits to entice growers into contracts that offer little or no guarantee for success or profit, and growers have limited clout to negotiate for better contract terms or treatment. This commenter explained that grower contracts are typically flock to flock with no commitments regarding future flocks, number of birds per flock, quality of birds placed, and feed delivered, and that they allow companies to cancel contracts at will. Instead, the commenter contended that contracts should last as long as the commitment the grower has with their financial institution. A poultry grower also recommended that the proposed rule require dealers to present contracts that endure for the entirety of a grower’s loan to give growers more security when deciding to invest start-up capital and to remedy issues that arise when a dealer refuses to extend a contract unless a grower makes certain modifications.

AMS response: AMS acknowledges these concerns raised by growers. As noted above, AMS is considering rulemaking for the purpose of more direct changes to the poultry grower payment systems. AMS also welcomes growers and others to contact us directly regarding these matters. Growers may file a complaint at [farmerfairness.gov](https://www.farmerfairness.gov) if they suspect a violation of the Act or any other Federal law governing fair and competitive marketing, including contract growing, of livestock and poultry. However, these items are outside the scope of this disclosure-based regime, which focuses on increasing transparency in live poultry dealer communications with poultry growers, not on requiring contracts to include specific guarantees or establishing requirements related to their duration. Therefore, AMS made no changes to the rule as proposed based on these comments.

I. Transparency Requirements for Poultry Grower Ranking Systems

AMS proposed to create a new § 201.214—Transparency in poultry grower ranking pay systems (§ 201.104—Disclosures for broiler grower ranking system payments—in this final rule) specifying the recordkeeping and disclosure requirements for live poultry dealers using a poultry grower ranking system to calculate grower payments.

Recordkeeping and Maintenance

AMS proposed in § 201.214(a) to require live poultry dealers who calculate payments under poultry grower ranking systems to produce and maintain records showing how certain inputs were distributed among participants. In proposing these recordkeeping and maintenance requirements, AMS intended to ensure that USDA or any other party with the proper legal authority can collect records for review during an investigation or legal action. In the proposed rule, AMS proposed to require dealers to retain records relating to the distribution of inputs to tournament participants for 5 years. AMS invited comments about whether this record maintenance period is appropriate. AMS also requested comments on the burdens these recordkeeping requirements create for dealers.

Comment: Groups representing poultry growers expressed support for a 5-year retention period for records, suggesting such record retention would allow for a higher degree of accountability and compliance enforcement in disputes over unfair distribution of inputs by live poultry dealers. These commenters contended burdens on dealers would be minimal, as records would be maintained electronically, and the industry already provides much of the required information to shared data collection services. A live poultry dealer argued that some information AMS proposed for dealers to provide is sensitive and proprietary, saying that, for example, grower payments may provide information about costs and live-side operations; breeder information might deal with strategic changes in breed or efforts to deal with chick health; and details about feed outages or other internal operations might reveal proprietary information that would adversely and unfairly impact the live poultry dealer’s competitive position.

AMS response: AMS agrees with the poultry grower commenters and retains 5 years as the appropriate length of time for record retention purposes for this

rule. Although most regulations under the Act provide for 2-year record retention, 9 CFR 203.4(c) allows for an extension of the record retention period when investigations or proceedings are underway. AMS is adopting a 5-year retention requirement here principally to enable PSD to enforce the disclosure requirements that provide growers with transparency into the past 5 years of revenues, which enables growers to see trends over time. To determine whether the required disclosures are accurate or not, PSD will need to be able to review at least 5 years' worth of records.

Regarding concerns about sensitive proprietary information raised by a live poultry dealer, proprietary information such as poultry genetics, poultry feed blends, trade secrets, or other proprietary information not contained in the grower contracts are not required to be disclosed and may thus remain restricted. Growers' need for relevant information with which to make informed decisions weighs heavily in favor of the disclosures specified in this final rule because they relate to the manner in which the poultry company treats growers under its poultry growing arrangements and enable broiler growers to monitor some aspects of the live poultry dealer's performance under the contracts. Moreover, the topics contemplated for disclosures to growers—such as grower compensation and policies and procedures on matters of interest to growers (sick chicks, feed complaints, sale of farm policies, etc.)—have limited proprietary value.

Accordingly, AMS made no changes to the rule as proposed based on these comments.

Placement Disclosure

AMS proposed in § 201.214(b) to require live poultry dealers to provide certain information about the flock placed with the grower within 24 hours of its placement on the grower's farm. This information would include the flock's stocking density, expressed as the number of poultry per facility square foot; the names and ratios of breeds of the flocks delivered; the ratios of male and female birds in the flock if the sex of the poultry had been determined; the breeder facility identifier; the breeder flock age; information regarding any known health impairments of the breeder flock and of the poultry delivered to the poultry grower; and what, if any, adjustments live poultry dealers will make to grower pay to reflect any of these inputs. AMS requested comments on how well the proposed requirement to supply input information at the time of placement responds to grower requests for such

information; whether the required information is useful to a grower's operation; what burdens or challenges dealers might encounter in collecting information for placement disclosures; and whether the placement disclosure requirement would affect live poultry dealers' business practices.

Comment: Farm bureaus and groups representing poultry growers supported the requirement to supply input information after placement, saying the information is critical to poultry grower performance. Several groups suggested additional systems for complaints and appeals are needed, saying poultry growers often do not have a fair way to report and resolve issues and that transparency alone does not guard against circumstances in which growers consistently receive poor-quality inputs or face repeated unfair treatment.⁹⁰

AMS response: Mandating particular systems for complaints and appeals would not be within the scope of this transparency rulemaking. However, AMS agrees that poultry growers should be aware of avenues for complaints and appeals where they exist. Consistent with AMS's experience regulating the poultry industry, commenter responses have identified circumstances where live poultry dealers commonly exercise higher levels of discretion with respect to the interaction between the dealers and the growers. In such circumstances, absent disclosures of policies and procedures that may exist, broiler growers are unable to understand and evaluate how live poultry dealers may handle those circumstances, which can and do affect growers' financial outcomes under the poultry growing arrangement. These circumstances—sick chicks and disasters, feed issues, and appeal procedures—were the subject of questions on which AMS requested comment in the proposed rule. Therefore, AMS added a new provision at § 201.102(c)(4) of the final rule

requiring live poultry dealers to disclose policies and procedures on increased layout time; sick, diseased, or high early-mortality flocks; natural disasters; weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability, as well as any appeal rights arising out of these events.

In AMS's experience fielding and investigating grower complaints, some live poultry dealers will remove sick, diseased, and high early-mortality flocks from the tournament settlement group and provide payment calculated separately. Similarly separate treatment will sometimes be made for instances of sick chicks, depopulation events, natural disaster, weather events, or other events affecting the physical infrastructure of the local complex or grower facility, as many live poultry dealers provided for during the COVID-19 pandemic or during the ongoing series of avian bird flu outbreaks.^{91 92} However, these practices are not uniform and are not necessarily provided for in written contracts.⁹³

How live poultry dealers respond to feed outages, including outage times, as well as to grower complaints relating to feed quality, formulation, or suitability, also vary widely, and commonly depend to a high degree on the approach that field agents for live poultry dealers take in their particular complex. AMS has received a range of complaints over the years relating to differential treatment between growers within complexes relating to these concerns. Live poultry dealers have indicated in the past to AMS that they provide growers the opportunity to appeal the determinations or actions of

⁹⁰ See, e.g., Campaign for Contract Agriculture, Rural Advancement Foundation International—USA, “Comment on AMS-FTPP-21-0044: Transparency in Poultry Grower Contracting and Tournaments” (received Aug. 23, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0479>; Institute for Agriculture & Trade Policy, “Comment on AMS-FTPP-21-0044: Transparency in Poultry Grower Contracting and Tournaments” (received Aug. 1, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0110>; Stone Barns Center for Food & Agriculture, “Comment on AMS-FTPP-21-0044: Transparency in Poultry Grower Contracting and Tournaments” (received Aug. 4, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0139>; Animal Welfare Institute, “Comment on AMS-FTPP-21-0044: Transparency in Poultry Grower Contracting and Tournaments” (received Aug. 1, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0109>.

⁹¹ A typical practice in such circumstances is to pay growers based on their previous five flock average to ameliorate losses. One such circumstance is detailed in “What lessons can poultry producers learn from extreme weather events?” *ThePoultrySite.com*, March 02, 2022, available at <https://www.thepoultrysite.com/articles/what-lessons-can-poultry-producers-learn-from-extreme-weather-events> (last accessed April 2023).

⁹² AMS's rule under § 201.102 (c)(3) would require dealers to disclose to growers its policies and procedures, as well as any appeal rights arising from four types of important events, including “Natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility.”

⁹³ A 2007 survey by USDA found that 17.9% of broiler contracts included specific provisions for catastrophic payments, see James MacDonald, “The Economic Organization of U.S. Broiler Production,” USDA Economic Information Bulletin 38 (June 2008).

local agents, but such availability has not been consistent and is subject to a high degree of opacity.

This rule provides up-front clarity for growers on how the live poultry dealer will deal with such circumstances. If live poultry dealers choose not to maintain such policies and procedures, growers would benefit knowing this up front during the contracting process.

However, this rule is focused on providing transparency regarding the policies and procedures that live poultry dealers may have, whether formal or in practice. Requiring additional systems for complaints and appeals was not proposed and would not be a logical outgrowth of the proposed rule. In future rulemaking, AMS may consider additional steps to address the maintenance of certain policies or procedures.

Comment: Several organizations suggested AMS require live poultry dealers to disclose input quality variables and feed discrepancies by house on each poultry grower's farm, preventing live poultry dealers from using averaging to hide variables and discrepancies on settlement sheets. The commenters said, with this addition, the placement and settlement disclosure requirements would give poultry growers more transparency in accessing information about their flocks, other inputs, and their performance in the context of their complex.

AMS response: Per-house disclosure would represent a substantial increase in recordkeeping burden. In addition, this disclosure would likely provide only a minor benefit, as metrics relating to payment are required to be provided to poultry growers on a farm-wide basis, and facility-based input disclosures are thus likely to create confusion among growers. Accordingly, AMS is not requiring disclosure at the house level.

Comment: Farmers unions and groups representing poultry growers expressed concern about variance in feed delivered to grower farms. These commenters urged AMS to require live poultry dealers to disclose information about the quantity and type of feed delivered throughout the flock's growout. Commenters said live poultry dealer errors in the type or amount of feed delivered, even with no feed disruption, can have significant ramifications for flock performance.

AMS response: As discussed above, AMS recognizes the need to provide transparency to address risks of deception in circumstances where dealer discretion, opacity, and other information asymmetries are present in the poultry growing arrangement. As highlighted by the comments, growers

have repeatedly expressed concerns regarding feed quality and type, as well as delivery and disruption thereof.

Section 201.102(c)(4)(v) and (vi) of the final rule requires disclosure of dealer policies and procedures relating to feed outages, including outage times, and grower complaints about feed quality, formulation, or suitability. Required disclosures also include policies and procedures around any appeals processes on such matters.

AMS considered an option to require live poultry dealers to disclose the feed mix, or recipe, to growers, but determined this option is not appropriate because the feed mix varies at different stages of the growout and it is a closely protected formula, treated as proprietary information by live poultry dealers. Also, AMS determined that providing additional disclosures about feed delivered throughout a flock's growout would involve overwhelming complexity, particularly due to the dynamic nature of feed contents and quantities within a given growout period. Moreover, these disclosures would have limited usefulness.

AMS acknowledges these commenters' concerns about transparency and responsiveness regarding feed quality and delivery issues and that particular instances of concern may arise but concludes that the potential benefits of the requested disclosures would not justify the costs.

Ongoing disclosure of the actual feed mix and delivery, as noted above however, may be too burdensome given the proprietary and fluid set of practices that live poultry dealers use in providing feed. It may also be overbroad, as a focus on policies and procedures will provide information that growers need to better manage the specific risks they encounter, while providing greater flexibility for live poultry dealers to develop the systems that work best for their company and their growers. AMS will continue to monitor these areas and expects to use the additional transparency provided by the disclosures to develop more tailored educational, outreach, or regulatory responses.

Comment: Several poultry industry representatives requested that AMS clarify what constitutes a health impairment requiring disclosure. A commenter said it is unclear whether AMS intended the provision requiring disclosure of health impairments to encompass impairments other than recognized and diagnosed poultry diseases, while another said the current proposal is vague enough to leave significant room for legal disputes over whether a condition affected a grower's

compensation. Several animal welfare groups said AMS should strengthen the disclosure requirements related to health issues. A commenter said integrators should have to disclose known health impairments at least 24 hours before the flock is placed with the grower, rather than within 24 hours of placement, because earlier notice would give the grower more time to prepare and would ensure a fairer marketplace. This commenter also suggested requiring integrators to track disease and to inform other poultry growers with birds from the same facility of problems with birds from a particular breeding facility or hatchery, so the entire affected community of poultry growers will be better prepared for disease outbreaks. Other commenters suggested that AMS require additional health-related disclosures, including any known health issues present in the flock being delivered, such as infections, and any past veterinary care rendered to the chicks, saying these extra disclosures would better allow them to provide suitable veterinary care and may lead to better growth outcomes and fewer deaths.

AMS response: AMS concluded that disclosure of known health impairments is the appropriate standard, and "health impairments" as generally understood provides an appropriate context for classification. AMS does not believe it is appropriate to limit the standard, as flock health impairments affect certain flocks, breeds, and growouts differently. Health impairments may affect growout management, performance, pay, or other relevant factors. Often, specific input deliveries may not be decided 24 hours in advance, as logistics, weather, transportation, and other factors may influence distribution. Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: Multiple farmers unions and groups representing poultry growers said live poultry dealers should disclose a breeder flock identifier in addition to a breeder facility identifier. A commenter said growers could use this data to support an appeal if they are punished for poor growth after receiving a diseased or lower-quality flock and to obtain the breeder's flock-breeding methods.

AMS response: AMS acknowledges the commenters' interest in the disclosure of breeder flock identifiers. However, it concluded that this additional information is not needed because individual breeder facilities are generally populated and depopulated all in and all out. Breeder facility identifiers would thus reflect the same information in breeder flock identifiers.

Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: Numerous non-profit organizations requested that AMS require live poultry dealers to provide historical breed performance and best management practice recommendations disaggregated according to important factors, such as breeder flock age and flock pickup date, and to keep this data archived for 10 years.

AMS response: Virtually all live poultry dealers provide manuals to growers outlining best management practices. In addition, historical performance is currently publicly available on breeder internet sites. Given the widespread availability of this information, AMS made no changes to the rule as proposed based on these comments. AMS may reevaluate in the event that industry practices shift away from voluntarily providing this information.

Comment: Several non-profit organizations said AMS should require live poultry dealers to disclose data about the optimal pickup age for a flock's breed on flock placement sheets. Some of these commenters also suggested AMS should require integrators to disclose the average feed conversion efficiency of flocks hatched from breeder flocks of that age in addition to requiring disclosure of breeder flock age on delivery. The commenters said this requirement would allow poultry growers to compare their own performance to a more accurate flock efficiency performance expectation.

AMS response: Weight, not number of days, is the target for bird harvest and is generally included in most settlements. As target weight is readily known to poultry growers, along with the average number of days to achieve the target, it is unnecessary to require this readily known information in the Disclosure Document. Accordingly, AMS is not requiring live poultry dealers to provide information related to the optimal pickup age for a flock's breed. While AMS is considering action targeting live poultry dealers who allow birds to stay in houses beyond their target weight, that falls outside the scope of this disclosure-based regime. AMS further notes the commenters' views regarding the value of benchmarking performance but is not prepared at this time to adopt such a requirement in this rule. AMS also notes that USDA makes available a range of resources, in particular Extension expertise, to assist growers in better analyzing their performance utilizing different inputs, and notes the inclusion

of contact information for USDA resources in the final rule.⁹⁴ AMS will monitor implementation and may examine additional tools for assisting growers in improving their performance.

Comment: Commenters representing the poultry industry said the information to be required on flock placement would burden live poultry dealers and is unnecessary because of a lack of evidence showing it would help poultry growers in managing their farms. Commenters also said providing stocking density information is not necessary because live poultry dealers will place flocks at the optimal density for the best return.

AMS response: Broiler growers, farm bureaus, and many other commenters widely supported flock placement disclosures because these disclosures assist growers in planning and operating their farms, managing their financial risks, and negotiating with live poultry dealers over better contractual execution, among other reasons. AMS has concluded that, for live poultry dealers engaging in the production of broilers, the burden of providing the flock placement disclosures, including disclosures on stocking density, would be minimal and the benefit to broiler growers substantially outweighs the impact to dealers. Further, dealer decisions on stocking density may also be influenced by other factors beyond optimal returns to growers, such as responses to market changes, which mitigates in favor of providing additional transparency by live poultry dealers, the entities responsible for making those decisions.

Comment: Several poultry and meat trade associations said live poultry dealers sourcing birds from a third party may not have access to some data the proposed rule would require them to disclose with placement, such as breeder flock age. Commenters also mentioned that third-party breeder operations might consider sourcing information to be proprietary or subject to a nondisclosure agreement, suggesting AMS address how live poultry dealers should make placement disclosures when they do not have required information or when law or contract prohibits them from providing it.

⁹⁴ See, e.g., Jennifer Rhodes, Extension Educator, et al., University of Maryland, "Broiler Product Management for Potential and Existing Grower," Table 1 and 2, available at Poultry Budgets, Enterprise Budgets, Agricultural and Resource Economics, North Carolina State University Extension, <https://cals.ncsu.edu/are-extension/business-planning-and-operations/enterprise-budgets/poultry-budgets/> (last accessed April 2023).

AMS response: Based on AMS experience, under most poultry growing arrangement contracts, live poultry dealers are responsible for providing the birds to the growers. Live poultry dealers may also be expected to already have State contract law obligations relating to their performance under the contract. Based on AMS's experience, dealers sourcing chicks from third parties already monitor the inputs provided by those parties. Growers need to know the information being required in this rule, such as the breeder flock age and known health impairments of the breeder flock, and the live poultry dealer, not the grower, is best positioned—indeed, is the only party positioned—to require, via contract, that the third-party provide the information necessary to comply with the rule. Nor are the obligations especially burdensome. For example, regarding health impairments, AMS is requiring only disclosure of "known health impairments" of the breeder flock or of the poultry delivered, and the live poultry dealer has a range of ways to ask the third-party input supplier to provide that information, including contractual guarantees, indemnifications, attestations, or other means all of which are already commonly used in livestock transactions to ensure animal health and food safety.

Whether the live poultry dealer is sourcing the inputs internally or via a contractual arrangement with a third party, it is ultimately the live poultry dealer that is providing the inputs to the grower under the poultry growing arrangement and is responsible for not engaging in a deceptive practice. AMS has discussed in other parts of this final rule why the information being requested about the inputs is not confidential or proprietary. Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: Several industry groups opposed the requirement proposed in § 201.214(b)(7) to disclose any adjustments the live poultry dealer intends to make due to the other factors covered in placement disclosures. One commenter said live poultry dealers would not be able to disclose adjustments at the beginning of a flock because it is impossible to predict the financial impact of factors that may affect live birds in advance. This commenter said it is more appropriate for live poultry dealers to make pay adjustments after a flock settles based on comparisons with historical data.

AMS response: Some live poultry dealers may be unable to predict the exact financial impact of those factors in any specific flock delivery to a grower,

but these are contracted-for payments that should be legitimately based upon factors known to both parties. Otherwise, the live poultry dealer may deceptively manipulate the contract payments based on withheld information because the live poultry dealer controls all the tools used to calculate payments. Of course, live poultry dealers may be able to predict some of the financial consequences of a contract, or the live poultry dealer may want to create additional grower incentives specific to one flock that may take the form of a pay adjustment. In AMS's experience reviewing contracts, payment formulas can be complicated. However, AMS included the requirement to disclose any adjustments that may be made based on the factor in the settlement disclosure to help growers to recognize and manage risks, and to prevent adjustments that were opaque or pose risks of deception to the grower.

The rule does not require any adjustments, and only requires live poultry dealers to *disclose* adjustments that can be known prior to placement and that the live poultry dealer could apply, for example a particular adjustment formula, process, or approach. The specific final amount of adjustment need not be predicted, but if the live poultry dealer knows that the inputs will likely result in payment being adjusted upward or downward in an unknown amount, and particularly if it knows how or under what conditions that will occur, it should disclose that information to a grower to allow the grower to better manage their growout strategies; plan for the payment they are expecting to receive upon settlement; and avoid being confused, misled, or otherwise deceived about how their performance under the contract will be compensated. Live poultry dealers remain free to make the actual contractually agreed upon adjustments after settlement based on flock performance. Therefore, AMS made no changes to the rule as proposed based on these comments.

Comment: Groups representing poultry growers supported the proposed placement disclosure requirements. These commenters said the requirements would ensure more transparency by integrators and help growers in areas such as flock management and financial planning. A live poultry dealer said much of the proposed placement disclosure information pertains to factors that do not vary significantly from grower to grower, saying any natural variation in inputs is expected to even out over time and providing the information would

place undue emphasis on single inputs rather than factors such as the grower's skill, dedication, and hard work.

AMS response: Input variation has not been the subject of external study because of the proprietary nature of the data available, but it has been the source of repeated concerns raised by growers for many years.⁹⁵ The persistence of these grower complaints suggests that making this information available to growers to measure, monitor, and adjust as they may see fit is worth the modest cost to live poultry dealers because it will reduce the opacity and risks of deception with respect to their payments. With that additional transparency, growers will be able to determine the relative emphasis to be placed on single inputs versus other factors, such as skill, dedication, or hard work, which may help them adjust their growout practices to match. To the extent variations do even out over time, growers will be in a better position to recognize those trends and make their own determinations on the importance of inputs versus other factors, thanks to this rule's enhancement of transparency tools. If input factors do not in fact vary significantly from grower to grower, the burden of disclosure by the live poultry dealer remains relatively light.

Comment: Industry groups contended the placement disclosure requirements would impose a significant administrative burden, such as requiring capital investments to overhaul their software to provide the required data. One commenter said the discussion of input distributions in the preamble to the proposed rule relied on anecdotal reports rather than actual data or evidence, making the proposed provisions arbitrary and capricious.

AMS response: AMS has conducted an extensive cost-benefit analysis for this rule, available under the regulatory analyses section below, and believes that the burden of compliance is relatively modest. AMS investigations and reviews of information sharing services and consultations with experts from the Agricultural Research Service, in addition to AMS's own subject matter experts, supervisors, and auditors with many years of experience in working with growers and auditing live poultry dealers all indicated that most live poultry dealers maintain this information already, and indeed report much of it to information sharing services.

⁹⁵ See, e.g., Transcript, United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshop, May 21, 2010, Normal, Alabama; Leonard, Christopher, *The Meat Racket* (2014).

AMS acknowledges that external analyses of poultry inputs generally lack a ranking system context, but the proprietary nature of the relevant data makes quantitative academic and other external analysis nearly impossible. Even with the lack of context, peer reviewed research supports the supposition that input differentiation can affect biological outcomes.⁹⁶ AMS is relying on the longstanding concerns of growers and its own experience as the industry's regulator to warrant placement disclosure requirements. Accordingly, AMS made no changes to the proposed rule based on these comments.

Settlement Document Information on Tournament Group

In the proposed rule, AMS proposed to retain existing regulatory requirements in § 201.100(f) to provide settlement sheets but to move the provision to § 201.214(c). It also proposed to require live poultry dealers employing poultry grower ranking systems to provide every grower within the system with settlement documents that show certain information about each grower's ranking within the system, housing specifications, and the inputs each poultry grower received. AMS invited comments on how well the requirement to provide input distribution information, along with settlement payment information, for all members of the tournament group responds to grower requests to improve transparency, address information asymmetry, and reduce the chance of deception in the tournament payment system.

⁹⁶ E. David Peebles, et al., "Effects of Breeder Age and Dietary Fat on Subsequent Broiler Performance. 1. Growth, Mortality, and Feed Conversion." *Poultry Science* 78.4 (1999): 505–51; J.B. O'Neill, "Relationship of Chick Size to Egg Size and its Effect Upon Growth and Mortality." *Poultry Science* 29 (1950):774; C.L. Wyatt, W.D. Weaver Jr, and W. L. Beane, "Influence of Egg Size, Eggshell Quality, and Posthatch Holding Time on Broiler Performance." *Poultry Science* 64.11 (1985): 2049–2055; R.A. Guill and K.W. Washburn, "Genetic Changes in Efficiency of Feed Utilization of Chicks Maintaining Body Weight Constant." *Poultry Science* 53.3 (1974): 1146–1154; R.G. Wells, and C. G. Belyawin, "Egg Quality-Current Problems and Recent Advances." *Poultry Science Symposium Series*. No. 636.513 W4. 1987(citing D. Spackman, "The Effects of Disease on Egg Quality"); W.A. Dozier III, et al., "Effects of Early Skip-A-Day Feed Removal on Broiler Live Performance and Carcass Yield." *Journal of Applied Poultry Research* 11.3 (2002): 297–303. AMS notes additionally that research in this and related areas has limitations. It is older and results are mixed. AMS is concerned that publically available research has stagnated, despite the introduction of new breed strains in the intervening years. Because integrators now own the genetics companies, AMS has additional concerns that research has, in effect, been privatized, creating information asymmetries.

Comment: Groups representing poultry growers, in general, expressed support for the proposed settlement disclosure requirements. Commenters noted these disclosures would help growers determine if they are being treated fairly compared to other growers in their complex and enable them to establish cases based on unfair treatment or retaliation claims. Several commenters advocated for further rulemaking to reform the tournament system, saying the proposed settlement sheet disclosures do not sufficiently mitigate several anticompetitive factors and unfair practices. Commenters said the current rule does not account for factors such as tournament group composition effects and recommended that the disclosure requirements for settlements apply to any poultry contract in which the integrator-controlled factors may impact the baseline or bonus income of the contract grower. These commenters suggested AMS require live poultry dealers to disclose input quality variables and feed discrepancies by house on each grower's farm to reflect circumstances in which flock drop-off or pick-up for a grower is split over a weekend, introducing variables in bird performance. AMS received few comments that specifically opposed making available to growers information about tournament grouping and composition. AMS has summarized above and below any comments that oppose proposed required disclosures, e.g., that the disclosures would unnecessarily increase the dealer's costs.

AMS response: AMS acknowledges the commenters' interest in input quality variables and feed discrepancies, as well as the timing of flock drop-off or pick-up. In response to comments, and based on AMS's experience regulating the poultry industry, AMS has identified circumstances where live poultry dealers commonly exercise higher levels of discretion. In these circumstances, broiler growers are unable to evaluate how live poultry dealers may handle those circumstances and, as such, are exposed to risks of deception with respect to the operation of their contract and payment. Commenters asked for specific disclosures regarding sick, diseased, or high early mortality flocks; natural disasters; depopulation events; feed outages; and feed quality, formulation, and suitability.⁹⁷

In this final rule, AMS requires additional disclosure regarding policies and procedures relating to layout time; sick, diseased, and high early-mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or grower facility; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages, including outage times; and grower complaints relating to feed quality, formulation, or suitability. AMS believes that focusing on disclosure of the live poultry dealer's policies and procedures—if any—in these areas will provide the appropriate flexibility for live poultry dealers to develop systems that work best for their company and their growers, while also providing growers with the additional information they may need to better manage risks relating to those matters.

AMS determined that specific disclosures would not be suitable to addressing these risks because the burden on live poultry dealers would be great, and the benefit of these disclosures would be insufficient. In part, many of these situations occur from time to time and depend upon discretion by the live poultry dealer and its field agents. Because ongoing disclosure would likely be insufficient to provide growers the advance notice of how live poultry dealers intend to handle such circumstances, AMS has determined that disclosure of policies and procedures is the most suitable and effective way to provide growers with transparency regarding these situations and risks arising from them. Such an approach is consistent with the approach to disclosure that AMS is taking, and proposed to take, in other areas that may depend on a degree of circumstance-specific discretion—for example, sale-of-farm policies.

AMS will continue to monitor these areas and expects to use the additional transparency provided by the disclosures to develop more tailored educational, outreach, or regulatory responses. AMS also notes the commenters' interest in additional

rulemaking with respect to fairness concerns relating to tournament systems and highlights that it has put forth an Advance Notice of Proposed Rulemaking focused on those issues.⁹⁸

Comment: AMS requested comment on whether the proposed requirement in § 201.214(c) (§ 201.104(c)(1) in the final rule) to include the housing specification for each poultry grower ranking system participant on grouping or ranking sheets responds to grower requests to improve transparency, address information asymmetry, and reduce the chance of deception in the tournament payment system. Groups representing poultry growers expressed support for this proposed requirement, saying it would improve growers' ability to assess the relative performance and income gains that more modern infrastructure may provide.

AMS response: In addition to helping growers assess the value of making housing upgrades, dealers may benefit from making such disclosures when they can demonstrate for growers a correlation between more advanced housing tiers and improved flock performance, inducing more grower advancement. Accordingly, we have retained the requirement in § 201.104(c) to provide these disclosures.

Comment: Several commenters said the proposed settlement disclosures would help poultry growers evaluate or improve their performance, make informed business decisions, or mitigate risks. For example, these commenters said the information would help growers to better understand their placement in the tournament and could change industry bargaining dynamics. However, many commenters said the disclosures do not go far enough in giving poultry growers meaningful tools to address fundamental power imbalances, hampering poultry growers' ability to meaningfully negotiate contracts with live poultry dealers and minimize dealer opportunities to manipulate rankings within a group.

AMS response: AMS has designed this final rule to enhance transparency for broiler chicken growers because of the deception that arises from well-documented information asymmetries and attendant risks in the design and operation of poultry grower ranking systems. Transparency, as provided by this rule, will prevent deception, encourage live poultry dealers to offer

⁹⁷ See, e.g., Animal Welfare Institute, "Comment on AMS–FTPP–21–0044: Transparency in Poultry Grower Contracting and Tournaments" (received Aug. 1, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0109>; Campaign for Contract Agriculture, Rural

Advancement Foundation International—USA, "Comment on AMS–FTPP–21–0044: Transparency in Poultry Grower Contracting and Tournaments" (received Aug. 23, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0479>; Institute for Agriculture & Trade Policy, "Comment on AMS–FTPP–21–0044: Transparency in Poultry Grower Contracting and Tournaments" (received Aug. 1, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0110>; Stone Barns Center for Food & Agriculture, "Comment on AMS–FTPP–21–0044: Transparency in Poultry Grower Contracting and Tournaments" (received Aug. 4, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0139>.

⁹⁸ Agricultural Marketing Service, "Poultry Growing Tournament Systems: Fairness and Related Concerns," Request for Comments (87 FR 34814, June 8, 2022), available at <https://www.federalregister.gov/documents/2022/06/08/2022-11998/poultry-growing-tournament-systems-fairness-and-related-concerns>.

better contracts, and enhance growers' ability to understand contracts and the grower-dealer relationship.

Transparency will also prevent live poultry dealers from engaging in certain forms of deception in the operation of those contracts. AMS also expects increased transparency to function as a deterrent by exposing abusive conduct by market participants. Transparency also creates reputational disincentives to such actions as well. Disclosure regimes in other areas, such as the FTC's Franchise Rule, as well as the long-established operation of the Federal securities laws, show that disclosure is a cost-effective tool to prevent deception, improve trust among market participants, and mitigate market failure and the potential for market failure. Disclosure laws are common in financial, housing, and other markets where the products are complex, the financial risks are significant, and one party has significantly more information than the other.⁹⁹ Additionally, AMS's experience in the poultry sector and agriculture in general shows that producers value transparency as a tool for enhancing their ability to contract and manage risks.

AMS recognizes, however, that transparency may not be sufficient to address all the risks that growers may face, in part because transparency does not inherently prohibit harmful practices that growers may be unable to avoid owing to lack of competition (*i.e.*, lack of other options for poultry dealers with whom to do business), deception, or other reasons.¹⁰⁰ Accordingly, AMS has proposed other rules seeking to prevent retaliation for joining an association or forming a cooperative, among other protections against discrimination, retaliation, and deception. AMS has also published an Advance Notice of Proposed Rulemaking regarding additional rules to address fairness concerns relating to tournament systems.¹⁰¹ AMS is committed to continuing to improve the integrity, fairness, and competitiveness of the poultry growing marketplace

through additional rules and through the enforcement of existing laws and regulations, as well as through a range of other strategies, such as \$1 billion in direct investments in expanded meat and poultry processing capacity that USDA is implementing to promote competition across agriculture.¹⁰²

Comment: AMS requested comment on whether there is other information or another way of presenting the proposed settlement information that would be better. Several groups representing poultry growers said the proposed disclosure requirements are helpful but incomplete and recommended requiring live poultry dealers to disclose other factors that impact grower settlement performance. Commenters suggested AMS require dealers to document and disclose the quality of the feed provided to the growers in the settlement group because feed quality can significantly affect the ranking if a live poultry dealer provides lower quality feed to one poultry grower within a settlement group. Commenters urged AMS to require integrators to disclose the average feed conversion efficiency of flocks hatched from breeder flocks of that age to enable growers to compare their own performance to a more accurate flock efficiency performance expectation. Commenters also suggested that AMS require live poultry dealers to disclose the flock age at pickup because when integrators pick up flocks before or after the ideal pick-up time range, growers are penalized due to the flock's less optimal weight or feed conversion efficiency metrics. Commenters also recommended disclosure of all appeals, summaries of their resolution, and any extended delay during poultry delivery or collection that results in the remaining flock members losing body weight, being placed back on feed, or being delivered or collected with a different payment settlement group at a later date.¹⁰³

Industry groups expressed concerns regarding proposed requirements to

report feed disruptions, suggesting AMS clarify what constitutes a disruption. These commenters noted the proposed rule does not address situations, such as outages caused by natural disasters or other events out of either party's control that may affect all participants in the settlement pool. An industry group also said omitting the requirement to disclose breeder flock information would reduce costs and administrative burden on live poultry dealers and reduce confusion among poultry growers. This commenter also noted live poultry dealers already provide the information used to calculate a grower's payment under the contract; therefore, the additional information is unnecessary and would be confusing to growers. The commenter also asked AMS to clarify how to address situations in which the live poultry dealer has determined the sex of the birds for some, but not all, growers in the settlement pool.

AMS response: Paragraphs 201.102(c)(4)(v) and (vi) of the final rule require disclosure of integrator policies and procedures relating to feed outages, including outage times, and grower complaints about feed quality, formulation, or suitability. AMS intends these provisions to be broadly construed to include situations caused by natural disasters as well as other miscellaneous situations. While AMS acknowledges the requests to omit breeder flock information, it recognizes that many growers have expressed concern about and need for this information. Growers will benefit from its inclusion in the required settlement disclosures because academic research indicates that different breeder flocks may perform differently.¹⁰⁴ This is particularly important information to growers settled under a tournament payment system, where small differences in outcomes can have an outsized effect on grower payments because growers are compared on a relative rather than objective basis. Integrators are in possession of this information because they acquire and deliver the chicks to growers, and engage in extensive research and development to improve performance of the breeds. Absent the provision of this information, growers are subject to deception because their ability to perform under the tournament may be adversely affected by differences in these inputs between growers and by the inability to know and adjust to those differences at the earliest possible

⁹⁹ D.W. Carlton and J.M. Perloff, *Modern Industrial Organization* (1994): 624. Paula J. Dalley, "The Use and Misuse of Disclosure as a Regulatory System," 34 *Fla. St. U.L. Rev.* 1121–22 (2007). <https://ir.law.fsu.edu/lr/vol34/iss4/2>.

¹⁰⁰ Federal Trade Commission Chair Lina M. Khan, "Poultry Growing Tournament Systems: Fairness and Related Concerns" (received Sept. 1, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-22-0046-0143>.

¹⁰¹ Agricultural Marketing Service, "Poultry Growing Tournament Systems: Fairness and Related Concerns," Request for Comments (87 FR 34814, June 8, 2022), available at <https://www.federalregister.gov/documents/2022/06/08/2022-11998/poultry-growing-tournament-systems-fairness-and-related-concerns>.

¹⁰² U.S. Department of Agriculture, Agricultural Marketing Service. (May 2022). *Agricultural Competition: A Plan in Support of Fair and Competitive Markets: USDA'S REPORT TO THE WHITE HOUSE COMPETITION COUNCIL*. Retrieved from Agricultural Competition: A Plan in Support of Fair and Competitive Markets (usda.gov).

¹⁰³ Campaign for Contract Agriculture, Rural Advancement Foundation International—USA, "Comment on AMS-FTPP-21-0044: Transparency in Poultry Grower Contracting and Tournaments" (received Aug. 4, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0479>, and Virginia Farm Bureau Federation, "VFBF Comments—AMS Poultry Disclosure Proposed Rule" (received Aug. 5, 2022), available at <https://www.regulations.gov/comment/AMS-FTPP-21-0044-0160>.

¹⁰⁴ E. David Peebles, *et al.* "Effects of Breeder Age and Dietary Fat on Subsequent Broiler Performance. 1. Growth, Mortality, and Feed Conversion." *Poultry Science* 78.4 (1999): 505–511.

moment, to the extent such adjustment is possible. Therefore, AMS is retaining this requirement in the final rule.

Paragraph 201.104(b)(3) requires that “[i]f the live poultry dealer has determined the sex of the birds, all ratios of male and female poultry delivered” must be disclosed. AMS does not require that the live poultry dealer disclose the sex of all birds delivered because AMS understands that industry practice varies on sexing, and not all birds are sexed before delivery. However, AMS maintains the requirement that where a live poultry dealer does engage in some collection of information regarding the sex of the birds, that the integrator must disclose that information to growers as it is helpful to growers.

AMS would accept the live poultry dealer using ratios and percentages to describe bird sex in relation to a flock. AMS did not provide further clarification beyond this explication because of the potential variation in practice, and because AMS believes that the language “all ratios” provides an appropriately inclusive coverage of the information that the live poultry dealer may collect, and which should be disclosed to growers in those circumstances. AMS will be making available guidance documents during the implementation phase to answer live poultry dealer and grower questions, and intends to implement the rule in a careful, iterative manner.

AMS acknowledges commenters’ concerns that flock pick-up timing (and hence age) may affect grower outcomes. Flock age is often disclosed under existing § 201.100(f) to the extent that daily averages are used in formulas to calculate payments. To appropriately balance the burdens on live poultry dealers, AMS is not adopting specific disclosures, beyond those that exist in § 201.100(f) on that topic at this time.

Comment: AMS requested information about obstacles to sharing or discussing settlement information with others and on whether the right to discuss the terms of poultry growing arrangement offers should apply to these disclosures. Groups representing poultry growers said they appreciate the proposed rule’s extension of the existing right to discuss the terms of growing arrangement offers with other growers from the same dealer to include the right to discuss the Disclosure Document. However, they believe growers should also have the right to discuss the settlement sheet disclosures proposed under § 201.214, and that AMS should clarify that the current right to discuss the poultry growing arrangement encompasses this right.

AMS response: The settlement sheet disclosures in § 201.104 will be provided to the entire pool of growers settled during the same time period. Only the growers’ personal identifying information may be excluded from the settlement sheet documents, as the rule specifically provides that the disclosures need not show the names of other growers. AMS is not aware of existing restrictions on settlement information. New restrictions related to settlement information will be reviewed by AMS for compliance under the Act, but AMS has not changed the rule based on this comment.

Comment: AMS invited comments on whether a grower being completely out of feed for 12 hours is an appropriate length of disruption to trigger reporting of a feed disruption or whether it should instead require a shorter time, such as 6 hours. Multiple farm bureau and poultry group commenters indicated that 6 hours rather than 12 hours would be an appropriate length of time to trigger reporting. The commenters stated that being out of feed for 6 hours drops birds’ feed conversion efficiency and would affect the grower on the settlement sheet. The commenters stated this length would allow growers to establish a pattern, as growers would have records that let them take action to correct the problem if they are out of feed multiple times for multiple hours during consecutive growout periods.

A poultry industry association commented that the turkey industry has almost no feed disruptions lasting more than 12 hours, except in cases of natural disaster. The commenter noted in the rare instances when a disruption might extend to that length of time, addressing it depends on timely and accurate reporting from the turkey grower and that turkey integrators have no control over the circumstances when growers do not report feed disruptions in a timely manner.

AMS response: AMS notes that research¹⁰⁵ has shown that commercial broilers deprived of feed for more than 12 hours develop hemorrhages in their intestines that curtail usual growth patterns and lessen the efficiency of conversion of feed into meat. AMS also noted feed withdrawal for 6 hours was not found to be statistically significant.¹⁰⁶ Accordingly, in the final rule, AMS retains the 12-hour threshold for reporting feed disruptions. However, AMS will monitor implementation and

encourages growers to report specific instances or patterns of concern to AMS.

Disclosure of Grower and Breeder Identity Information

Section 201.214(b)(4) of the proposed rule would require dealers to include the breeder facility identifier for the flock in the information they provide to growers within 24 hours of flock delivery. Under proposed § 201.214(c)(1), dealers, when providing grouping or ranking sheets to growers at time of settlement, would not have to show the names of other growers, but would be required to show their housing specification and the actual figures upon which the grouping or ranking is based for each grower grouped or ranked during the specified period. AMS proposed in § 201.214(c)(2)(iv) to require the grouping or ranking sheets provided to growers to disclose the breeder facility identifiers for each poultry grower ranking participant. However, AMS did not propose to require dealers to disclose the names of breeder farms. AMS invited comments on whether it should reevaluate this position. In addition, live poultry dealers currently are not required to disclose the names of all competing growers on ranking sheets. AMS did not propose to change this requirement but asked whether it should require dealers to disclose the names of all competing growers in settlement documents.

Comment: Several groups representing poultry growers urged AMS to require integrators to provide the names of breeding facilities, saying extreme vertical integration means that many breeding facilities are owned by the integrator delivering chicks to a grower and if growers knew the actual names of breeders, it would be easier for them to independently assess relevant variables or issues rather than relying on the integrator’s representations. However, other groups representing poultry growers did not support a requirement for live poultry dealers to disclose farm names.

AMS response: The purpose of the rule is to provide the grower with reliable information needed to make decisions in the management of their farm. Consistent designation of breeder facility identifiers is sufficient for the purposes of enabling growers to consistently understand and track the input. AMS makes no changes based on the comment.

Comment: Farm bureaus and poultry grower groups said it is not necessary for AMS to require live poultry dealers to disclose the names of all competing growers in settlement documents. These

¹⁰⁵ K.L. Thompson, “Optimizing Feed Withdrawal Programs,” Purdue Extension (2008).

¹⁰⁶ S.F. Bilgili and J.B. Hess, “Tensile strength of broiler intestines as influenced by age and feed withdrawal.” *J. Appl. Poultry Res.* 6 (1997): 279–283.

commenters opposed disclosure of individual grower names and said such disclosure would be a breach of privacy.

AMS response: AMS agrees grower privacy is important and should be appropriately protected. The names of competing growers does not provide useful information to growers to assess the role that differences in inputs played in their settlement or, from that, in the expected future profitability of their operations because the purpose of the disclosure is to prevent deception against the grower and to enable the grower to perform better. The appropriate focus then is on the substantive differences in the inputs, or the housing specifications, which requires disclosure of those items among different settlement participants but can be done using consistent identifiers other than actual grower names. To affirm that position, AMS retained the language of the proposed rule, which provided that the names of the growers need not be provided in the settlement document, consistent with current practice under existing disclosure requirements for settlement. AMS is not adopting a prohibition on live poultry dealers using the names of growers as that was not proposed. Further, because the goal of the rule is disclosure, rather than prohibitions against disclosure, such a prohibition is outside of the scope of this rule.

J. Effective Date

Comment: Live poultry dealers and industry groups noted AMS has publicly indicated that it is considering changes to multiple regulations under the Act and said that AMS should share all proposed rules specific to the tournament system at one time to allow stakeholders to comment on the proposed changes in their entirety. Commenters further urged AMS not to take an incremental approach to updating the regulations and asserted that such an approach would create challenges for poultry growers and dealers, such as increasing compliance costs, confusion, uncertainty, and frustration. In addition, these commenters recommended that AMS provide one effective date for all regulatory changes under the Act. One commenter recommended that the effective date for this rule be delayed for five years to give live poultry dealers time to build five-year records for disclosure and to develop the necessary systems for producing required disclosures. Another commenter suggested that AMS conduct outreach to explain to producers and food companies the regulatory changes and

how they will be implemented and enforced.

AMS response: Our approach has been to address the regulatory needs of the poultry industry systematically and as swiftly as possible. All broiler growers can benefit immediately from the greater transparency offered by this final rule. AMS does not want to postpone implementing this regulation, which makes available vital information growers need when deciding whether to incur capital expenses and engage in broiler production. Nor do we want to delay provision of useful input information to broiler growers in tournaments, who can use that information immediately to make production management decisions.

Based on AMS's experience with the industry, we believe live poultry dealers have ready access to the historical information they are required to provide in the Disclosure Documents. AMS agrees with commenters that the final rule should provide sufficient time to implement any changes it requires. Therefore, the effective date for this rule is 75—rather than 60—days following publication in the **Federal Register**. Live poultry dealers will need to amend contracts in some instances, create records processes, format the incorporation of new information in existing documents, and create Disclosure Documents using USDA instructions. Seventy-five days provides the length of at least one flock to prepare for implementation of the rule. USDA will have resources available to answer questions as appropriate. Additionally, based in part on the experience of recent settlements between DOJ and a large poultry company, AMS believes this period will provide sufficient time for live poultry dealers to update their compliance systems and policies and procedures and commence complying with the rule.

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

AMS rejects comments calling for a delay of rules until other rules are proposed and critiquing its incremental approach. To the contrary, AMS is deploying a nuanced approach to these rulemaking proposals such that stakeholders and the public can review each individual proposal on its own

merits. This approach offers producers and other market participants greater ability to effectively evaluate the impacts of each proposal on the market and their particular interests, and enables commenters to more effectively tailor and target comments.

K. Regulatory Notices & Analysis and Executive Order Determinations

Comment: Live poultry dealers said the full cost of the proposed rule will likely be many times more than predicted by AMS. For example, these commenters asserted AMS greatly underestimated the costs of creating the recordkeeping systems needed to comply with the proposed rule, the proposal would add costs generated by frivolous litigation, and the proposal would undermine the tournament system and replace it with a new model that would likely drive up the costs of chicken production. Live poultry dealers and industry groups said AMS's own estimate indicates the 10-year aggregate costs will be higher for poultry growers than for live poultry dealers.

AMS response: In drafting and estimating the cost of the proposed rule, AMS consulted auditors and supervisors who are familiar with live poultry dealers' records from many years of experience in auditing live poultry dealers for compliance with the Act. In contrast, commenters provided no estimated costs for AMS to review. AMS expects the recordkeeping systems most live poultry dealers already have in place will enable them to gather much of the information in the disclosures from records available to them, which limits the necessity of developing new recordkeeping systems.

The higher costs estimated for broiler growers compared to live poultry dealers is due to the large number of broiler growers that receive the disclosures compared to a small number of live poultry dealers. The primary costs to the live poultry dealers are the one-time costs to develop the disclosures, while the ongoing costs to update, distribute, and maintain the disclosures are relatively small. A small number of live poultry dealers will incur relatively small costs to distribute the disclosures to relatively large groups of growers, but AMS anticipates every grower will read the disclosures. The actual cost to any individual grower is estimated as the value of the time required to read the Disclosure Documents, but with more than 16,000 broiler growers with more than 19,000 broiler growing contracts and just over 40 live poultry dealers engaged in broiler production, aggregate cost estimates are higher for broiler growers

than for live poultry dealers, though the rule has a significantly lower cost estimate for a single grower than for a single dealer.

The new requirements in the rule are primarily disclosures of information by dealers to broiler growers. AMS does not expect that informing growers about their contracts and how they are ranked in the tournament system will cause frivolous lawsuits. Increased transparency through this final rule should improve confidence in the tournament system rather than undermine it.

Comment: Groups representing poultry growers said they agree with AMS that the benefits of the proposed rule outweigh the costs. They suggested that benefits for poultry growers include being able to predict their range of income for the coming year and having transparency about the quality of inputs provided by the live poultry dealer. These commenters also said that additional benefits to poultry-dependent communities could include fewer growers going into debt to build facilities and consequently fewer abandoned poultry houses degrading the value of farms and the community. Industry groups said they do not believe estimates of benefits are well-founded, and that the calculation of benefits merely attempts to quantify the revenue reduction poultry growers would be willing to accept in exchange for increased transparency under the proposal.

AMS response: USDA estimated that some of the benefits of the rule would come from reduced revenue uncertainty associated with greater transparency. The greater transparency would include a tighter range around predicted income due to such factors as a higher probability of receiving a new contract and lower variability in compensation under the contracts due to greater transparency about input quality as it relates to revenue. USDA also listed a number of benefits in qualitative terms, as it does not have the information to estimate empirical values associated with them.

AMS expects that if property values change due to final §§ 201.102 or 201.104, the change would be very small. Broiler growers who abandoned housing and exited the industry will not benefit from the rule and will have no incentive to remove the abandoned housing. For broiler growers that remain in the industry, expected gains would be modest relative to the costs removing buildings.

The concept of risk aversion is well founded. It is the reason that insurance and futures and options exchanges exist,

for example. The risk aversion benefits estimated for the rule represent the value to growers of a decrease in the uncertainty of revenue due to increased transparency. Since growers do not have to pay for the increased transparency, the estimated benefit to growers is the same as their net benefit (*i.e.*, the gross benefit minus the cost to growers of increased transparency). And at the industry level, even with the small decrease in grower revenue uncertainty assumed for the analysis, the benefits to growers are higher than the cost to dealers of complying with the rule.

L. Legal Issues Relating to the Proposed Rule

Comment: Industry groups argued AMS lacks authority to issue this rule. A commenter said that AMS asserts a broad mandate to rewrite private contracts and affect relationships between live poultry dealers and poultry growers, yet the Act's legislative history shows Congress intended for AMS's statutory authority to be much narrower in scope. A commenter cited a Supreme Court decision shortly after the Act's passage noting that Congress enacted the Act to ensure the free flow of livestock and prevent packers from using monopoly power to set unfair prices,¹⁰⁷ as well as the 1935 expansion of the Act to include live poultry dealers, in which Congress said it targeted unfair, deceptive, and fraudulent practices and devices because "they are an undue restraint and unjust burden upon interstate commerce."¹⁰⁸

Commenters continued by arguing, for instance, AMS does not have authority to promulgate parts of the proposed rule it justifies based on the goal of achieving "fair income" for poultry growers or that characterize growing arrangements as incomplete contracts so it can target information asymmetry between dealers and growers. A commenter rejected the concept that the Act gives AMS authority to prevent information asymmetry in contracts between dealers and growers, stating that it has not established that the Act's prohibition on unfair, unjustly discriminatory, or deceptive practices applies to "plainly written poultry growing arrangements." Commenters contended that many other lawful business arrangements do not encompass all conditions affecting compensation in the contract and that all real-world markets have some information asymmetry. A commenter

also contended AMS's citation of FTC regulation under sec. 5 of the FTC Act, which Congress drew on in enacting the Act to support its targeting of information asymmetry, undermines its authority in relation to the proposed rule. According to this commenter, this section was interpreted at the time of the Act's enactment to "prohibit anti-competitive and monopolistic conduct, but not to restrict legitimate corporate activity" such as the tournament system.

A meat and poultry industry association said AMS lacks statutory authority to justify disclosure of potentially confidential, proprietary, and competitively sensitive payment history information required in § 201.102(d) of the final rule, as well as the requirement in § 201.102(d)(4) of the final rule that live poultry dealers must disclose contact information for State university extension service offices or county farm advisor's offices. The commenter also said if, as implied under § 201.102(g)(1)—Grower Receipt of the final rule, AMS is taking the position that live poultry dealers can violate sections 202(a) and 202(b) of the Act even if they do not harm competition, it is acting without statutory authority, as Congress enacted the Act to curb monopolies and courts have consistently held that the statute only prohibits anticompetitive practices.

AMS response: AMS disagrees that competition was at the time of enactment, or is now, the controlling factor for all regulations issued under the Act. Moreover, even where relevant, competition for the purposes of Section 202 must be defined by the plain meaning of Section 202, which defines the scope of USDA's authority. Therefore, the meaning of competition or harm to competition must be broader than its meaning under the antitrust laws.¹⁰⁹

As USDA noted in a 2010 proposed rule, a 2016 interim final rule, and a 2017 final rule,¹¹⁰ it has consistently taken the position that "in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury." Scope of Sections 202(a) and (b) of the Packers

¹⁰⁹ See *Spencer Livestock Com. Co. v. Department of Agriculture*, 841 F.2d 1451 at 1455 (9th Cir. 1988) (The Packers and Stockyards Act is more than "a mere mirror of the antitrust laws").

¹¹⁰ In the 2017 final rule, USDA withdrew the 2016 interim final rule out of concerns about confusion over the conflicting court decisions on this subject and the absence of a good cause justification for foregoing notice and comment. However, USDA reaffirmed its longstanding position that harm to competition is not required, which we again reaffirm here.

¹⁰⁷ *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922).

¹⁰⁸ Packers and Stockyards Act of 1921, Public Law 74–272, § 501, 49 Stat. 648, 648 (1935).

and Stockyards Act, 81 FR 92566, 92567 (Dec. 20, 2016); *see also* Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 FR 48594, 48595 (Oct. 18, 2017); 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, 35340 (June 22, 2010).

USDA has previously explained that this consistently-held position is based on the language, structure, purpose, and legislative history of the Act. *See, e.g.*, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 FR at 92567–92568. USDA continues to adhere to this longstanding position, despite the disagreement of some courts as to the proper scope of the Act. *See* Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 FR 48596 (Oct. 18, 2017) (reaffirming that “USDA has adhered to this interpretation of the P&S Act for decades” and rejecting comments that this interpretation is not the USDA’s longstanding position).

Even where courts have disagreed with USDA’s longstanding position that competitive harm is not required under these sections, some have not held that such a requirement would apply to a claim of deception under § 202(a), as opposed to other claims such as unfairness claims. *See, e.g., Been v. O.K. Industries*, 495 F.3d 1217, 1227 (10th Cir. 2007) (“We are concerned here only with whether unfairness requires a showing of a likely injury to competition, not whether deceptive practices require such a showing.”) Such AMS authority to regulate deception is well-established. This includes forming the basis of a proposed consent decree between DOJ and two of the nation’s largest poultry companies relating to the failure to provide the transparency that would be mandated under this rule. As DOJ set forth in its complaint: “Poultry processors have also engaged in deceptive practices associated with the ‘tournament system.’ Under this system, growers are penalized if they underperform other growers, but poultry processors control the key inputs . . . that often determine a grower’s success. Poultry processors often fail to disclose the information that growers would need to evaluate and manage their financial risk or compare offers from competing processors.”¹¹¹

The regulatory mechanism of disclosure, as set forth in this rule, is also well-established as a cure for

deceptive practices that arise from information gaps in the marketplace, including AMS’s disclosures already in place under the Act for settlement in the poultry sector, FTC’s mandated disclosures by franchise companies to franchisees, and a range of other mandated disclosures by Federal and State regulators. Rather than undermining AMS’s authority, a reference to FTC’s sec. 5 authority on deceptive practices is entirely appropriate, as courts have long recognized the similar design and application of the two provisions. Violations under FTC’s sec. 5 deceptive practices authority do not require a showing of harm to competition.¹¹²

Regardless, even if a showing of harm to competition were required for a deception claim, the deceptive practices prohibited in this rule would meet such a requirement. AMS rejects the idea that a prohibition on certain widespread deceptive practices is inconsistent with addressing anticompetitive conduct, including information asymmetries and the holdup and other anticompetitive risks that may arise from them and distort competition in the market for grower services.

AMS affirms the longstanding view that fraud and deception have no value or place in a competitive market.¹¹³ Indeed, the academic literature has long understood that Section 202 covers two broad categories of conduct, (1) anticompetitive conduct and (2) conduct described as “market abuses.”¹¹⁴ AMS seeks to enable growers to better protect themselves from hidden risks in contracting and the operation of those contracts. Preventing deception enhances competition among dealers by enabling growers to compare offers and reasonably assess entry into the business. Preventing deception improves how markets function by forcing dealers to compete for growers service based on the merits of commercial offer the producer is making. Preventing deception enables growers to better assess their performance vis-à-vis other growers.

¹¹² Federal Trade Commission, Policy Statement on Deception, 1983. *See also, e.g., FTC v. Minuteman Press et al.*, E.D. N.Y. (1998), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/minuteman-press-et-al>. *Morrone’s Water Ice, Inc.; Franchise Consultants Corporation d/b/a Franchise Consultants Group; et al.*, E.D. Penn. (2003), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/x020068-morrone-water-ice-inc-franchise-consultants-corporation-dba-franchise-consultants-group-et-al>.

¹¹³ *Bruhn’s Freezer Meats, Inc. v. Department of Agriculture*, 438 F.2d 1332, at 1341 (mislabeling grading of meat violates section 202); *USDA v. Excel Corp.*, 397 F.3d 1285 (failure to disclose change in grading system violates section 202).

Ultimately, the conduct at issue is squarely within the purposes of the Act. Where conduct “prevents an honest give and take in the market,” it “deprives market participants of the benefits of competition” and “impedes . . . a well-functioning market.”¹¹⁵ In its report on the 1958 amendments to the Packers and Stockyards Act, the U.S. House of Representatives explained that the statute promotes both “fair competition and fair trade” and is designed to guard “against [producers] receiving less than the true market value of their livestock.”¹¹⁶ Deception subverts normal market forces, undermines market integrity, and deprives producers and growers of the true value of their products and services.

Comment: Poultry grower groups argued that AMS has both authority and obligation to implement the rule. These commenters said the Act authorizes the Secretary of Agriculture to make rules necessary to carry out its provisions, and one of its cornerstones is ensuring that business arrangements between live poultry dealers and growers are not unfair, unjustly discriminatory, deceptive, or facilitating undue preferences. They contended that, because the proposed rule aims to improve the information asymmetry between dealers and growers so that violations of the Act no longer persist unchecked, its requirements clearly fall within AMS’s rulemaking authority. The commenters also cited evidence that Congress intended the Act to go beyond previous antitrust laws to target an expansive range of anticompetitive conduct by meat companies.

AMS response: AMS affirms the view that the conduct that may be prohibited under the Act is more expansive than that which is covered under the Sherman Act, 15 U.S.C. 1 *et seq.*, the Clayton Act, 15 U.S.C. 12 *et seq.*, or the FTC Act, 15 U.S.C. 41 *et seq.*, and in particular, that deceptive practices sought to be prohibited by the rule fall within the authority of the Act.

Comment: Live poultry dealers and industry groups argued that the proposed rule is beyond the scope of congressional direction. They said that there was a lack of further congressional action since the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill; Pub. L. 110–234; June 18, 2008) and that AMS has completed its rulemaking under the 2008 Farm Bill. This, the commenters assert, indicates that Congress views the current framework as adequate.

¹¹⁵ Kades, 55, also quoting the FTC.

¹¹⁶ Kades at 55.

¹¹¹ *U.S. v. Cargill Meat Solutions*, Complaint, D. MD, July 25, 2022, available at <https://www.justice.gov/atr/case-document/file/1528331/download>.

These commenters also cited the major questions doctrine put forth by the recent Supreme Court decision in *West Virginia v. Environmental Protection Agency*¹¹⁷ as a limiting factor for AMS's authority to promulgate this rule. According to these commenters, the issue of whether the Federal Government should further regulate poultry growing contracting has political and economic significance, and AMS has not demonstrated clear congressional authorization to exercise its powers on this issue, meaning the agency lacks the authority for this rule. Poultry grower groups argue that the proposed rule does not trigger the major questions doctrine because, rather than making a radical change based on vague authority, it is based on clear congressional mandates and represents only incremental improvements to the preexisting regulatory regime. These commenters further contended that sec. 202 of the Act, which enumerates the practices Congress has deemed unlawful, provides a clear and forceful statement of AMS responsibility to regulate such practices.

AMS response: AMS exercises its statutory authority under the Act, which includes authority to address deceptive practices. The lack of congressional action since the 2008 Farm Bill does not impact the scope of AMS's authority under the Act.

With respect to the major questions doctrine, there is no indication that this regulation is of such economic and political significance that the Congress did not give the Secretary authority to write a regulation of this kind. In *West Virginia*, 142 S. Ct. at 2604, the Court noted that EPA's modeling "would entail billions of dollars of compliance costs[.]" In comparison, this rule will cost less than 10 million dollars over the course of the next decade. Sec. 407 of the Act gives AMS the authority to "make such rules, regulations, and orders as may be necessary to carry out the provisions of" the Act. 7 U.S.C. 228. Moreover, at least one court has concluded that Congress intended for the USDA to have broad regulatory power under the Packers and Stockyards Act. As the Court of Appeals for the Eighth Circuit observed in *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1339 (8th Cir. 1971), "[t]he Act was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of

Agriculture complete regulatory power over packers and all activities connected therewith. H.R. Rep. No. 324, 67th Cong., 1st Sess. (1921); H.R. Rep. No. 77, 67th Cong., 1st Sess. (1921)."

As noted above, AMS has long maintained disclosure requirements under the Act with respect to poultry contracting and the operation thereof, including settlement payment disclosures. Further, regulation of the communication to producers under related regulations is not at all unusual: buyers in grade and yield transactions must provide accurate accounting and provide the basis of the grade. Similarly, FTC has long required disclosures under its Franchise Rule¹¹⁸ to address similar deception risks for business owners seeking to enter into a franchise relationship with a franchisor. In this rule, AMS updates its disclosure rules to reflect the realities of modern poultry growing, which are comparable to a franchisor-franchisee contractual relationship, including with respect to taking out debt, taking into account the range of other risks relating to doing business in this sector such as trust and compliance issues as exemplified by a recent DOJ poultry industry price fixing prosecution and Packers and Stockyards Act deceptive practices investigation resulting in a number of guilty pleas and consent decrees.¹¹⁹

Comment: Live poultry dealers and industry groups argued that AMS relied on anecdotes and did not cite actual violations of the Act that would justify the proposed rule. These commenters indicated that the administrative record thus does not support a rulemaking on poultry grower contracting at this time, especially one likely to have significant costs affecting supply chains. State attorneys general and groups representing poultry growers noted a proposed settlement agreement between DOJ and poultry processors¹²⁰ stemming from the recent wage suppressing conspiracy and Packers and Stockyards Act deceptive practices investigation that includes disclosure requirements similar to those in the proposed rule. Groups representing

poultry growers suggested this consent decree indicates that these companies are capable of running their businesses under fairer and more transparent conditions.

AMS response: AMS chose to take a regulatory approach, as opposed to case-by-case enforcement, to enable it to better tailor its approach to addressing the concerns under the Act that AMS has identified in the poultry sector, especially relating to broiler chickens. Such an approach permits AMS to transparently engage the public, industry, Congress, and others, and obtain the benefit of accepting public comments during the regulatory process. Yet, as indicated by the State attorney general commenters, AMS has also determined it appropriate to refer cases regarding deception in the failure to disclose important information regarding financial risks in poultry growing arrangements and the operation of those arrangements to DOJ for handling as circumstances warrant, as exemplified by the recent consent decree whereby the nation's third largest poultry processor agreed to provide the disclosures as set forth in the proposed rule and updated by this final rule. This case and settlement indicate both the seriousness of the ongoing deceptive practices violation, as well as the appropriateness and workability of the remedy defined by this rule.

Comment: Several farm bureaus suggested the rule should have been an interim final rule, rather than a final rule, to give AMS the regulatory flexibility to immediately address any effectiveness issues with the disclosures. Groups representing poultry growers said the proposal's required disclosure of material information to protect parties to asymmetrical business relationships is a longstanding policy tool for promoting healthier markets and does not violate any "cognizable right," including dealers' First Amendment rights. Groups representing poultry growers also urged AMS to affirm its interpretation of secs. 202(a) and (b) of the Act to not require a harm-to-competition standard, as it is highly difficult for farmers to meet this standard, and argued that USDA's December 2020 "undue preferences" rule¹²¹ creates a substantial loophole for

¹¹⁸ 16 CFR parts 436 and 437.

¹¹⁹ Plea Agreement: *U.S. v. Pilgrim's Pride Corp.*, Feb. 23, 2021, 20-cr-00330-RM, available at <https://www.justice.gov/atr/case-document/file/1373956/download>. Consent Decree: *U.S. v. Cargill Meat Solutions Corp., et al.* (Sanderson Farms, Inc., Wayne Farms, LLC), July 25, 2022, 1:22-cv-01821-ELH, available at <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

¹²⁰ *U.S. v. Cargill Meat Solutions Corp., et al.* (Sanderson Farms, Inc., Wayne Farms, LLC), July 25, 2022, 1:22-cv-01821-ELH, available at <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

¹¹⁷ 142 S. Ct. 2587 (2022).

¹²¹ Agricultural Marketing Service, "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, Final Rule, Dec. 11, 2020, 85 FR 79779, available at <https://www.federalregister.gov/documents/2020/12/11/2020-27117/undue-and-unreasonable-preferences>

dealers by allowing them to justify actions they claim are a “reasonable business decision.” An industry group said the heightened disclosure requirements between dealers and growers in the proposed rule may raise competitive concerns by creating an information exchange of specific and competitively sensitive information between a wide range of actual and potential competitors. The commenter also said marketing agreements may experience a chilling effect, as increased transparency may lead dealers to offer growers uniform contract terms that diminish competition as well as individual growers’ marketing power.

AMS response: AMS notes the commenters’ interest in an interim final rule. An interim final rule is generally reserved for situations where the agency, for good cause, finds that prior notice is “impracticable,” “unnecessary,” or “contrary to the public interest,” in which case the agency may issue a final rule without providing the usual notice and comment required by the Administrative Procedure Act (APA).¹²² However, because AMS has already solicited comments on the proposed rule, it is unnecessary to issue an interim rule and make a good cause finding to justify non-compliance with the APA’s notice and comment requirements.

AMS further affirms that no further showing is required to prove a violation of the Act beyond a violation of the provisions set forth in this rule.

AMS believes that the provision of additional information to growers will improve the competitive market conditions by allowing growers to better understand, evaluate, and compare contracts among dealers, enhancing their ability to bargain efficiently by reducing deceptive practices. Deception has no competitive value or place in the market and can create inefficiencies. AMS is skeptical that contract terms will necessarily become more uniform and further finds that the new transparency will allow live poultry dealers to compete for growers on the merits of their contracts and aid in marketplace innovation as live poultry dealers and growers remain free to develop new and innovative methods for conducting their business. Previous AMS rulemakings related to disclosures in poultry growing have not been shown to negatively affect innovation.

With respect to information exchanges, AMS notes that statistical sharing services today routinely collect

and make available a wide range of information only to live poultry dealer subscribers. AMS has tailored the disclosures to provide information useful to growers in their particular circumstances and has reduced requirements such as the disclosure of information across all complexes in part to reduce risks of inappropriate information sharing.

M. Other Comments About the Proposed Rule

Comment: A farm bureau recommended adding several requirements for grower contracts, such as: performance verification provisions to protect growers from arbitrary company sanctions on bird placements; clear statements of layout times (i.e., time between flock placements) and company compensation for extended periods of reduced or no bird placements; a requirement that contracts should not be subject to change by the company without prior agreement from the grower; starting pay rates that allow amortization of debt load in 10 years, cover normal expenses, and provide the grower a livable income; additional compensation for above-average feed conversion; and company responsibility for low performance based on company-provided inputs. In addition, the commenter recommended that contracts clearly disclose risks and provide grower protections against early termination, and that live poultry dealers provide growers with ample time to review contracts. This commenter said contracts that require arbitration for grower disputes should also require arbitration for dealer disputes, while another farm bureau said AMS should ban mandatory arbitration clauses in contracts.

AMS response: AMS shares many of the concerns expressed in the above comment summary. Improved transparency including contract requirements requiring minimum flock placements and minimum density will reduce asymmetric information problems and address many of the issues related to flock placements and out time. Additionally, this regime will deter dealers from constant contract modifications that would trigger a new Disclosure Document. Further, AMS views the financial disclosures required in this rule as appropriate to inform growers of revenues, potential profitability, and debt management. Growers maintain the statutorily protected right to opt out of arbitration. Therefore, no changes were made to the proposed rule.

Comment: A poultry grower group indicated the rule does not address the

lack of transparency associated with farm research and development. The commenter explained that poultry companies do not own their own farms; therefore, research and development for farm-level changes cannot take place within the company’s business infrastructure. According to the commenter, the result is that major dealers benefit from expensive research and development efforts, and the unknowing poultry growers routinely shoulder the burden of live poultry dealer “experiments” with neither consent from nor compensation for the grower.

To stay ahead of the field and make advancements, according to the commenter, companies use a few common strategies, such as merging with and acquiring smaller companies that are pioneers in new fields, leveraging financial and political influence over research at universities, and experimenting through mandatory trial-and-error efforts on contract farms, such as studying the effect of windows in chicken houses and introduction of slow-growth chickens as a research program with associated adjustments in flock schedules for growers.

The commenter provided an example of growers being required to change growing practices due to the increased value of chicken paws (feet) without seeing a benefit. Multiple farmers contracting with three different integrators have come to the commenter expressing concerns about having to change growing practices to promote the health of chicken paws. No farmer was compensated for these changes according to the commenter; however, the companies have experienced a financial windfall because of growing demand in China for chicken paws. According to the commenter, farmers spent their own time and energy to increase company profits and that effort was not reflected in their tournament ranking.

AMS response: AMS shares some of the concerns cited above, particularly with regard to practices resembling “trial and error” experimentation at the expense of contract growers. To the extent that programs of this type are a change in housing specification, new disclosures would be required for growers to evaluate the benefit. Where adjustments to management practices cause growers to incur additional costs and are not covered in the contract, a new contract may be required, again triggering a new Disclosure Document. Separately, AMS has proposed rules to better protect growers’ rights to organize associations and cooperatives, which may enable them to more effectively

and advantages under the packers and stockyards act.

¹²² 5 U.S.C. 553(b)(B).

work together and bargain under existing laws.¹²³ Therefore, no changes to the proposal are warranted.

Comment: A group representing poultry growers noted that, under the proposed rule, live poultry dealers will still control most of the production inputs, which fails to close the extreme disparity in bargaining power between growers and dealers. Based on the experience of growers in its network, the commenter described several problems it anticipated will remain even if the proposed rule is implemented.

The commenter stated debt accumulation is a problem that will remain even if the rule is implemented. The commenter stated that growers lack leverage to negotiate favorable contract terms, often incurring substantial debt loads as they invest significant amounts of money in poultry houses and in modifications and upgrades that dealers require as a condition of contract renewal. According to the commenter, growers are then stuck paying back the loans to the same companies that required them to make the investments in the first place, leading to “crippling accumulations of debt” resulting in numerous bankruptcies, and the amount of this debt is expected to increase.

Finally, the commenter said there are limited legal resources available to farmers to fight against poultry companies, with time and legal costs deterring farmers from seeking justice in court. According to the commenter, while the proposed rule provides some legal recourse for controversies related to the Disclosure Document and poultry growing arrangements, the exchange of information between growers and dealers is not sufficient and the costs of litigation are still often prohibitive.

AMS response: AMS is concerned about poultry grower debt accumulation. AMS is confident the disclosure regime outlined in this proposal will provide baseline information relating to revenue and profitability of their operations, improving grower debt management. As housing specifications evolve and new investments are mandated, under this rule, growers will receive additional required disclosures that will better enable growers to assess additional capital investments. AMS will continue to review capital improvement programs and evaluate those programs under existing § 201.216. AMS encourages

growers with specific concerns to submit complaints and tips through farmerfairness.gov or to contact AMS directly at 1-833-DIAL-PSD (1-833-342-3773).

Comment: Commenters recommended AMS require dealers proposing or requiring modifications to existing grower infrastructure housing specifications to disclose their own cost-benefit analysis to growers. Further those commenters said that any finding that any such cost/benefit disclosures are broadly fallacious, *i.e.*, that where the dealer's cost-benefit claims did not match the actual costs and benefits, should constitute a violation of the Act as a deceptive practice.

AMS response: While this rule does require some financial disclosures related to additional capital improvements and other deviations from the prior five-year grower payments, AMS is not requiring the production and disclosure of a dealer's cost-benefit analyses because AMS is not prepared, at this time, to assess all potential cost-benefit factors, as well as the necessary formatting and recordkeeping requirements that would be implicated. In the interim, AMS will also continue to review grower solicitation practices and inducement materials. Practices and materials that are deceptive have and will continue to be violations of the Act. AMS is not adopting such a requirement at this time but may consider the value of such a disclosure as part of future steps. In particular, AMS is reviewing this issue in light of comments received on the June 2022 “Advance Notice of Proposed Rulemaking on Poultry Tournaments: Fairness and Related Concerns” and may elect to address issues related to additional capital investments in future rulemakings.

Comment: Commenters also wanted AMS to require live poultry dealers to give poultry growers a minimum of 6 months to begin any upgrades they might demand.

AMS response: AMS is also not at this time adopting any requirements relating to the timing for when housing upgrades could be required. The request by commenters is not within the scope of this rule, and AMS needs additional time to consider the matter. AMS will consider the matter as part of comments received to the June 2022 “Advance Notice of Proposed Rulemaking on Poultry Tournaments: Fairness and Related Concerns.”

VIII. Regulatory Analyses

A. Executive Orders 12866, 13563, and 14094

AMS is providing a regulatory analysis in conformance with the requirements of 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, 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 rule, AMS considered several alternatives, which are described in the Regulatory Impact Analysis, below.

The final 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.

This final 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 final rule can be found in the rule's economic analysis.

AMS is amending 9 CFR part 201 by adding new definitions to § 201.2, adding new § 201.102 regarding contract and disclosure requirements for live poultry dealers engaged in broiler production, and adding new § 201.104 regarding live poultry dealer responsibilities when they use poultry grower ranking systems to settle payments for broiler growers. Based on its familiarity with the industry, AMS's Packers and Stockyards Division (PSD) prepared an economic analysis of the final rule as part of the regulatory process. The economic analysis includes a cost-benefit analysis of the rule. PSD then discusses the impact on small businesses.

B. Regulatory Impact Analysis

As a required part of the regulatory process, AMS prepared an economic

¹²³ Agricultural Marketing Service, “Inclusive Competition and Market Integrity,” Proposed Rule, Oct. 3, 2022, 87 FR 60010, available at <https://www.federalregister.gov/documents/2022/10/03/2022-21114/inclusive-competition-and-market-integrity-under-the-packers-and-stockyards-act>.

analysis of the costs and benefits of final §§ 201.102 and 201.104.

The poultry industry is highly vertically integrated. That is, a single entity owns or controls nearly all the steps of poultry production and distribution. Poultry production contracts reduce the costs for live poultry dealers of negotiation with individual growers over the purchase of individual flocks of poultry and relieve live poultry dealers from the burden and risks of owning and maintaining poultry houses. The growout portion of production is largely accomplished through contract growers, who bear these burdens and risks. Most poultry, and particularly broilers, are grown under production contracts.

The USDA National Agricultural Statistics Service's (NASS) Census of Agriculture (Agricultural Census) reported that 96.3 percent of broilers were raised and delivered under production contracts in 2017.¹²⁴ Live poultry dealers place chicks in poultry houses owned by contract growers. Typically, live poultry dealers provide young poultry, feed, medication, and harvest and transportation services to these poultry growers, who house, feed, and tend the growing birds.

In order to grow poultry on a commercial scale, a poultry grower must invest in poultry housing. The investment is often substantial. Most farms have multiple houses, and the total investment required can easily exceed \$1 million. Also, the housing is built and equipped specifically for the purpose of growing poultry. The costs of adapting the housing for any other purpose can be prohibitive.¹²⁵ Because the live poultry dealers control most aspects of a grower's production, growers are dependent upon the actions of the live poultry dealers to recoup the grower's substantial and specific investment. This puts growers in a particularly precarious position in which contract growers have only a small number of live poultry dealers with whom to do business in almost all geographic markets within the United States.

Broiler industry vertical integration leads to many risks being borne by contract poultry growers. Due to the large investment required of poultry growers, the financial risk of protecting that investment is substantial. Because live poultry dealers maintain such heavy influence over many key aspects

of growers' production, growers have significant exposure to liquidity risks, should flock placements and revenues fall.

Thus, contract poultry growers are subject to numerous risks associated with live poultry dealers' control over key aspects of their operations, such as the frequency and density of flock placements, and the related risks of not having control over the genetic quality or health of the chicks placed by the live poultry dealers. Live poultry dealers control the scheduling of feed deliveries, which also can impact feed conversion and thus grower pay. Also, production variables such as bird target weights and growout periods are determined by the live poultry dealer, further adding to the risks borne by contract poultry growers.

Live poultry dealers benefit from poultry growing contracts by having control over the quality and supply of inputs (birds) into the processing plant while remaining free from many of the risks related to capital investments in growing capacity, where those costs and associated risks are borne by the growers. On the other hand, contracts shift other risks from the grower to the live poultry dealer. With live poultry dealers responsible for chick genetics, feed quality, and other inputs (with the possible exception of fuel), changes in input prices do not directly affect growers. Growers also do not bear the risks (or enjoy the benefits) of price changes in the value of live poultry or poultry meat, as they do not own the poultry or poultry meat and thus do not sell it. Research on poultry growing contracts in the broiler market has shown live poultry dealers to shift that variation in input costs and output prices, which comprises up to 84 percent of the variation in returns to broiler production.^{126 127}

The most common form of poultry growing contract is a relative performance contract, also known as a "tournament" contract in the industry. Tournament systems are a type of poultry contract under which the live poultry dealer assigns each grower to a settlement pool, which consists of all the growers' given flocks that the live poultry dealer processed in a given week. The live poultry dealer provides the grower with the production inputs of an initial supply of chicks and feed

and veterinary support throughout the growing period; the grower provides the inputs of housing, water, electricity, labor, and management. At the time of processing, the live poultry dealer collects the finished broilers and calculates an average performance metric for the settlement pool, typically the feed-conversion ratio or similar metric. The grower's compensation under the tournament contract, is the sum of a base payment, which typically depends on the total liveweight of the finished birds and a payment or deduction based on the average performance metric for the settlement pool. For most tournaments, the payment or deduction formula is the difference between the grower's performance metric and the settlement's average, subject to a scaling multiplier. Production periods for poultry are sufficiently short that a grower will typically be in several tournaments in a year.

Agricultural production is an inherently risky endeavor, and returns have some level of risk no matter the marketing channel or structural arrangement. For example, common production risks are systematic risks common to all growers in a given geography (which may coincide with a given tournament) such as weather or widespread disease, feed quality, or genetic strains. Academic research finds that where risks are likely to affect all growers in a region, compensation is less likely to be adversely affected under a tournament contract than it would be on a simple price per unit of weight contract.¹²⁸ For example, if an unusual heat wave caused all growers in a tournament to experience poorer feed conversion, all tournament growers may require more feed and a longer grow period for their flocks to reach the target weight. They would receive the same pay for the weight produced, while not being penalized for the higher feed costs incurred to produce that weight. Some aspects of the tournament system are not necessary to account for these risks, however, and other contractual arrangements may account for the same risks without the concerns associated with the tournament system.

As noted, no contract type will protect growers from all market risks, and tournament contracts still leave growers exposed to some common risks. For example, when plants had to reduce processing capacity due to the COVID-19 pandemic, growers experienced

¹²⁴ USDA, NASS. 2017 Census of Agriculture: United States Summary and State Data, (April 2019): 7, 56.

¹²⁵ For a discussion of the difficulty in adapting of broiler grow houses for other purposes, see Vukina and Leegomonchai 2006, Op. Cit.

¹²⁶ C.R. Knoeber and W.N. Thurman, "Don't Count Your Chicken . . . : Risk and Risk Shifting in the Broiler Industry," *American Journal of Agricultural Economics* 77 (1995): 486–496.

¹²⁷ This research is regularly cited and reaffirmed in the current economics literature including Tsoulouhas and Vukina (2001) and McDonald (2014) that we cite elsewhere.

¹²⁸ See, e.g., Theofanis Tsoulouhas and Tomislav Vukina. "Regulating Broiler Contracts: Tournaments Versus Fixed Performance Standards," *American Journal of Agricultural Economics* 83 (2001): 1062–1073.

reduced compensation to the extent that they received fewer or less dense placements from the live poultry dealers.

Tournament systems do not insulate growers from the other risks of contracts discussed above such as financial risk, liquidity risk, the risk from incomplete contracts, and the lack of control over inputs and production variables. Tournaments also introduce new categories of risks to growers, such as group composition risk and added risks of settlement-related deception or fraud. The risks of deception or fraud as discussed above include the inability of growers to verify the accuracy of payments, and to detect discrimination or retaliation.

Group composition risk is the risk associated with the composition and performance of other growers in their settlement groups. A particular grower's pay is impacted by the performance of others in the tournament. Growers have no control over the other tournament members' effort and performance, nor over with which other growers they are grouped. An individual grower's effort and performance can be static, and yet that grower's payments could fluctuate based on the grower's relative position in the settlement group. Further, changes in payment may not be commensurate with the changes in grower's effort and performance. These characteristics of the tournament system can add to the variability of pay and affect the ability of growers to plan and measure their own effort and performance. On the other hand, the system is designed to incentivize participants to do their best in the hopes of gaining higher rewards.

The integrators also determine which growers are in each settlement group. While growers in a group must have similar flock finishing times, a live poultry dealer could move a grower into a different grouping by altering layout

times to change the week that a grower's broilers are processed. An individual grower may perform consistently in an average performing pool, but if the live poultry dealer places that grower in a pool with more outstanding growers, those outstanding growers raise the group average and reduce the fees paid to the individual. At its discretion or per the poultry growing arrangement, a live poultry dealer may remove certain growers it considers to be outliers from a settlement pool. This would likely affect the average performance standard for the settlement and affect the remaining growers' pay. Group composition risk can be more relevant to some growers when a tournament's settlement group contains growers with different quality or ages of grow houses.

In addition, the current documentation of tournament terms provides little to no information on the expected variation between individual payments over time. Providing the settlement formula alone does not give growers a means by which they can predict total income over a meaningful period. More generally, an individual grower cannot estimate the variance in pay across periods with the same accuracy as the live poultry dealer with which he or she contracts. Information provided pursuant to this rule addresses this issue. Also, growers do not currently receive information that allows them to understand the impact of many live poultry dealer decisions made during the growout period that may affect grower incomes. For example, live poultry dealers may switch the genetics of chicks supplied to growers or change a feed ration or supplier. Increased information required in settlement disclosure regarding inputs and other factors will make it easier for growers to assess the impacts of these decisions and improve their ability to protect themselves against any

systematic issues related to those decisions.

Live poultry dealers benefit from tournaments systems, because they provide live poultry dealers more control and certainty of the total pay to all the growers in a settlement group. They also benefit from the system if it disincentivizes shirking with respect to production efficiency. However, the incentive to avoid shirking can be imparted in a fixed performance standard contract as well.

There is asymmetry in the information available to live poultry dealers and the growers with whom they contract. Some of the information held by live poultry dealers would be valuable to growers because it influences grower compensation in tournament contracts and might help growers in negotiating contract terms and making decisions about capital investments and flock management.

The contracts themselves are often incomplete and exhibit asymmetry in the information available to live poultry dealers and contract growers. Because live poultry dealers supply most of the inputs, much of the production information is available to the grower only from the live poultry dealer. For example, the contract grower may not know precisely how much feed it used, or how much weight the flock gained under his or her care, unless the live poultry dealer provides the information.

Growers often lack negotiating leverage with live poultry dealers to demand transparency and completeness in contracts. Most growers have few live poultry dealers in their area with whom they can potentially contract. The table below shows the number of live poultry dealers 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—LIVE POULTRY DEALERS IN BROILER GROWERS' AREA ¹²⁹

Integrators in grower's area ¹³⁰	Farms	Broilers	Production	Have additional integrator in area
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	Na

¹²⁹ MacDonald. (June 2014) Op. Cit.

¹³⁰ MacDonald. (June 2014) Op. Cit. (Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011.

"Respondents were asked the number of integrators in their area, which was subjectively defined by each grower. They were also asked if they could change to another integrator if they stopped raising broilers for their current integrator." The 7 percent

of those facing a single integrator assert that they could change, presumably through longer distance transportation to an integrator outside the area. Ibid. p. 29 and 30.)

The data in the table show that 52 percent of broiler growers (farms), accounting for 55 percent of broilers produced and 56 percent of total production and, report having only one or two integrators in their local areas. This limited integrator competition may accentuate the contract risks. Even where multiple integrators are present, there can be significant costs to switching, including owing to the differences in technical specifications that integrators may require. To switch, the growers likely may need to invest in new equipment and learn to apply different operational techniques due to different breeds, target weights and growout cycles.

Live poultry dealers hold information on how individual poultry growers perform under a variety of contracts. The mean number of contracts for the live poultry dealers filing annual reports¹³¹ with AMS in 2021 was 472. The largest live poultry dealers contracted with several thousand growers. Because live poultry dealers provide most of the inputs to all the growers in each tournament, the live poultry dealers have information about the quality of the inputs, while each grower can know only what he or she can observe. A grower almost certainly will not know about the inputs received by other growers. Live poultry dealers also have historical information concerning growers' production and income under many different circumstances for all the growers with which they contract, while an individual grower, like most other producers, has information concerning only its own production and income.

New growers entering the industry may have little or no experience from which to draw information for forming expectations for future input and maintenance costs or for evaluating the value of initial capital expenditures. Experienced growers entering into new contracts are limited to their own past experience to draw upon. Live poultry dealers have information from all their contractors about performance, costs, and expenditures.

Compensation based on relative performance when growers are not in control of many of the inputs of production may create opportunities for live poultry dealer deception. It is also difficult, especially for new growers, to understand how compensation is likely to vary over time as a result of

tournaments and other terms that may not currently be present in all contracts such as placement frequency and flock density. This problem of incomplete contracts is of particular concern due to the cost and lifespan of the capital required to be a poultry grower.

With incomplete contracts, at least one party will have discretionary latitude to deviate from expectations.¹³² For example, poultry production contracts often do not guarantee the number of flocks a grower will receive even with long-term contracts, even though this is critical information for understanding the value of the contract to the grower.¹³³ The type and frequency of required upgrades to existing equipment and housing are often left to the discretion of the live poultry dealer.

Hold-up is a problem that occurs in poultry production contracts because the poultry grower's outlay of the significant capital requirements of growing chickens results in specialized equipment and facilities with little value outside of growing chickens. As a result, growers entering the market are tied to growing chickens to pay off the financing of the capital investment. Growers might fear that they will be forced to accept unfavorable contract terms because they must continue production to pay off lenders and have few, if any, alternative live poultry dealers with which they can contract. This can lead to underinvestment in the capital necessary to grow broilers.

Comments From the Proposed Rule and Changes to the Final Rule

After consideration of public comments, AMS determined to adopt the proposed rule as a final rule with several modifications. In order to make compliance with the final rule as easy as possible for regulated entities, AMS reorganized the final rule by moving the new disclosures required into revised § 201.102 and new § 201.104. In the final rule, AMS removed the proposed revisions to § 201.100 requiring all live poultry dealers to provide certain additional disclosures to prospective or current growers and placed the requirements in new § 201.102. AMS also moved the requirements from proposed new § 201.214 to new § 201.104. This reorganization of the rule does not impact the recordkeeping requirements or costs of the final rule.

A commenter representing the turkey industry noted the proposed rule was

largely based on research into the broiler industry. The commenter asserted it would be extremely difficult for turkey companies to implement the rule due to differences between turkey and chicken production. Based on comments received to the proposed rule and AMS further study, AMS has limited the applicability of final §§ 201.102 and 201.104 to live poultry dealers engaged in the production of broilers. The final rule does not apply to live poultry dealers engaged in the production of turkeys, ducks, geese, and other domestic fowl. The proposed rule considered the costs and benefits to all live poultry dealers. This change reduced the number of live poultry dealers to whom the final rule applies from 89 respondents made up of live poultry dealers engaged in the production of broilers, turkeys, ducks, geese, and other domestic fowl under the proposed rule to 42 live poultry dealers engaged in the production of broilers in the final rule. Accordingly, this change reduced the costs and benefits from the proposed rule to the final §§ 201.102 and 201.104. Existing provisions of § 201.100 continue to apply to live poultry dealers engaged in the production of broilers, turkeys, ducks, geese, and other domestic fowl. The new provisions of § 201.102 and the new § 201.104 apply only to live poultry dealers engaged in the production of broilers. AMS made several other changes to the proposed rule that are reflected in the final rule.

Live poultry dealers commented that the full cost of the proposed rule would likely be many times greater than predicted by AMS. The commenters asserted AMS greatly underestimated the costs of creating the recordkeeping systems needed to comply with the proposed rule.

Commenters suggested that AMS underestimated the amount of time required to create and maintain recordkeeping systems. They also suggested that AMS did not adequately consider the IT and legal costs or the cost of hiring compliance officers. Some live poultry dealers indicated that the rule would promote frivolous lawsuits, and suggested the requirement to list ongoing litigation would discourage settlement. Some commenters also indicated that disclosures would undermine the tournament payment system, forcing live poultry dealers to adopt less efficient methods of compensation, which would increase the price of chicken and ultimately increase inflation.

AMS consulted auditors and supervisors who are familiar with live poultry dealers' records from many

¹³¹ 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 on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

¹³² Steven Y. Wu and James MacDonald, "Economics of Agricultural Contract Grower Protection Legislation," *Choices*, Third Quarter, 2015, pp 1-6.

¹³³ MacDonald (June 2014) Op. Cit.

years of experience with AMS in auditing live poultry dealers for compliance with the Act. AMS expects that recordkeeping systems that most live poultry dealers already have in place will enable them to gather much of the information in the disclosures from records they already have available to them and limit the necessity of developing new recordkeeping systems. AMS made no changes to the information collection requirements of the proposed rule based on this comment.

AMS proposed to require live poultry dealers to make various financial disclosures to broiler growers, including a table showing “average annual gross payments” made to growers at all complexes owned or operated by the live poultry dealer for the previous calendar year, as well as to growers at the local complex. Poultry and meat trade associations suggested AMS require dealers to disclose average annual gross payments only for the grower’s local complex. These commenters noted that complexes in different geographic areas face different economic conditions, arguing that information about payments at other complexes would not be useful and would potentially confuse growers. Therefore, AMS removed the proposed requirement disclose payment information for all complexes owned or operated by the dealer. AMS maintains the requirement for live poultry dealers engaged in the production of broilers to disclose payment information only relating to the broiler grower’s local complex. Accordingly, this change reduced the information collection burden on live poultry dealers from the proposed to the final rule.

Growers and live poultry dealers also requested in comments that AMS provide more specificity on how to calculate average annual gross payments. While the proposed rule provided detail on calculations, the commenters felt the instructions were not sufficiently specific to assure that live poultry dealers could comply and that broiler growers received adequate data on which to base business decisions. Therefore, AMS developed more detailed instructions on how to calculate them. The instructions are included in Form PSD 6100 (Live Poultry Dealer Disclosure Document). AMS added a modest amount of time to its cost estimates for live poultry dealers to review the instructions.

Several commenters recommended that AMS require the disclosure of grower turnover data. Grower turnover rates relate to the general risk of termination and non-renewal of

contracts with a live poultry dealer. This information would allow growers to compare the turnover rates of multiple live poultry dealers as a risk factor when making contracting decisions. Therefore, AMS added a provision of the final rule requiring live poultry dealers engaged in the production of broilers to disclose average annual broiler grower turnover rates for the previous calendar year and the average of the 5 previous calendar years at both the company level and the local complex level. AMS developed instructions for how to calculate average annual broiler grower turnover rates. The instructions are included in Form PSD 6100. AMS added a modest amount of time to its cost estimates for live poultry dealers to review the instructions and calculate grower turnover rates.

Numerous commenters from the grower and live poultry dealer sectors expressed that these provisions should be in plain and unambiguous language to avoid discrepancies in interpretation among the various parties, regulators, and courts. Some commenters also indicated a need to ensure growers who are not native speakers of English can understand the disclosures.

Considering the comments, AMS added a provision at § 201.102(g)(4) of the final rule to require live poultry dealers engaged in the production of broilers to make reasonable efforts ensure that growers are aware of their right to request translation assistance, and to assist the grower in translating the Disclosure Document at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement, but the grower has the option to waive up to 7 calendar days of that time period. Reasonable efforts include but are not limited to providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the broiler grower’s geographic area. The rule would also prevent a live poultry dealer from restricting a broiler grower or prospective broiler grower from discussing or sharing the Disclosure Document for purposes of translation with a person or organization that provides language translation services. AMS also added a provision to § 201.100 preventing live poultry dealers from restricting growers from sharing the Disclosure Documents with legal counsel, accountants, family, business associates, and financial advisors or lenders.

The proposed rule would have required live poultry dealers to provide growers with copies of the Disclosure Document and a true written copy of the contract 7 calendar days prior to executing the contract. The final rule changes the 7-day requirement to a 14-day requirement, but the broiler grower has the option to waive 7 calendar days of that time period. These changes did not affect the estimation of costs or benefits in the rule because growers retain the flexibility to determine the length of time they need to review the documentation.

The proposed rule also would have required live poultry dealers to obtain the broiler grower’s or prospective broiler grower’s dated signature as evidence of receipt of the Disclosure Document or obtain alternative documentation acceptable to the Administrator as evidence of receipt. The final rule will require live poultry dealers to obtain the broiler grower’s or prospective broiler grower’s dated signature as evidence of receipt or obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt. AMS expects in either case live poultry dealers to engage in personal communications with the grower and the delivery of the Disclosure Document, resulting in comparable levels of effort by the live poultry dealer. Accordingly, these changes did not affect the estimation of costs or benefits in the rule.

In the proposed rule, AMS did not specifically propose to require live poultry dealers to disclose their policies on grower payments with respect to increased lay-out time, diseased flocks, natural disasters and other depopulation events, feed issues or outages, or policies on grower appeal rights and processes. Multiple commenters suggested AMS include these disclosures. In the final rule, AMS added a provision at § 201.102(c)(4) requiring live poultry dealers engaged in the production of broilers to disclose policies and procedures on increased lay-out time; sick, diseased, or high early mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability, as well as any appeal rights arising out of these events. AMS added a modest amount of time to its cost estimates for

live poultry dealers to comply with this new requirement.

AMS proposed in § 201.100(f)(1)(i) to require live poultry dealers to establish, maintain, and enforce a governance framework reasonably designed to audit the accuracy and completeness of the disclosures in the Disclosure Document, which must include audits and testing, as well as reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers.

AMS determined that the requirement in § 201.102(f)(2) for the principal executive officer or officers to certify the governance framework and the accuracy of the Disclosure Document adequately covers the intended requirement for officers of this level to be focused on the effectiveness of the governance framework. AMS concluded that this level of detail about the audit process for the Disclosure Document was not necessary, particularly as AMS seeks to balance the need to ensure reliability of these statements with the burden on the principal executive officers regarding details of the governance process. Therefore, AMS removed the proposed requirement for audit, testing, and reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers, which reduces the burden on regulated entities.

AMS expects §§ 201.102 and 201.104 to mitigate costs associated with asymmetric information by requiring live poultry dealers to disclose more and potentially valuable information to growers. Section 201.102 requires live poultry dealers engaged in the production of broilers to make disclosures before entering into new contracts, renewing existing contracts, or requiring growers to make additional capital investments. Section 201.104 requires live poultry dealers engaged in the production of broilers to disclose additional information at the placement and settlement of each flock.

AMS considered three alternatives to the final §§ 201.102 and 201.104. The first is “do nothing” or the *status quo*. All regulations under the Act would remain unchanged. It forms the baseline against which the second alternative, §§ 201.102 and 201.104 will be compared. The rule removes portions of the current § 201.100, which already requires disclosure from live poultry dealers, and replaces them with a more extensive set of disclosure requirements in § 201.102 that only apply to live poultry dealers engaged in broiler production. Since the cost and benefit analysis are compared to the cost and benefits *status quo*, costs and benefits

estimated here reflect only cost and benefits associated with the new requirements in §§ 201.102 and 201.104.

AMS considered a third alternative similar to §§ 201.102 and 201.104. The alternative would leave all of the requirements in §§ 201.102 and 201.104 the same, but entirely exempt live poultry dealers engaged in broiler production that process less than 2 million pounds per week. This third alternative would exempt smaller live poultry dealers, some of which might not have sophisticated records. However, since larger growers do most of the contracting (as quantified later in this analysis), most broiler growers would still receive the disclosures. AMS then estimated and compared the costs and benefits of the alternatives and selected §§ 201.102 and 201.104 as the preferred alternative to finalize.

Discussion of the Benefits of the Regulations

The primary purpose of the final rule is to make information available to broiler growers when that information would be most important in decision-making. Currently, most broiler production contracts are incomplete, and providing more information would likely lower the uncertainty the grower faces over their revenue and profit estimates. In addition, growers lack negotiating leverage with live poultry dealers to demand, among other things, transparency, and completeness in contracts. A benefit of this regulation is that by providing prospective growers and those contemplating additional capital investments better information on expected returns, growers should be able to make more informed business decisions and can more readily avoid entering into contracts that are not financially sustainable. The regulation still retains the rights of broiler growers to discuss the terms of the broiler growing arrangement and the Disclosure Document with other growers for the same live poultry dealer, advisors, and governmental agencies even if the broiler growing arrangement contains a confidentiality provision. This facilitates better information sharing, decision making, and risk management. By alleviating market failures, disclosures may help the market for grower services function better and help growers benefit from competition in the market for their services.

Better information on live poultry dealer commitments should reduce hold-up concerns that may stifle investment by growers. Better information and transparency on placements and settlements could reduce grower concerns over live

poultry dealer manipulation of inputs and reduces the potential for deception or fraud, and the high degree of control and influence that the live poultry dealer has over many, if not most, of the critical inputs that will determine the business success of the grower's operation.

Alternatively, the placement and settlement information could provide broiler growers with concrete information they can use to support, individually or collectively, any grievances they might have with a particular live poultry dealer. At the same time, this regulation provides growers a measure of protection against risks of retaliation or discrimination that may arise from disputes with live poultry dealers during the course of the broiler growing arrangement.

Section 201.102 lays out the information that a live poultry dealer is required to provide to broiler growers contemplating a relationship with that live poultry dealer. The disclosure of information is required whenever a live poultry dealer seeks to renew, revise, or replace an existing broiler growing arrangement. In addition, such disclosure is required for any new contract as well as whenever a live poultry dealer is requiring an original capital investment or a change to existing housing specifications that require an additional capital investment. These are the times when the information will be most useful in informing broiler growers of the potential implications of entering into a contract with the live poultry dealer or contemplating additional investment in capital stock. This information allows potential growers to make more informed and financially sustainable business decisions. Inaccurate information provided in disclosure to growers, and other bait-and-switch tactics, such as making a material policy change but not through a new or revised contract, would be a deceptive practice and would constitute a violation of this section and § 202(a).

When a live poultry dealer requires a broiler grower to make a capital investment, the dealer is required to provide the grower with the capital specifications they are required to meet and with a letter of intent sufficient to seek financing, as well as a full disclosure of the terms of the agreement. This information allows more informed investment decisions and help potential lenders accurately assess risk.

The Disclosure Document provides information on the length of the contract, number of guaranteed placements, stocking density, and notification of certain risks inherent in

the agreement. All this information helps to evaluate the longer-term viability of the investment and reduce hold-up fears.

Grower awareness of minimum flock placements and minimum stocking densities enables growers to more accurately estimate the risks and returns associated with their operations including debt management, cash flow, and other risks. It may enable growers, as well as financial institutions, to better estimate and manage risk, potentially including the acquisition of external insurance and risk management products.

In addition to information about the specific terms of the contract, information is provided to inform growers about the live poultry dealer's financial history and history of grievances with growers with whom they have contracted. This information also improves growers' ability to evaluate their decisions and the potential for hold-up related concerns.

The Disclosure Document includes information on the level and distribution of payments made to broiler growers under contract to the live poultry dealer. It describes past and expected future annual returns for similarly situated growers based on the complex and the live poultry dealer's other complexes with the same housing specifications. It presents returns at various levels of performance, as not all growers perform equally relative to the fixed cost of entry, making it easier for potential growers to estimate their revenues from the contract. The Disclosure Document also provides insights into the variability of cash flow within any given year to enable the grower to improve business decision-making and manage risk. The increased information in the Disclosure Document on the expected levels and distributions of payments has the added benefit of lowering the uncertainty of revenue streams for contract broiler growers.

The reliability of these disclosures would be reinforced by a governance framework and anti-fraud protections. In presenting this information to growers, the Disclosure Document reduces information asymmetry and the risk of fraud and deception. As a result, prospective growers and those contemplating additional capital investments have more confidence in the integrity of the information and consequently in their ability to make sound decisions.

A live poultry dealer is required to provide the Disclosure Document to growers prior to their entering into an agreement to allow time to discuss the terms of the agreement with advisors,

lawyers, business associates, bankers, USDA, or other extension organizations to obtain assistance in evaluating the agreement.

Section 201.104 requires additional ongoing disclosure of information related to broiler grower ranking pay systems ("tournaments"). This information is focused on the actual distribution of inputs to growers at the time of placements and the outcomes of the ranking system. Some of this information improves growers' ability to manage the flocks under their care, while other information helps growers to evaluate the factors affecting the outcome of the ranking system.

Lack of transparency in the tournament calculations has led to risks by growers relating to the potential for fraud and deception. These include grower inability to verify the accuracy of payments, to measure and manage risks, and to detect possible discrimination or retaliation for disputes arising under the broiler growing arrangement. The provision of additional transparency around tournament systems in this regulation is designed to address those risks. Provision of information regarding consistency of inputs (both at the time of placement and at the time of settlement), and any adjustments to methods or formulas, will foster more transparent, accurate, reliable, and widely accepted tournaments, and greater ability to monitor and hold live poultry dealers accountable for divergences from high standards of market integrity.

Broiler growers who participate in numerous tournaments over time will benefit from the added information they receive at the time of placement and settlement, as they will gain experience and knowledge useful in maximizing their growout performance. Because live poultry dealer-provided inputs may vary from flock-to-flock, growers may enhance their knowledge and improve management practices and skills with access to input distribution information, particularly at the stage when the input is provided. The increased information in the settlement and placement disclosures will allow growers to assess the impacts of input variability on revenues over time, which will also serve to lower the uncertainty of revenue streams. Growers armed with this information may be better able to efficiently allocate resources, reduce uncertainty of revenue streams, and maximize their individual profitability.

Confidentiality restrictions have historically prevented broiler growers from releasing details of contract pay and performance, thus limiting the availability of comprehensive data with

which to consider the effects of alternative regulatory and institutional structures on market performance.¹³⁴ Subsequently, the literature on these topics is insufficient to allow AMS to fully estimate the magnitude of the inefficiencies corrected by the rule, nor the degree to which the disclosure requirements and additional grower protections will address them. Though AMS is unable to completely quantify the benefits of the regulations, this analysis explains numerous benefits derived from increased information, reduced information asymmetries, and reduction in risk of deception by live poultry dealers. Each of the disclosures required under §§ 201.102 and 201.104 of the rule provides information that will be useful to growers in making more informed decisions and reducing concerns resulting from lack of access to information.

AMS estimated the industry benefits in two parts, one quantifiable and the other non-quantifiable. For the quantifiable part, AMS will provide a minimum value of the benefit to broiler growers from the additional information in the disclosures required under §§ 201.102 and 201.104 and will refer to this minimum benefit as G_{min} .

The quantifiable minimum benefit of the financial, placement, and settlement disclosures, G_{min} , arises from the additional information available to growers that serves to lower the uncertainty in revenue streams of contract growers. Lower uncertainty in revenue streams results in a reduction in revenue risks to growers. According to economic principles, a risk averse grower will benefit economically from a reduction in revenue risk.¹³⁵ AMS quantifies the benefit to growers from the reduction in revenue risk by estimating the Risk Premium (RP) to contract broiler growers from reducing variability of their net revenues from the disclosures. AMS will then use RP as G_{min} , the quantifiable minimum benefit of the disclosures.

However, §§ 201.102 and 201.104 have additional, other non-quantified benefits to growers and live poultry dealers, referred to as B_o .¹³⁶ These other benefits arise from a reduction in risk of retaliation by allowing growers to share

¹³⁴ For instance, the analysis of MacDonald (2014), MacDonald and Key (2014), and Vukina and Leegomanchai (2006) (Op. Cit.) relies on data from grower surveys. Knoeber and Thurman (1995) relies on contract settlement data from a single integrator.

¹³⁵ A risk averse grower prefers revenue streams with low uncertainty to revenue streams with high uncertainty when both have the same mean return.

¹³⁶ In the context of this analysis, "non-quantified" is defined to include measures which are quantitative in principle but whose value cannot be estimated at present.

information even if the growing arrangement contains a confidentiality provision and reducing the potential for fraud and deception by live poultry dealers by providing better, more accurate, and verifiable information to growers. These other benefits may lead to an improved allocation of capital and labor resources (such as increased capital investment through the reduction in perceived hold-up risk, and more informed decisions on whether and with whom to enter into a growing arrangement), leading to improved efficiencies and an improved allocation of resources for broiler growers and live poultry dealers.

AMS refers to the total benefits to the industry as B_T , which is the sum of the quantified G_{min} , and the non-quantified B_O , benefits or, $B_T = G_{min} + B_O$. AMS is not able to fully quantify the total benefits, B_T , from improved grower information, more informed decision-making, reduced revenue uncertainty, grower risk reductions, and an improved allocation of resources. The benefits AMS was able to quantify exceed the costs AMS was able to quantify.

AMS expects that the effects on the industry from the final rules will be very small in relation to the total value of industry production. In other words, AMS expects the impacts on total industry supply to be immeasurably small, leading to immeasurably small indirect effects on industry supply and demand, including price and quantity effects.

Estimation of Costs and Benefits of the Regulations

AMS estimated costs and benefits for two alternatives. The first is the §§ 201.102 and 201.104, which is the preferred alternative. The second alternative is the same as § 201.102 and 201.104 with a complete exemption for live poultry dealers engaged in broiler production that process fewer than 2 million pounds per week. Both are compared against a baseline of *status quo*, which has no costs or benefits.

The quantified costs of §§ 201.102 and 201.104 primarily consist of the time required to gather the information and distribute it among the broiler growers. These costs of the rule will fall on live poultry dealers as they collect and disseminate the required information, and on broiler growers based on the value of the time they put into reviewing the disclosures. Though broiler growers are expected to incur costs in reviewing the information, they would be the primary beneficiaries of the information, which would be reflected in their ability to make more

informed decisions. The broiler growers must review the information in order to realize the benefits. This may result in a more efficient allocation of capital to the broiler growing industry.

There were 42 live poultry dealers to which the rule would apply that filed annual reports¹³⁷ with AMS, and their reports indicate that they had 19,808 contracts with 16,524 broiler growers during their fiscal year 2021.

AMS expects the total costs and benefits would be very small relative to the size of the market. Chicken sales in the U.S. for 2019 were approximately \$58.6 billion. The total quantified costs of §§ 201.102 and 201.104 are estimated to be greatest in the first year at \$3.4 million, or 0.006 percent (six thousandths of one percent) of revenues. Although an increase in cost of six-thousandths of a percent of sales could reduce supply, the reduction would be extremely small and would not measurably alter broiler supply. Provisions of final § 201.202 and 201.204 require only disclosures to growers. Neither requires any changes in the way live poultry dealers or broiler growers produce or process broilers. Given the nature of the rule, AMS expects that neither live poultry dealers nor broiler growers would measurably change any production practices that would impact the overall supply of broilers.

Expected quantified costs are estimated as the value of the time required to produce and distribute the disclosures required by §§ 201.102 and 201.104 as well as the time required to create and maintain any necessary additional records. AMS's experience in reviewing live poultry dealers' records indicates that most live poultry dealers already keep nearly all of the required records.

Final § 201.102 requires live poultry dealers disclose information to broiler growers concerning the growout contract, capital investments, grower earnings, recent litigation, recent bankruptcies, and live poultry dealers' policies concerning events such as disasters or feed outages that might occur during the growout period. The disclosures will require live poultry dealers to retain records, but AMS experience in reviewing live poultry dealers' records indicates that most live poultry dealers already keep nearly all of the necessary records.

¹³⁷ All live poultry dealers are required to annually file PSD form 3002 "Annual Report of Live Poultry Dealers," OMB control number 0581-0308. The annual report form is available to public on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

Paragraph (a) of final § 201.102 requires live poultry dealers to provide a true copy of a new contract as well as a Disclosure Document that is defined in the remaining paragraphs. When the new contract is associated with new housing or changes in the housing live poultry dealers are also required to provide a letter of intent that growers can present to lenders. Paragraph (b) of the final § 201.102 requires live poultry dealers to disclose certain terms of the contract including the live poultry dealer's contact information, length of the term of the agreement offered, annual minimum number of placements, and minimum stocking density. AMS is aware that live poultry dealers already keep copies of contracts because AMS commonly reviews growout contracts on letters of intent during live poultry dealer compliance reviews.

Paragraph (c) of final § 201.102 requires live poultry dealers to disclose a summary of litigation and bankruptcies in the last 5 years. Although AMS does not commonly review records of past bankruptcies or litigation in live poultry dealer compliance reviews, courts keep records of litigation and bankruptcies that would enable live poultry dealers to disclose the required summaries. Paragraph (c) also requires live poultry dealers to disclose their policies concerning a number of events that could occur during the term of the contract, including increased layout times; high mortality birds, natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; depopulation of birds; feed outages; grower complaints concerning feed. In the event that the live poultry has no policy, paragraph (c) requires the live poultry dealer to disclose that it has no policy. AMS commonly reviews the types of policies in paragraph (c) of final § 201.102, and AMS expects that live poultry dealers that have the relevant policies will have records of them.

Paragraph (d) of final § 201.102 requires records of annual turnover rates for the last 5 years and annual gross payments per square foot by complex and housing type. Current regulations under the Act generally require live poultry dealers to retain payment records for at least 2 years,¹³⁸ and as noted below the final rule requires payment records under final § 201.104(a) be retained for 5 years. Some disclosures required under final

¹³⁸ Section 401 of the Act and 9 CFR 201.94, 201.95, and 203.4.

§ 201.102 will inherently necessitate that the companies keep records sufficient to produce and substantiate the disclosure. For example, the dealer would need to keep the last 5 years of litigation records to support a disclosure about its litigation history. As a result, some live poultry growers may need to keep payment records for a longer period of time than they do today, but AMS experience indicates that most live poultry dealers already keep the records for a longer period. Live poultry dealers keep lists of the growers under contract, and AMS reviews indicate that most keep list of growers for at least 5 years.

Paragraph (f) of § 201.102 requires live poultry dealers to create a governance framework to ensure the accuracy of the disclosure documents and paragraph (g) requires live poultry dealers to keep a receipt from growers indicating that the grower received the disclosure document. The records required in paragraphs (f) and (g) would be records that live poultry dealers currently do not keep. Live poultry dealers will need to develop new recordkeeping systems to retain them.

Paragraph (a) of final § 201.104 requires live poultry dealers to retain payment records for 5 years. Current regulations require live poultry dealers to retain records for 2 years. Some live poultry growers may need to keep payment records for a longer period of time as result of the rule, but AMS experience indicates that most live poultry dealers already keep the records for a longer period. The remainder of final § 201.104 requires live poultry dealers to disclose information to poultry growers about flocks placed with each grower, including when the flocks are placed and when the live poultry dealers make payment for raising the flocks.

Paragraph (b) requires live poultry dealers to make disclosures when flocks are placed with the broiler grower. Paragraph (c) requires live poultry dealers to make disclosures when the live poultry dealer makes payment to the broiler grower. Paragraph (b) and (c) requires the live poultry dealer to retain records for each flock of the stocking density, ratios of the breeds delivered in the flock, ratios of each sex in the lot if the live poultry dealers has determined it, age of the breeder flock, known health impairments in the breeder flock, and adjustments that live poultry dealers make to a grower's payment based on any of the disclosed information. Paragraph (c) also requires live poultry dealers to disclose the number feed outages that lasted more than twelve hours at each grower's facility.

Paragraphs (b) and (c) require live poultry dealers to maintain the same type of records that AMS commonly requests from live poultry dealers during compliance reviews,¹³⁹ and are records that most live poultry dealers already retain. An exception would be live poultry dealers that purchase chicks from outside hatcheries, as they may not already be retaining records concerning the breeder flock. The records would be available from the hatchery, but some live poultry dealers may have to keep records that they do not otherwise keep.

Although live poultry dealers will need to keep considerable amounts of records to comply with the disclosures required in final §§ 201.102 and 201.104, live poultry dealers already retain most of the records necessary. Live poultry dealers will need to create relatively few new records beyond those that they already retain, and AMS expects that additional costs to live poultry dealers associated with creating and maintaining records will be relatively small.

AMS also estimates the amount of time that broiler growers would take to review the information provided to them by live poultry dealers. Estimates of the amount of time required by live poultry dealers to create and distribute the disclosures 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 in working with growers and with auditing live poultry dealers for compliance with the Act. Estimates for the value of the time are U.S. Department of Labor (DOL) Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) released May 2022.¹⁴⁰ Occupations used in the estimation

¹³⁹ AMS routinely conducts reviews of live poultry dealers for compliance with the Packers and Stockyards Act and regulations. Some of the applicable regulations in live poultry compliance reviews include § 201.43 Payment and accounting for livestock and live poultry; § 201.49 Requirements regarding scale tickets evidencing weighing of livestock, live poultry, and feed; § 201.71 Scales and or Electronic Evaluation Devices or Systems; accurate weights and measures, repairs, adjustments or replacements after inspection; § 201.73 Scale operators to be qualified; § 201.82 Care and promptness in weighing and handling livestock and live poultry; § 201.95 Inspection of business records and facilities; § 201.100 Records to be furnished poultry growers and sellers; § 201.108–1 Instructions for weighing live poultry or feed; § 201.211 Undue or unreasonable preferences or advantages; § 201.215 Suspension of delivery of birds; § 201.216 Additional capital investments criteria; and § 201.217 Reasonable period of time to remedy a breach of contract among others.

¹⁴⁰ See U.S. Bureau of Labor Statistics, *May 2021 National Occupational Employment and Wage Estimates*, May 2021. https://www.bls.gov/oes/current/oes_nat.htm#00-0000.

were Executive Secretaries and Executive Administrative Assistants (occupation code 43–6011) for live poultry dealers' administrative assistants, General and Operations Managers (Occupation code 11–1021) for live poultry dealers' managers, Lawyers (occupation code 23–1011) for attorneys for live poultry dealers and for growers, Agricultural Workers (occupation code 45–2090), Computer and Information Systems Managers (occupation code 11–3021), Software and Web Developers, Programmers, and Testers (occupation code 15–1250) for information technology managers, Accountants and Auditors (occupation code 13–2011) for accountants for live poultry dealers, Bookkeeping, Accounting, and Auditing Clerks (occupation code 43–3031) for bookkeepers for live poultry dealers, and Management Occupations (occupation code 11–0000) for poultry growers.

AMS marked up the wages 41.82 percent to account for benefits. This results in a cost per hour of \$41.71 ($\29.41×1.4182) for live poultry dealers' administrative assistants, \$84.27 ($\59.42×1.4182) for live poultry dealers' managers, \$131.38 ($\92.64×1.4182) for attorneys for live poultry dealers and for growers, \$92.91 ($\65.51×1.4182) for information technology managers, \$56.27 ($\39.68×1.4182) for information technology staff, \$49.98 ($\35.24×1.4182) for accountants for live poultry dealers, \$27.44 ($\19.35×1.4182) for bookkeepers for live poultry dealers, and \$60.70 ($\42.80×1.4182) for poultry growers.

Costs of § 201.102

Section 201.102 lists several new disclosure and recordkeeping requirements for live poultry dealers engaged in the production of broilers. These new and extended requirements are in addition to those already included in current § 201.100 that would create additional costs above the *status quo*.

The new provisions in § 201.102 require large live poultry dealers to disclose a true written copy of the growing agreement and a new Disclosure Document any time a live poultry dealer seeks to renew, revise, or replace an existing broiler growing arrangement that does not contemplate modifications to the existing housing specifications. Small live poultry dealers that process less than 2 million pounds of broilers per week are excluded from this disclosure requirement. Before a live poultry dealer enters a broiler growing arrangement that would require an original capital

investment or requires modifications to existing housing, both large and small live poultry dealers must provide a copy of the broiler growing agreement, the housing specifications, a letter of intent, and the new Disclosure Document.

The Disclosure Document requires live poultry dealers to disclose summaries of litigation over the prior five years with any broiler growers, bankruptcy filings, and the live poultry dealer's policy regarding a grower's sale of the farm or assignment of the contract.

Live poultry dealers are required to disclose growers' variable costs if it collects the information. Live poultry dealers are required to establish, maintain, and enforce a governance framework that is reasonably designed to audit the information to ensure accuracy, ensure compliance with the Act, and obtain and file signed receipts certifying that the live poultry dealer provided the required Disclosure Document.

Section 201.102 requires live poultry dealers to include a statement in the disclosure document describing existing policies and procedures, as well as any appeal rights arising from increased lay-out time; sick, diseased, and high early mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability. If no policy and procedures exist, the live poultry dealer will acknowledge "no policy exists".

The Disclosure Document requires specific financial disclosures to broiler growers. The first required disclosure is a set of tables showing average annual gross payments in U.S. dollars per farm facility square foot in each quintile or mean and standard deviation to broiler growers for each of the 5 previous years, organized by housing specification at each complex. Based on comments received to the proposed rule, AMS has provided instructions in the final rule for calculating average annual gross payments in each quintile or mean and standard deviation. The second required disclosure is a table showing the average annual broiler grower turnover rates for the previous calendar year and the average of the 5 previous calendar years at a company level and at a local complex level.

AMS estimates the aggregate one-time costs of setting up the Disclosure Document will require 4,128

management hours, 1,512 legal hours, 1,016 administrative hours, and 1,079 information technology hours costing \$689,000 in the first year for live poultry dealers to initially review the regulation and set up the Disclosure Document.¹⁴¹ ¹⁴² A more detailed explanation of the one-time first-year costs associated with § 201.102 is in Table 1 in Appendix 1.

AMS expects the ongoing costs of updating and distributing the Disclosure Document to growers renewing or revising existing contracts, new growers entering into contracts, existing growers required to make additional capital investments to require in aggregate 2,061 management hours, 273 legal hours, 836 administrative hours, and 805 information technology hours to produce and distribute to growers the gross payment disclosure information annually for an aggregate annual cost of \$319,000 to live poultry dealers. AMS expects the total cost of producing the annual gross payment disclosure information to consist of \$689,000 in the first year to set up the systems and controls, plus \$319,000 in costs the first year and annually thereafter to compile, distribute, and maintain the disclosure data and documents. Thus, the first-year aggregate total costs of § 201.102 to live poultry dealers are expected to be \$1.0 million and then \$319,000 annually on an ongoing basis. A more detailed explanation of the ongoing costs associated with § 201.102 is in Table 2 in Appendix 1.

With the exception of signing a receipt—itself not mandatory—the rule does not impose any requirement on broiler growers to review the information provided by live poultry dealers. However, to benefit from the Disclosure Document, growers will need to review the information provided. According to AMS subject matter experts, broiler growers will spend the most time on their first review of the Disclosure Document in order to understand the information and then spend less time reviewing subsequent disclosures. For § 201.102 (a)(1), AMS expects that growers will take about one hour to review the documents each time documents are disclosed to them in the first year. Live poultry dealers processing fewer than an average of 2

¹⁴¹ Average hourly wage rates used to estimate dealer costs include a 41.82% markup for benefits and are as follows: Management—\$93.20, Legal—\$113.80, Administrative—\$39.69, and Information Technology—\$82.50.

¹⁴² The one-time set-up costs are not equal to the first-year costs of § 201.102 because the first-year costs include the one-time set-up costs and the ongoing costs that would be incurred in the first year as contracts are renewed, revised, or originated.

million pounds of broilers weekly will be exempt from the reporting requirements, but large live poultry dealers are required to provide disclosures to growers for each of 19,417 ¹⁴³ contracts that come up for renewal in the first year. AMS expects that 74.71 percent of the contracts will require renewal in the first year. This includes all flock-to-flock contract, one-year contracts, and the portion of the longer-term contracts that will expire in the first year. At an hourly wage of \$60.70 AMS expects the requirements associated with § 201.102 (a)(1) will cost about \$881,000 ¹⁴⁴ in the aggregate in the first year. After the first year, as broiler growers get familiar with the disclosures, AMS expects growers to spend less time reviewing the documents. AMS expects growers to take about five minutes reviewing each Disclosure Document for an aggregate cost of \$73,000 ¹⁴⁵ per year.

For the remaining contracts that will not be renewed in the first year, AMS expects that 5 percent of the contracts will be renewed in each of the next five years for a yearly cost of \$59,000.¹⁴⁶

Section 201.102 (a)(2) and (3) will only apply to broiler growers that are new entrants requiring an original capital investment and to broiler growers making significant capital improvements. AMS expects that each of these groups of growers will account for 5 percent of the 20,000 ¹⁴⁷ contracts live poultry dealers reported in their annual reports to AMS. If growers require one hour at \$60.70 per hour, growers' aggregate costs will be \$60,000 ¹⁴⁸ for reviewing documents required in § 201.102(a)(2) and an

¹⁴³ Live poultry dealers processing an average of more than 2,000,000 pounds of broiler per week, reported a combined 19,417 broiler contracts in their fiscal year 2021 annual reports to AMS. 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 on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSF3002.pdf>.

¹⁴⁴ 1 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 74.71 percent of the contracts renewed in the first year = \$880,541.

¹⁴⁵ 1/12 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 74.71 percent of the contracts renewed in the first year = \$73,378.

¹⁴⁶ 1 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 5 percent of the contracts renewed per year = \$58,931 per year.

¹⁴⁷ Live poultry dealers reported a combined total of 19,808 contracts for their fiscal year 2021. Smaller live poultry dealers would not be exempt from reporting requirements in § 201.102(a)(2) or (3).

¹⁴⁸ 1 hour to review each disclosure × \$60.70 per hour × 19,808 contracts × 5 percent of growers that are new entrants = \$60,117.

additional \$60,000¹⁴⁹ for reviewing documents required in § 201.102(a)(3) in the first year and in each successive year.

AMS estimates growers' aggregate costs for reviewing and acknowledging receipt of disclosures associated with § 201.102 to be \$1.2 million in the initial year, \$253,000 through year five, and then \$194,000 in each succeeding year.¹⁵⁰ The costs will decline after year five because AMS expects that all contracts will have been renewed by the end of year five and that all growers would have reviewed the Disclosure Document at least one time by year six. The Agricultural Census reports that there were 16,524 contract broiler growers in the United States in 2017.¹⁵¹

The ten-year total costs of § 201.102 to all 42 of the affected live poultry dealers are estimated to be \$3.9 million and the present value (PV) of the ten-year total costs to be \$3.4 million discounted at a 3 percent rate and \$2.9 million at a 7 percent rate. The aggregate annualized costs of the PV of ten-year costs to live poultry dealers discounted at a 3 percent rate are expected to be \$398,000 and \$411,000 discounted at a 7 percent rate.

The ten-year aggregate total costs of § 201.102 to broiler growers are estimated to be \$3.2 million and the present value of the ten-year total costs to be \$2.8 million discounted at a 3 percent rate and \$2.5 million at a 7 percent rate. The annualized costs of the PV of ten-year costs to broiler growers discounted at a 3 percent rate are expected to be \$331,000 and \$351,000 discounted at a 7 percent rate.

The ten-year aggregate total costs of § 201.102 to live poultry dealers and broiler growers are estimated to be \$7 million. The present value of the ten-year total costs are estimated to be \$6.2 million discounted at a 3 percent rate and \$5.4 million at a 7 percent rate. The annualized costs of the PV of ten-year costs to live poultry dealers and broiler growers discounted at a 3 percent rate are expected to be \$728,000 and \$762,000 discounted at a 7 percent rate.

Costs of § 201.104

Disclosures that are required in § 201.104 are associated with poultry grower ranking systems. At the time of broiler placement, § 201.104 requires

live poultry dealers to disclose information about inputs, such as stocking density, breed and breeder flock information for each flock placed with a grower within 24 hours of flock placement. At the time of settlement, it requires the live poultry dealer to disclose information about the housing specifications for each grower grouped or ranked during the specified period and the distribution of inputs to each grower in each tournament for each flock settled in the tournament system.

AMS estimates that the live poultry dealers' one-time aggregate costs of reviewing the regulation and developing the placement and settlement disclosure documents will require 630 management hours, 462 administrative hours, and 1,764 information technology hours costing \$236,000 in the first year to initially set up the disclosure documents required by § 201.104.¹⁵² A more detailed explanation of the one-time first-year costs associated with § 201.104 is in Table 3 in Appendix 1.

AMS expects the § 201.104 disclosure documents will require an additional 2,640 hours divided evenly among management, administrative, and information technology staff to produce, distribute, and maintain the disclosure documents each year on an ongoing basis for an aggregate annual cost of \$193,000. A more detailed explanation of the ongoing costs associated with § 201.104 is in Table 4 in Appendix 1.

AMS expects the aggregate cost of producing the § 201.104 pre-flock placement and settlement disclosure documents to consist of \$236,000, in the first year to review the regulation and to set up the systems and controls, plus \$193,000 in costs the first year and annually thereafter to compile, distribute, and maintain the placement and settlement disclosure documents. Thus, the aggregate first-year total costs to live poultry dealers of § 201.104 are expected to be \$429,000 and then \$193,000 annually on an ongoing basis.

Section § 201.104(b) concerns disclosures of inputs placed with broiler growers in tournament settlement systems. Live poultry dealers will be required to disclose information about inputs, such as feed, medication, chicks, etc. for each flock placed with a grower. AMS expects that, the first time a grower receives the disclosure, he or she will require about 10 minutes to review each of the disclosure's documents. At \$60.70 per hour, the first disclosure

document will cost growers \$134,000.¹⁵³ After reviewing the documents the first time, AMS expects that growers will need only 5 minutes to review successive disclosures. Because growers average 4.5 flocks per year, AMS expects that reviewing the disclosure documents concerning inputs will cost in the aggregate an additional \$234,000¹⁵⁴ for the remaining 3.5 flocks in the first year and \$301,000¹⁵⁵ for the 4.5 flocks in each successive year.

Section 201.104(c) concerns disclosures about the group of growers in settlement groups in tournament settlement systems. Live poultry dealers are required to disclose information about growers in each tournament for each flock settled in tournament system. AMS expects that the cost to growers associated with § 201.104(c) will be identical to the costs of reviewing the disclosures required in § 201.104(b). Aggregate costs would be \$134,000¹⁵⁶ for the disclosures reviewed. AMS expects that reviewing the disclosure documents will cost an additional \$234,000¹⁵⁷ for the remaining 3.5 flocks in the first year and \$301,000¹⁵⁸ for the 4.5 flocks in each successive year.

AMS estimates growers' aggregate costs for reviewing disclosures associated with § 201.104 to be \$736,000 in the first year and \$602,000 in each subsequent year. AMS expects that broiler growers will spend the most time on their first review of the placement and settlement disclosures in order to understand the information, with less time for each subsequent review.

The ten-year aggregate total costs of § 201.104 to live poultry dealers are estimated to be \$2.2 million and the present value of the ten-year total costs to be \$1.9 million discounted at a 3 percent rate and \$1.6 million at a 7 percent rate. The annualized costs of the PV of ten-year costs to live poultry dealers discounted at a 3 percent rate are expected to be \$219,000 and \$224,000 discounted at a 7 percent rate.

¹⁵³ 1/6 hours × \$60.70 per hour × 16,524 broiler growers × 80 percent of broilers raised in tournament systems = \$133,731.

¹⁵⁴ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 3.5 additional flocks in the first year × 80 percent of broilers raised in tournament systems = \$234,029.

¹⁵⁵ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 4.5 flocks per year × 80 percent of broilers raised in tournament systems = \$300,894 per year.

¹⁵⁶ 1/6 hours × \$60.70 per hour × 16,524 broiler growers × 80 percent of broilers raised in tournament systems = \$133,731.

¹⁵⁷ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 3.5 additional flocks in the first year × 80 percent of broilers raised in tournament systems = \$234,029.

¹⁵⁸ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 4.5 flocks per year × 80 percent of broilers raised in tournament systems = \$300,894 per year.

¹⁴⁹ 1 hour to review each disclosure × \$60.70 per hour × 19,808 contracts × 5 percent of growers that require significant housing upgrades = \$60,117.

¹⁵⁰ The average hourly wage rate used to estimate broiler grower costs includes a 41.56% markup for benefits and is as follows: Management—\$70.94.

¹⁵¹ USDA, NASS. 2017 Census of Agriculture: United States Summary and State Data, (April 2019).

¹⁵² IT staff will be required to modify integrator information systems to compile information from past settlements to calculate the information required to be disclosed to growers.

The ten-year aggregated total costs of § 201.104 to broiler growers are estimated to be \$6.2 million and the present value of the ten-year total costs to be \$5.3 million discounted at a 3 percent rate and \$4.4 million at a 7 percent rate. The annualized costs of the PV of ten-year costs to broiler growers discounted at a 3 percent rate are expected to be \$617,000 and \$620,000 discounted at a 7 percent rate.

The costs from § 201.104 are higher for broiler growers than for live poultry dealers. There are two reasons for this. First, the rule only affects 42 live poultry dealers while it affects 16,524 broiler growers. Secondly, the primary costs to the live poultry dealers are the development of the placement and settlement disclosures, while the ongoing costs to distribute and maintain them are relatively small. Each broiler grower would receive and review both a placement and settlement disclosure for each flock placed and then settled in each tournament. Thus, there are many broiler growers who would receive and review the placement and settlement disclosures with each flock every year, which explains the higher cost relative to live poultry dealers. The relative higher cost to the broiler growers would be more than offset by the benefits of the extra information they can use to make financial business decisions. The benefits will be discussed in a later section.

The ten-year aggregate total costs of § 201.104 to live poultry dealers and broiler growers are estimated to be \$8.3 million and the present value of the ten-year total costs to be \$7.1 million discounted at a 3 percent rate and \$5.9 million at a 7 percent rate. The annualized aggregate costs of the PV of ten-year costs to live poultry dealers and broiler growers discounted at a 3 percent rate are expected to be \$836,000 and \$844,000 discounted at a 7 percent rate.

Combined Costs of §§ 201.102 and 201.104

Combined costs to live poultry dealers for §§ 201.102 and 201.104 are expected to be \$1.4 million in the first year, and \$512,000 in subsequent years. These combined costs are also reported above the Paperwork Reduction Act section as the combined costs to live poultry dealers for compliance with the reporting and recordkeeping requirements of §§ 201.102 and 201.104. The combined costs for broiler growers are expected to be \$1.9 million in the first year, \$854,000 in years two through five, and \$795,000 after year five on an ongoing basis.

The ten-year aggregate combined costs of §§ 201.102 and 201.104 to live poultry dealers are estimated to be \$6.0 million and the present value of the ten-year total costs to be \$5.3 million discounted at a 3 percent rate and \$4.5 million at a 7 percent rate. The annualized aggregate combined costs of the PV of ten-year costs to live poultry dealers discounted at a 3 percent rate are expected to be \$617,000 and \$635,000 discounted at a 7 percent rate.

The ten-year aggregate combined costs of §§ 201.102 and 201.104 to broiler growers are estimated to be \$9.3 million and the present value of the ten-year total costs to be \$8.1 million discounted at a 3 percent rate and \$6.8 million at a 7 percent rate. The annualized aggregate combined costs of the PV of ten-year costs to broiler growers discounted at a 3 percent rate are expected to be \$948,000 and \$971,000 discounted at a 7 percent rate. The costs to broiler growers from §§ 201.102 and 201.104 are higher for broiler growers than live poultry dealers for the reasons discussed above.

The ten-year aggregate combined costs of §§ 201.102 and 201.104 to live poultry dealers and broiler growers are estimated to be \$15.4 million and the present value of the ten-year aggregate combined costs to be \$13.3 million discounted at a 3 percent rate and \$11.3 million at a 7 percent rate. The annualized aggregate costs of the PV of ten-year costs to live poultry dealers and broiler growers discounted at a 3 percent rate are expected to be \$1.6 million and \$1.6 million discounted at a 7 percent rate.

Benefits of §§ 201.102 and 201.104

As discussed above, AMS will estimate the industry benefits from §§ 201.102 and 201.104 in two parts, one quantifiable and the other non-quantifiable. For the quantifiable part, AMS will provide a minimum value of the combined benefit to broiler growers from the additional information in the disclosures required under §§ 201.102 and 201.104 and will refer to this minimum benefit as G_{\min} . AMS first estimates G_{\min} and discusses the non-quantifiable benefits of the final rules immediately below and after the discussion of the benefit estimates.

Poultry growers are expected to benefit from the information in two ways. First, growers will benefit as live poultry dealers lose some potential market power. Second, the Disclosure Documents will provide growers more information on their anticipated revenue variability than they currently have, which will assist in supporting future income projections. This

additional information can give growers greater economic and financial certainty. While the economic literature does not address the relationship between asymmetric information and market power in the relationship among broiler growers and live poultry dealers, or in any directly analogous relationships, firms with information that other market participants do not have can command considerable monopoly and monopsony power.¹⁵⁹ As an example of the monopsony power of information, imperfect information in the market about an employee's training level limits the wages that a trained worker can obtain in the outside market, and it gives monopsony power to the employer that supported the training.¹⁶⁰ This concept extends to the grower-live poultry dealer relationship, substituting for training the marketing and production information about the contract grower that one live poultry dealer possesses but which is not available to other live poultry dealers, thus lowering the open market value of the grower's services. Further, in this example the grower has limited information on returns to other growers in their market due to the live poultry dealer's ability to shield this information. Thus, it is more difficult for the grower to make business decisions such as choosing whether to deal with the current live poultry dealer or sign a contract with another live poultry dealer, should one be available in the region.

In an example of large grain traders that have oligopsony and oligopoly market power, one analysis finds that large grain traders manipulate prices and market information.¹⁶¹ The analysis contends that these major firms move prices to their benefit by taking advantage of information they alone possess, *e.g.*, information on foreign subsidiaries, contract positions, the price-reporting system, export data, and commodity exchanges. Likewise, live poultry dealers have information they alone possess and can use to their advantage.

In a third example specific to broiler contracting, but with information exchange not being explicitly addressed, live poultry dealers will have monopsony-oligopsony power in a

¹⁵⁹ Allen, B. 1990. "Information as an Economic Commodity," *American Economic Review*, Vol. 80:2, pages 268–273.

¹⁶⁰ Acemoglu, D. and J. Piskchke. 1998. "Why do Firms Train? Theory and Evidence," *Quarterly Journal of Economics* Vol 113(1):79–119.

¹⁶¹ See Perloff, J., and G. Rausser. 1983. "The Effect of Asymmetrically Held Information and Market Power in Agricultural Markets", *American Journal of Agricultural Economics* Vol 65(2): 366–372.

given geographical area to the extent that growers have limited opportunity to contract with other live poultry dealers. Grower capital investments (poultry housing and specialized equipment) have little use outside of raising broilers. Being aware of the possibility that they may be held-up by live poultry dealers, growers will sub-optimally invest in specific assets.¹⁶² Implicitly then, knowledge of the possibility that they will be held-up will affect the growers' capital investment decisions.

If the market were less oligopsonistic, with live poultry dealers facing more competition between themselves for growers, individual live poultry dealers would have to make a case for why growers should grow for them rather than for competing live poultry dealers. In the extreme case of perfect competition, all price and other market information is known by all participants. While the nature of the broiler market means full competition and hence full market information cannot be achieved, the Disclosure Document does include the grower turnover rates and quintiles of average annual gross payment per square foot for the calendar year for the complex. Absent the Disclosure Document from the live poultry dealer, the typical grower is unlikely to have this market information. With this information, the grower can make more informed business decisions, including whether to move to another live poultry dealer upon contract completion, thus lowering the current live poultry dealer's market power, at least when alternative live poultry dealers are available. The information on grower turnover rates from the Disclosure Document should give the grower a better idea of their probability of being held-up, thus better informing their capital investment decisions. While lowering information asymmetry increases benefits to growers, live poultry dealers will suffer losses by losing market power.

AMS does not have the data necessary for estimating the economic impacts of

a loss of market power on the part of live poultry dealers due to information transfer nor the benefits to growers. However, according to basic economic principles, increasing competition—i.e., reducing the market power advantage of a buyer or seller—leads to increases in economic efficiency in the market. Based on these principles, we expect that a reduction in dealer market power would, if it occurs, result in net economic benefits. AMS also expects the grower to benefit simply from having more information on the potential variability of returns, even if average returns do not change. According to economic principles of expected utility, a risk averse producer will benefit economically from a reduction in revenue variability.¹⁶³ Purely addressing information exchange, the live poultry dealer is not losing the information it supplies the grower via the Disclosure Document. The live poultry dealer's quantified costs are associated with creating the Disclosure Document.

The act of supplying past revenue information in the disclosures may alter the statistical distribution of revenue the grower thinks they will face (including statistics that describe the distribution, such as mean and variance), mostly likely increasing expected mean revenues. By simply having more market information (e.g., the revenue quintiles from the Disclosure Document), presumably the grower will be able to place a smaller variability on their projected revenue than they would with less information. If they are risk averse, by the principle of expected utility, they will receive an economic benefit from being able to place a lower variability on his projected revenue. AMS estimates G_{\min} as the combined benefits to growers of §§ 201.102 and 201.104 from the reduction in profit uncertainty due to obtaining the revenue information from the Disclosure Document. AMS expects the majority of the benefits of reduced profit uncertainty will result from additional information in the financial disclosures

under § 201.102 as these disclosures provide revenue projections at different performance percentiles over different housing types. AMS expects that the additional information received in placement and settlement disclosures under § 201.104 regarding the effects of input variability on revenue variability will also result in reduced profit uncertainty, though to a lesser extent than the financial disclosures. AMS was not able to allocate the benefits between §§ 201.102 and 201.104 and presents just the total combined minimum quantifiable benefits of both rules.

Given assumptions about the level of risk aversion of the producer, the distribution of a contract grower's revenue, and the grower's utility function,¹⁶⁴ it is possible to calculate a grower's benefits of decreased revenue uncertainty associated with greater transparency. AMS relied on an empirical approach to estimate the minimum benefits, defined as a Risk Premium (RP), to contract broiler growers of a range of reductions in the variability of their net revenue.¹⁶⁵

The following table presents the G_{\min} benefit estimates based on RP estimates for the first year for several scenarios of reduction in the variability of net revenue and two assumptions for a risk aversion premium (RAP) and two assumptions for how risk aversion changes with wealth. For the latter, constant absolute risk aversion (CARA) assumes that the grower's risk aversion does not change as wealth increases. Decreasing absolute risk aversion (DARA) assumes the grower's risk aversion increases as wealth decreases. Another possibility is that the grower's risk aversion is increasing with wealth (IARA). While no evidence exists one way or another for how the risk preference of broiler contract growers changes with wealth, the agricultural economics literature generally assumes DARA over IARA.

¹⁶⁴ A utility function is an economic concept that measures an individual's preferences over a set of goods and services.

¹⁶⁵ AMS prepared a technical appendix (Appendix 2) that provides an explanation of the empirical approach used to estimate the Risk Premium and is included at the end of this document.

¹⁶² Vukina, Tom, and Poramet Leegommonchai. "Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry." *American Journal of Agricultural Economics* 88 (2006).

¹⁶³ Garcia, P., B. Adam, and R. Hauser. 1994. The Use of Mean-Variance for Commodity Futures and Options Hedging Decisions". *Journal of Agricultural and Resource Economics*, 19(1): 32–45.

TABLE 2—MINIMUM QUANTIFIABLE BENEFITS, G_{\min} , (RISK PREMIUM) TO CONTRACT GROWERS OF REDUCTIONS IN NET REVENUE VARIABILITY

Grower risk aversion (risk aversion premium)	Reduction in coefficient of variation of net revenue ^b			
	1%	2%	5%	10%
One year value				
Moderate (20%)	\$1,350,000	\$2,690,000	\$6,610,000	\$12,840,000
High (40%)	3,210,000	6,380,000	15,700,000	30,540,000
DARA, High/Moderate	1,839,000	3,655,000	8,966,000	17,365,000
PV over 10 years discounted at 3%				
Moderate (20%)	11,515,774	22,946,246	56,384,641	109,527,804
High (40%)	27,381,951	54,422,694	133,924,185	260,512,395
PV over 10 years discounted at 7%				
Moderate (20%)	9,481,835	18,893,434	46,425,874	90,182,787
High (40%)	22,545,697	44,810,450	110,270,230	214,500,180

^a The risk aversion premium (RAP) varies between 0 and 100 percent of the potential lost revenue, with higher values reflecting higher risk aversion. A value of 20 percent is considered a reasonable reflection of moderate aversion to risk and 40 percent being reflection of high-risk aversion.

^b The coefficient of variation of net revenue is a standardized measure of variability, and is defined as the standard deviation of net revenue divided by its mean.

The RAP varies between 0 and 100 percent of the potential lost revenue, with higher values reflecting higher risk aversion. The RP estimates assume that mean net returns are unchanged, *i.e.*, this exercise is solely valuing the reduction in grower revenue uncertainty. AMS estimates benefits under two CARA scenarios, one where the growers have moderate risk aversion, with one with a RAP of 20 percent and a high RAP of 40 percent, using contract producer revenue data for 2020. The parameters used for the DARA scenario are chosen such that the grower has a RAP of 40 percent when wealth is zero, and a RAP of 20 percent at mean wealth.

As the above table shows, one-year benefits range from \$1.4 million with a 1 percent reduction in the variability of net revenue when moderate risk aversion is assumed to \$31 million with a 10 percent reduction in the variability of net revenue when high risk aversion is assumed. AMS assumes growers will receive the same benefit of reduced variability of net revenue every year in which they contract. Discounting these annual values over ten years leads to a range in benefit estimates from \$9.5 million to \$261 million depending on the combination of risk aversion assumption, reduction in variability in net returns, and the discount rate.

With assumptions of moderate risk aversion and that the rule would lead to a two percent reduction in the coefficient of variation in net revenue, the benefit estimate is \$19 million with a discount rate of seven percent PV. The

analysis summarized in Table 2 assumes that the grower maximizes an absolute risk aversion (ARA) utility function, whether CARA or DARA. The alternative to an ARA function is a relative risk aversion function (RRA) (see Appendix 2 for a discussion of ARA and RRA).

As discussed above, §§ 201.102 and 201.104 have additional, other non-quantified benefits to the industry, referred to as B_o . First, if broiler growers did not expect to receive at least as much in benefits as it takes in time to review the disclosures, they would not review them. Some of these benefits are captured in the quantitative estimates of the value of reduction in revenue uncertainty, but there are others benefits the growers would likely expect from these disclosures. The other benefits would arise from a reduction in risk of retaliation and the potential for fraud and deception by live poultry dealers. The additional information to growers may lead to a more optimal allocation of capital and labor resources (such as increased capital investment through the reduction in perceived hold-up risk, and more informed decisions on whether and with whom to enter into a growing arrangement), leading to improved efficiencies across the entire industry.

The combined minimum benefits for broiler growers, G_{\min} , from reduced revenue uncertainty are expected to be \$2.7 million in the first year and on an

ongoing basis.¹⁶⁶ The ten-year total minimum benefits of §§ 201.102 and 201.104 to broiler growers are estimated to be \$26.9 million and the present value of the ten-year total minimum benefits to be \$22.9 million discounted at a 3 percent rate and \$18.9 million at a 7 percent rate. The annualized PV of ten-year minimum benefits to broiler growers discounted at 3 and 7 percent rates are expected to be \$2.7 million. The total benefits to the industry, B_T , from §§ 201.102 and 201.104 would be the sum of the minimum benefits to all growers, G_{\min} , and the other non-quantified benefits to the industry from growers' risk reductions and a more efficient allocation of labor and capital, B_o . The values appear in Table 3 in the next section. AMS expects the total benefits to the industry from the rule—as is the case for total costs, noted above—will be very small in relation to the total value of industry production.

Chicken sales in the U.S. for 2019 were approximately \$58.6 billion. Total quantified cost of §§ 201.102 and 201.104 is estimated to be greatest in the first year at \$3.4 million, or 0.0006 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 rule.

¹⁶⁶ All benefits estimates assume a moderate (20 percent) RAP and a 2 percent reduction in coefficient of variation of net revenue.

Total Quantified Combined Costs and Benefits of §§ 201.102 and 201.104

The cost and benefit estimates of §§ 201.102 and 201.104 presented above appear in the following table.

TABLE 3—QUANTIFIABLE COSTS AND BENEFITS ¹⁶⁷ OF §§ 201.102 AND 201.104

Preferred alternative	Cost			Benefits	
	Live poultry dealers	Broiler growers	Industry total	Individual grower (G _{min}) ^a	Total industry (B _T)
§ 201.102:					
First-Year	\$1,008,000	\$1,180,000	\$2,188,000	G _{min}	G _{min} + B _O
Ten-Year Total	3,881,000	3,158,000	7,039,000	G _{min}	G _{min} + B _O
PV of Ten-Year Discounted at 3 Percent	3,392,000	2,822,000	6,214,000	G _{min}	G _{min} + B _O
PV of Ten-Year Discounted at 7 Percent	2,886,000	2,468,000	5,354,000	G _{min}	G _{min} + B _O
PV of Ten-Year Annualized at 3 Percent	398,000	331,000	728,000	G _{min}	G _{min} + B _O
PV of Ten-Year Annualized at 7 Percent	411,000	351,000	762,000	G _{min}	G _{min} + B _O
§ 201.104:					
First-Year	429,000	736,000	1,164,000	G _{min}	G _{min} + B _O
Ten-Year Total	2,162,000	6,152,000	8,314,000	G _{min}	G _{min} + B _O
PV of Ten-Year Discounted at 3 Percent	1,872,000	5,263,000	7,135,000	G _{min}	G _{min} + B _O
PV of Ten-Year Discounted at 7 Percent	1,573,000	4,352,000	5,925,000	G _{min}	G _{min} + B _O
PV of Ten-Year Annualized at 3 Percent	219,000	617,000	836,000	G _{min}	G _{min} + B _O
PV of Ten-Year Annualized at 7 Percent	224,000	620,000	844,000	G _{min}	G _{min} + B _O
§§ 201.102 and 201.104:					
First-Year	1,437,000	1,916,000	3,353,000	2,690,000	G _{min} + B _O
Ten-Year Total	6,043,000	9,310,100	15,353,000	26,900,000	G _{min} + B _O
PV of Ten-Year Discounted at 3 Percent	5,264,000	8,085,000	13,349,000	22,946,000	G _{min} + B _O
PV of Ten-Year Discounted at 7 Percent	4,459,000	6,820,000	11,279,000	18,893,000	G _{min} + B _O
PV of Ten-Year Annualized at 3 Percent	617,000	948,000	1,565,000	2,690,000	G _{min} + B _O
PV of Ten-Year Annualized at 7 Percent	635,000	971,000	1,606,000	2,690,000	G _{min} + B _O

^a AMS estimates G_{min} as the combined benefits to growers of §§ 201.102 and 201.104.

^b Estimates do not include unquantified costs of risk increases.

The quantified costs and minimum quantifiable benefits to the industry in the first year are \$3.4 million and \$2.7 million, respectively. The quantified costs exceed the minimum quantifiable benefits in the first year only. The minimum quantifiable benefits exceed the quantified costs in the ten-year total, the PVs on the ten totals, the annualized PV of ten-year totals. This is a function of quantified costs being higher at the beginning of the program and falling off over time while the quantified benefits remain constant over the entire estimation period.

AMS expects that the net benefits to the industry from §§ 201.102 and 201.104 will be very small in relation to the total value of industry production. Thus, AMS expects the impacts of the net benefits on total industry supply to be immeasurably small, leading to immeasurably small indirect effects on industry supply and demand, including price and quantity effects.

Costs and Benefits of the Small Business Exemption Alternative

AMS estimated costs and benefits for an alternative to the preferred option for

the rule. It would be the same as §§ 201.102 and 201.104, with the exception that the alternative would exempt live poultry dealers that process less than 2 million pounds of broilers per week from all provisions of the two final rules. In the preferred alternative, small businesses would be exempt from the disclosure requirements in § 201.102(a)(1) only. The rest of the provisions of §§ 201.102 and 201.104 would still apply.

The costs associated with this alternative are similar, but smaller than the preferred option. According to annual reports that live poultry dealers file with AMS,¹⁶⁸ small live poultry dealers processing broilers make up 35.7 percent of all live poultry dealers but have only 2 percent of broiler growing contracts. The estimation of the costs and benefits of the small business exemption alternative will follow the same format as the preferred alternative.

¹⁶⁸ 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 on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf>.

Costs of § 201.102—Small Business Exemption Alternative

AMS estimates the one-time costs for live poultry dealers of setting up the Disclosure Document for the small business exemption alternative would require 2,914 management hours, 972 attorney hours, 722 administrative hours, and 884 information technology hours costing \$486,000 in the first year for live poultry dealers to set up the Disclosure Document.¹⁶⁹ A more detailed explanation of the one-time first-year costs associated with the alternative § 201.102 is in Table 1 in Appendix 3.

AMS expects the ongoing costs for live poultry dealers for the small business exemption alternative of updating and distributing the Disclosure Document to broiler growers renewing or revising existing contracts, new growers entering into contracts, existing growers required to make additional capital investments to require 1,617 management hours, 176 legal hours, 726

¹⁶⁹ As discussed previously, the one-time set-up costs are not equal to the first-year costs of § 201.102 because the first-year costs include the one-time set-up costs and the ongoing costs that would be incurred in the first year as contracts are renewed, revised, or originated.

¹⁶⁷ Ibid.

administrative hours, and 733 information technology hours to produce, distribute to growers, and maintain the Disclosure Document annually for an annual cost of \$258,000. A more detailed explanation of the ongoing costs associated with the alternative § 201.102 is in Table 2 in Appendix 3.

AMS expects the total cost of producing the disclosure information to be \$486,000 in the first year to set up the systems and controls, plus \$258,000 in costs the first year and annually thereafter to compile and distribute the disclosure data and documents. Thus, the first-year total costs of § 201.102 for live poultry dealers are expected to be \$743,000 for the small business exemption alternative and then \$258,000 annually on an ongoing basis.

For alternative § 201.102(a)(1), AMS expects that broiler growers would take about 1 hour to review the documents each time documents are disclosed to them in the first year. The alternative would exempt live poultry dealers processing fewer than an average of 2 million pounds of broilers weekly from the reporting requirements, but large live poultry dealers would be required to provide disclosures to broiler growers for each of 19,417¹⁷⁰ contracts that come up for renewal in the first year. AMS expects that 74.71 percent of the contracts will require renewal in the first year. This includes all flock-to-flock contracts, one-year contracts, and the portion of the longer-term contracts that will expire in the first year. At a wage of \$60.70, AMS expects the requirements associated with § 201.102 (a)(1) will cost broiler growers about \$881,000¹⁷¹ in the first year in the aggregate. After the first year, as broiler growers get familiar with the disclosures, AMS expects growers to spend less time reviewing the documents. AMS expects broiler growers to take about five minutes reviewing each Disclosure Document for an aggregate cost of \$73,000¹⁷² per year.

For the remaining contracts that will not be renewed in the first year, AMS expects that 5 percent of the contracts

will be renewed in each of the next 5 years for a yearly cost of \$59,000.¹⁷³

Paragraphs 201.102(a)(2) and (3) would only apply to broiler growers that are new entrants with original capital investments and to growers making significant upgrades with additional capital investments to broiler houses. AMS expects that each of these groups of broiler growers will account for 5 percent of the 19,417 broiler growing contracts live poultry dealers reported in their annual reports¹⁷⁴ to AMS. If growers require one hour at \$60.70 per hour, growers' aggregate costs would be \$59,000¹⁷⁵ for reviewing documents required in § 201.102 (a)(2) and an additional \$59,000¹⁷⁶ for reviewing documents required in § 201.102 (a)(3) in the first year and in each successive year.

AMS estimates broiler growers' aggregate costs for reviewing the Disclosure Document associated with § 201.102 for the small business exemption alternative to be \$1.2 million in the initial year, \$250,000 through year five, and then \$191,000 in each succeeding year.

The ten-year aggregate total costs for the live poultry dealers of § 201.102 for the small business exemption alternative are estimated to be \$3.1 million. The present value of the ten-year aggregate total costs of § 201.102 to live poultry dealers are estimated to be \$2.7 million discounted at a 3 percent rate and \$2.3 million at a 7 percent rate. The annualized aggregate costs of the PV of ten-year costs to live poultry dealers discounted at a 3 percent rate are expected to be \$313,000 and \$322,000 discounted at a 7 percent rate.

The ten-year aggregate total costs to broiler growers of § 201.102 for the small business exemption alternative are estimated to be \$3.1 million. The present value of the ten-year total costs of § 201.102 to broiler growers are estimated to be \$2.8 million discounted at a 3 percent rate and \$2.4 million at a 7 percent rate. The annualized aggregate costs of the PV of ten-year costs to broiler growers discounted at a 3 percent rate are expected to be

\$328,000 and \$349,000 discounted at a 7 percent rate.

The first-year aggregate total costs to broiler growers and live poultry dealers of § 201.102 for the small business exemption alternative are estimated to be \$1.9 million and the ten-year aggregate total costs of § 201.102 for the small business exemption alternative for live poultry dealers and broiler growers are estimated to be \$6.2 million. The present value of the ten-year aggregate total costs of § 201.102 to live poultry dealers and broiler growers are estimated to be \$5.5 million discounted at a 3 percent rate and \$4.7 million at a 7 percent rate. The annualized costs of the PV of ten-year aggregate costs to live poultry dealers and broiler growers discounted at a 3 percent rate are expected to be \$641,000 and \$671,000 discounted at a 7 percent rate.

Costs of § 201.104—Small Business Exemption Alternative

AMS estimates that the aggregate one-time costs of developing the placement and settlement disclosure documents for live poultry dealers under the small business exemption alternative would require 405 management hours, 297 administrative hours, and 1,134 information technology hours costing \$152,000 in the first year to initially set up the placement and settlement disclosure documents. A more detailed explanation of the one-time first-year costs associated with the alternative § 201.104 is in Table 3 in Appendix 3.

AMS expects the disclosure documents to require an additional 1,697 hours divided evenly among management, administrative, and information technology staff to produce, distribute, and maintain the disclosure documents each year on an ongoing basis for an annual cost of \$124,000. Thus, the aggregate first-year costs are estimated to be \$276,000, including the one-time set up costs and the costs of producing and distributing the placement and settlement disclosures. A more detailed explanation of the ongoing costs associated with the alternative § 201.104 is in Table 4 in Appendix 3.

For the alternative § 201.104(b), live poultry dealers would be required to disclose information about inputs, such as stocking density, breed and breeder flock information for each flock placed with a grower. AMS expects that, the first time a broiler grower receives the disclosure, he or she would require about 10 minutes to review each of the disclosure's documents. At \$60.70 per hour, the first disclosure document would cost growers \$86,000 in the

¹⁷⁰ Live poultry dealers processing an average of more than 2,000,000 pounds of broilers per week, reported a combined 19,417 broiler contracts in their fiscal year 2021 annual reports to AMS. 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 on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSF3002.pdf>.

¹⁷¹ 1 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 74.71 percent of the contracts renewed in the first year = \$880,541.

¹⁷² 1/12 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 74.71 percent of the contracts renewed in the first year = \$73,386.

¹⁷³ 1 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 5 percent of the contracts renewed per year = \$58,929 per year.

¹⁷⁴ 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 on the internet at <https://www.ams.usda.gov/sites/default/files/media/PSF3002.pdf>.

¹⁷⁵ 1 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 5 percent of growers that are new entrants = \$58,929.

¹⁷⁶ 1 hour to review each disclosure × \$60.70 per hour × 19,417 contracts × 5 percent of growers that require significant housing upgrades = \$58,929.

aggregate.¹⁷⁷ After the reviewing the documents the first time, AMS expects that broiler growers would only need 5 minutes to review successive disclosures. Since growers average 4.5 flocks per year, AMS expects that reviewing the disclosure documents concerning inputs would cost an additional \$150,000¹⁷⁸ for the remaining 3.5 flocks in the first year and \$193,000¹⁷⁹ for the 4.5 flocks in each successive year.

Alternative § 201.104(c) concerns disclosures about the group of broiler growers in settlement groups in broiler tournament systems. Live poultry dealers would be required to disclose information about the housing specifications for each grower grouped or ranked during the specified period and the distribution of inputs to each grower in each tournament for each flock settled in tournament system. AMS expects that the cost to broiler growers associated with § 201.104(c) will be identical to the costs of reviewing the disclosures required in § 201.104(b). Aggregate costs would be \$86,000.¹⁸⁰ for the disclosures reviewed. AMS expects that reviewing the disclosure documents would cost, in the aggregate, an additional \$150,000¹⁸¹ for the remaining 3.5 flocks in the first year and \$193,000¹⁸² for the 4.5 flocks in each successive year.

AMS estimates growers' aggregate costs for reviewing the placement and settlement disclosures associated with § 201.104 under the small business exemption alternative to be \$473,000 in the first year and \$387,000 in each subsequent year. As discussed previously, AMS expects that broiler

growers would spend the most time on their first review of the placement and settlement disclosures in order to understand the information, with less time for each subsequent review.

The ten-year aggregate total costs to live poultry dealers of § 201.104 under the small business exemption alternative are estimated to be \$1.4 million. The present value of the aggregate ten-year total costs of § 201.104 to live poultry dealers are estimated to be \$1.2 million discounted at a 3 percent rate and \$1.0 million at a 7 percent rate. The annualized costs of the PV of aggregate ten-year costs to live poultry dealers discounted at a 3 percent rate are expected to be \$141,000 and \$144,000 discounted at a 7 percent rate.

The ten-year aggregate total costs to broiler growers of § 201.104 for the small business exemption alternative are estimated to be \$4.0 million. The present value of the aggregate ten-year total costs of § 201.104 to broiler growers are estimated to be \$3.4 million discounted at a 3 percent rate and \$2.8 million at a 7 percent rate. The annualized aggregate costs of the PV of ten-year costs to broiler growers discounted at a 3 percent rate are expected to be \$397,000, and \$398,000 discounted at a 7 percent rate.

The first-year aggregate total costs to live poultry dealers and broiler growers of § 201.104 under the small business exemption alternative are estimated to be \$749,000 and the ten-year aggregate total costs are estimated to be \$5.3 million. The present value of the ten-year aggregate total costs of § 201.104 to live poultry dealers and broiler growers are estimated to be \$4.6 million discounted at a 3 percent rate and \$3.8 million at a 7 percent rate. The aggregate annualized costs of the PV of ten-year costs to live poultry dealers and broiler growers discounted at a 3 percent rate are expected to be \$538,000 and \$542,000 discounted at a 7 percent rate.

Combined Costs of §§ 201.102 and 201.104—Small Business Exemption Alternative

Aggregate combined costs to live poultry dealers for §§ 201.102 and 201.104 for the small business exemption alternative are expected to be \$1.0 million in the first year, and \$381,000 in subsequent years. The combined costs for broiler growers are expected to be \$1.6 million in the first year, \$637,000 in years two through five, and \$578,000 after year five on an ongoing basis.

The aggregate ten-year combined quantified costs to live poultry dealers of §§ 201.102 and 201.104 for the small

business exemption alternative are estimated to be \$4.5 million and the present value of the ten-year combined costs are \$3.9 million discounted at a 3 percent rate and \$3.3 million at a 7 percent rate. The aggregate annualized costs of the PV of ten-year costs to live poultry dealers discounted at a 3 percent rate are expected to be \$454,000 and \$466,000 discounted at a 7 percent rate.

The aggregate ten-year combined costs to broiler growers of §§ 201.102 and 201.104 for the small business exemption alternative are estimated to be \$7.1 million and the present value of the ten-year combined costs are estimated to be \$6.2 million discounted at a 3 percent rate and \$5.2 million at a 7 percent rate. The aggregate annualized costs of the PV of ten-year costs to broiler growers discounted at a 3 percent rate are expected to be \$725,000 and \$747,000 discounted at a 7 percent rate. As under the preferred alternative, the costs to broiler growers from §§ 201.102 and 201.104 under the small business exemption alternative would be higher for broiler growers than live poultry dealers for the reasons discussed above.

The aggregate combined costs to live poultry dealers and broiler growers of §§ 201.102 and 201.104 under the small business exemption alternative are estimated to be \$2.7 million in the first year, \$1.0 million in years two through five, and \$960,000 in years six and beyond. The aggregate ten-year combined costs of §§ 201.102 and 201.104 for the small business exemption alternative for live poultry dealers and broiler growers are estimated to be \$11.5 million and the present value of the ten-year combined costs are estimated to be \$10.1 million discounted at a 3 percent rate and \$8.5 million at a 7 percent rate. The aggregate annualized costs of the PV of ten-year costs to live poultry dealers and broiler growers discounted at a 3 percent rate are expected to be \$1.2 million and \$1.2 million discounted at a 7 percent rate. Additionally, there may be costs of bearing increased risk that AMS has not estimated of increasing transparency in broiler grower contracting and tournaments, which would have different effects on more or less diversified live poultry dealers.

Combined Benefits of §§ 201.102 and 201.104—Small Business Exemption Alternative

According to PSD records, only 2 percent of broiler growing contracts are between small live poultry dealers and broiler growers. Thus, 98 percent of all broiler growers will receive the benefits

¹⁷⁷ 1/6 hours × \$60.70 per hour × 16,524 broiler growers × 80 percent of broilers raised in tournament systems × 64.3 percent of live poultry dealers that process more than 2,000,000 head per week = \$85,970.

¹⁷⁸ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 3.5 additional flocks in the first-year × 80 percent of broilers raised in tournament systems × 64.3 percent of live poultry dealers that process more than 2,000,000 head per week = \$150,447.

¹⁷⁹ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 4.5 flocks per year × 80 percent of broilers raised in tournament systems × 64.3 percent of live poultry dealers that process more than 2,000,000 head per week = \$193,432 per year.

¹⁸⁰ 1/6 hours × \$60.70 per hour × 16,524 broiler growers × 80 percent of broilers raised in tournament systems × 64.3 percent of live poultry dealers that process more than 2,000,000 head per week = \$85,970.

¹⁸¹ 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 3.5 additional flocks in the first-year × 80 percent of broilers raised in tournament systems × 64.3 percent of live poultry dealers that process more than 2,000,000 head per week = \$150,447.

¹⁸² 1/12 hours × \$60.70 per hour × 16,524 broiler growers × 4.5 flocks per year × 80 percent of broilers raised in tournament systems × 64.3 percent of live poultry dealers that process more than 2,000,000 head per week = \$193,432 per year.

of §§ 201.102 and 201.104 under the small business exemption alternative. To estimate the minimum quantified benefits to broiler growers, G_{min} , under the small business exemption alternative, AMS multiplied the minimum quantified benefits under the preferred alternative in Table 3 by 98 percent.

AMS estimates the aggregate minimum benefits to growers, G_{min} , from §§ 201.102 and 201.104 under the small business exemption alternative from reduced profit uncertainty to be \$2.6 million in the first year and on an ongoing basis.¹⁸³ The ten-year total minimum benefits of §§ 201.102 and 201.104 to broiler growers are estimated to be \$26.4 million and the present value of the ten-year total minimum benefits to be \$22.5 million discounted at a 3 percent rate and \$18.5 million at a 7 percent rate. The annualized PV of ten-year minimum benefits to broiler

growers discounted at 3 and 7 percent rates are expected to be \$2.6 million.

The total benefits to the industry, B_T , from §§ 201.102 and 201.104, under the small business exemption alternative, would be the sum of the minimum benefits to all broiler growers, G_{min} , and the other benefits to the industry from extra information and a more efficient allocation of labor and capital, B_O . The values of the estimated benefits appear in Table 4 in the next section. AMS expects the quantified minimum benefits to growers from §§ 201.102 and 201.104, combined with the other non-quantified benefits to growers, to exceed the costs of §§ 201.102 and 201.104 under the small business exemption alternative.

Combined Costs and Benefits of §§ 201.102 and 201.104

The aggregate cost and benefit estimates of §§ 201.102 and 201.104 under the small business exemption

alternative presented above appear in the following table. The quantified costs and minimum quantifiable benefits to the industry in the first year under the small business exemption alternative are \$2.7 million and \$2.6 million, respectively. The minimum quantifiable benefits exceed the quantified costs on a ten-year and ten-year annualized basis.

As with the preferred option, AMS expects that the net benefits to the industry from §§ 201.102 and 201.104 under the small business exemption alternative will be very small in relation to the total value of industry production. Thus, AMS expects the impacts of the net benefits on total industry supply under the small business exemption alternative to be immeasurably small, leading to immeasurably small indirect effects on industry supply and demand, including price and quantity effects.

TABLE 4—QUANTIFIABLE COSTS AND BENEFITS OF §§ 201.102 AND 201.104—SMALL BUSINESS EXEMPTION

Small business exemption alternative	Cost			Benefits	
	Live poultry dealers	Broiler growers	Industry total	Individual grower (G_{min}) ^a	Total industry (B_T)
§ 201.102:					
First-Year	\$743,000	\$1,175,000	\$1,918,000	G_{min}	$G_{min} + B_O$
Ten-Year Total	3,062,000	3,132,000	6,194,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Discounted at 3 Percent	2,669,000	2,799,000	5,469,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Discounted at 7 Percent	2,264,000	2,449,000	4,713,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Annualized at 3 Percent	313,000	328,000	641,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Annualized at 7 Percent	322,000	349,000	671,000	G_{min}	$G_{min} + B_O$
§ 201.104:					
First-Year	276,000	473,000	749,000	G_{min}	$G_{min} + B_O$
Ten-Year Total	1,390,000	3,955,000	5,345,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Discounted at 3 Percent	1,204,000	3,383,000	4,587,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Discounted at 7 Percent	1,011,000	2,798,000	3,809,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Annualized at 3 Percent	141,000	397,000	538,000	G_{min}	$G_{min} + B_O$
PV of Ten-Year Annualized at 7 Percent	144,000	398,000	542,000	G_{min}	$G_{min} + B_O$
§§ 201.102 and 201.104:					
First-Year	1,019,000	1,648,000	2,667,000	2,637,000	$G_{min} + B_O$
Ten-Year Total	4,452,000	7,087,000	11,539,000	26,369,000	$G_{min} + B_O$
PV of Ten-Year Discounted at 3 Percent	3,873,000	6,183,000	10,056,000	22,493,000	$G_{min} + B_O$
PV of Ten-Year Discounted at 7 Percent	3,275,000	5,247,000	8,522,000	18,520,000	$G_{min} + B_O$
PV of Ten-Year Annualized at 3 Percent	454,000	725,000	1,179,000	2,637,000	$G_{min} + B_O$
PV of Ten-Year Annualized at 7 Percent	466,000	747,000	1,213,000	2,637,000	$G_{min} + B_O$

^a AMS estimates G_{min} as the combined benefits to growers of §§ 201.102 and 201.104.

^b Estimates do not include unquantified cost of risk increases.

AMS considered the small business exemption alternative in part because of concerns that, due to scale economies, smaller live poultry dealers would not be able to absorb the cost of the required information disclosures as well as the large live poultry dealers. If the costs are disproportionately large for smaller live poultry dealers, large dealers might have

an advantage possibly driving further consolidation chicken production. AMS subject matter experts do not expect that the costs of the rule will result in any additional consolidation by large live poultry dealers acquiring small live poultry dealers. The reasons are a lack of additional economies of scale from a large firm acquiring a small firm and the increase in costs to the large firm from no longer having the exemptions to small live poultry dealers offered in the preferred alternative.

AMS also had to consider the rights of the growers who contracted with the smaller live poultry dealers. Those growers would be denied the benefits of the rule under the small business exemption. Also, AMS estimates that costs associated with the required information disclosures will be small relative to the size of the industry. Given these considerations, AMS chose final §§ 201.102 and 201.104, which exempts small live poultry dealers from some, not all, of the disclosures required

¹⁸³ All benefits estimates assume a moderate (20 percent) RAP and a 2 percent reduction in coefficient of variation of net revenue.

of the large firms over the alternative rule that would exempt all live poultry dealers producing less than 2 million pounds of chicken per week.

C. Regulatory Flexibility Analysis

AMS is adding §§ 201.102 and 201.104 to the regulations under the Act. Section 201.102 will require live poultry dealers that deal in broilers to make disclosures before entering into new contracts or renewing existing contracts. Section 201.104 will require live poultry dealers that deal in broilers to disclose information at the settlement of each flock. Sections 201.102 and 201.104 will not apply to live poultry dealers that deal in turkeys, ducks, geese, or other fowl if the live poultry dealer does not deal in broilers.

The provisions in § 201.102 will require large live poultry dealers to disclose a true written copy of the growing agreement and a new Disclosure Document any time a live poultry dealer seeks to renew, revise, or replace an existing poultry growing arrangement that does not contemplate modifications to the existing housing specifications. Small live poultry dealers that process less than 2 million pounds of poultry per week will be excluded from this disclosure requirement. Before a live poultry dealer enters a poultry growing arrangement that would require an original capital investment or requires modifications to existing housing, both large and small live poultry dealers must provide a copy of the growing agreement, the housing specifications, a letter of intent, and the new Disclosure Document.

The Disclosure Document will require live poultry dealers to disclose summaries of litigation with any broiler grower, bankruptcy filings, and the live poultry dealer's policy regarding a grower's sale of the farm or assignment of the contract.

Live poultry dealers will be required to disclose growers' variable costs if it collects the information. Live poultry dealers will be required to audit the information to ensure accuracy and obtain and file signed receipts certifying that the live poultry dealer provided the required Disclosure Document. Live poultry dealers will be required to describe policies and procedures, as well as any appeal rights arising from increased lay-out time; sick, diseased, and high early mortality flocks; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability. Live poultry dealers will be required to

disclose annual grower turnover rates as well.

The Disclosure Document will require two separate financial disclosures to growers. The first disclosure will be a table indicating average annual gross payments to broiler growers for the previous calendar year. The table will be organized by housing specification at each complex located in the United States that is owned or operated by the live poultry dealer and should express average payments on the basis of U.S. dollars per farm facility square foot. The second disclosure will be a set of tables with the average annual gross payments per farm facility square foot in each quintile to broiler growers for each of the five previous years, organized by housing specification at each complex.

Live poultry dealers will also be required to make reasonable efforts to assist growers in translating the Disclosure Document. The rule will also prevent live poultry dealers from restricting growers or potential growers from sharing the Disclosure Document with a translator. Disclosures required in § 201.104 are associated with poultry grower ranking systems. At the time of placement, § 201.104 requires live poultry dealers to provide specific information concerning the inputs, including feed, chicks, medication, etc., that the live poultry dealer provided to the grower. At the time of settlement, it will require the live poultry to provide specific information about inputs provided to every other grower in the tournament or ranking pool within 24 hours of flock delivery. Similar information on inputs will also be disclosed at settlement.

AMS expects the disclosure requirements in §§ 201.102 and 201.104 will mitigate effects associated with asymmetric information between broiler growers and live poultry dealers. Some of the information held by live poultry dealers will be valuable to growers because it influences grower compensation in tournament contracts and might help growers in negotiating contract terms and making decisions about capital investments.

The contracts themselves are often incomplete and exhibit asymmetry in the information available to live poultry dealers and contract growers. Because live poultry dealers supply most of the inputs, much of the production information is available only to the grower from the live poultry dealer. For example, the contract grower may not know precisely how much feed it used, or how much weight the flock gained under his or her care, unless the live poultry dealer provides the information.

The proposed rule would have amended § 201.100 and added new § 201.214 to the regulations under the Act. The final rule will leave the current § 201.100 unchanged, and it will add two new regulations, §§ 201.102 and 201.204.

The proposed rule would have required live poultry dealers to provide growers with copies of the disclosure document and a true written copy of the contract 7 calendar days prior to executing the contract. The final rule changes the 7-day requirement to a 14-day requirement, but the broiler grower has the option to waive 7 calendar days of that time period.

The proposed rule also would have required live poultry dealers to obtain the broiler grower's or prospective broiler grower's dated signature as evidence of receipt of the Disclosure Document. The final rule will require live poultry dealers to obtain the broiler grower's or prospective broiler grower's dated signature as evidence of receipt but will also permit a live poultry dealer to obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt. The proof of delivery and best-efforts requirement, as an alternative, provide reasonable assurance in circumstances where the grower refuses to sign or where the grower has made him or herself unavailable that the grower receives and is able to evaluate in a timely manner the Disclosure Document. The grower receipt requirement, and this alternative, are comparable in cost and achieve the goal of this rule to minimize the risk that live poultry dealer deliver the Disclosure Document through means that, in practice, are not be read or noticed by the grower under the time frames provided, and so obstruct the purposes of ensuring the grower can evaluate the information before the grower makes significant decisions.

In response to comments to the proposed rule, AMS changed the final rule to make it applicable only to live poultry dealers that deal in broilers. The rule will not apply to live poultry dealers that deal with turkeys, ducks, geese, or other fowl unless the live poultry dealer also deals in broilers. For live poultry dealers that deal in broilers as well as turkeys or other fowl, the final rule only applies to the broiler operations.

In response to comments, AMS also added provisions to § 201.102 that will require live poultry dealers to assist growers with understanding the Disclosure Documents for broiler growers that do not speak English as a primary language. AMS also added

provisions requiring live poultry dealers to describe policies and procedures, as well as any appeal rights arising increased lay-out time; sick, diseased, and high early mortality flocks; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability.

Applying the rule to fewer firms considerably reduces the aggregate cost to small businesses. The proposed rule would have applied to 54 small live poultry dealers. The final rule will apply to 20 live poultry dealers that are small businesses. This is mostly due to removing live poultry dealers that handle turkeys. There were very few live poultry dealers active in the markets for ducks, geese, and other fowl. Also, the smallest of the small live poultry dealers do not deal in broilers, and while they would have been required to comply with the proposed rule, the final rule will not apply to them.

AMS also added disclosure requirements to the final rule that were not required in the proposed rule, and those disclosures will increase costs to the small businesses that will be required to comply with the final rule.

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS). SBA considers broiler producers, NAICS 112320, small if sales are less than \$3.5 million per year. Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees.¹⁸⁴

AMS maintains data on live poultry dealers from the annual reports these firms file with PSD. Data from the annual reports indicate that 42 live poultry dealers would have been subject to the regulation in their fiscal year 2021. Twenty of the live poultry dealers would be small businesses according to the SBA standard. In their fiscal year 2021, live poultry dealers reported that they had 19,808 broiler production contracts with broiler growers. Small live poultry dealers accounted for 950 contracts.

Annual reports from live poultry dealers indicate they had 19,808 contracts, but a broiler grower can have more than one contract. The 2017 Census of Agriculture indicated that there were 16,524 poultry growers in the

United States.¹⁸⁵ AMS has no record of the number of broiler growers that qualify as small businesses but expects that nearly all of them are small businesses.

Costs of §§ 201.102 and 201.104 to live poultry dealers will primarily consist of the time required to gather the information and distribute it among the growers. Sections 201.102 and 201.104 will also cost broiler growers the value of the time they put into reviewing and acknowledging receipt of the disclosures.

Expected costs are estimated as the total value of the time required to produce and distribute the disclosures that will be required by §§ 201.102 and 201.104 as well as the time to create and maintain any necessary additional records, although live poultry dealers already keep nearly all of the required records. Estimates of the amount of time required to create and distribute the disclosure documents were provided by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in auditing live poultry dealers for compliance with the Act. Estimates for the value of the time are DOL BLS OEWS estimated released May 2022.¹⁸⁶ AMS marked up the wages 41.82 percent to account for benefits.

AMS expects § 201.102 will initially require 1,589 hours of management time at \$84.27 per hour costing \$134,000, 720 hours of attorney time at \$131.38 per hour costing \$95,000, 487 hours of administrative time at \$41.71 per hour costing \$20,000, and 396 hours of information technology staff hours at \$92.91 per hour costing \$37,000 to keep and maintain records and produce and distribute the disclosures. AMS expects § 201.102 will annually require an additional 578 hours of management time at \$84.27 per hour costing \$49,000, 116 hours of attorney time at \$131.38 per hour costing \$15,000, 254 hours of administrative time at \$41.71 per hour costing \$11,000, and 148 hours of information technology staff hours at \$92.91 per hour costing \$14,000. Total aggregate first-year one-time set up costs to small live poultry dealers for § 201.102 are expected to be \$286,000. AMS expects aggregate cost to small live poultry dealers to be \$88,000 annually, for a first-year total cost of \$374,000.

¹⁸⁵ USDA, NASS. *2017 Census of Agriculture: United States Summary and State Data*. Volume 1, Part 51. Issued April 2019. p. 56. https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1_Chapter_1_US/usv1.pdf.

¹⁸⁶ See U.S. Bureau of Labor Statistics, *May 2021 National Occupational Employment and Wage Estimates*, May 2022. <https://www.bls.gov/oes/special.requests/oesm21all.zip>. Viewed January 31, 2023.

AMS estimated § 201.104 will require a one-time first year aggregate investment of 300 hours of management time at \$84.27 per hour costing \$25,000, 220 hours of administrative time at \$41.71 per hour costing \$9,000, and 840 hours of information technology staff time at \$92.91 per hour costing \$78,000. Total aggregate first-year setup costs are expected to be \$112,000.

AMS expects § 201.104 will annually require an aggregate additional 1,257 hours distributed evenly across management, administrative, and information technology staff at \$84.27, \$41.71, and \$92.91 per hour, respectively, costing \$35,000, \$17,000, and \$39,000 respectively to keep and maintain records and produce and distribute the disclosures. Total aggregate first-year costs to small live poultry dealers for § 201.104 are expected to be \$204,000. After the first year, aggregate costs are expected to be \$92,000 annually.

The rule will regulate live poultry dealers' contracts. AMS expects that costs per live poultry dealer would be correlated with number of contracts. All expected costs of § 201.102 are associated with maintaining records and producing and distributing Disclosure Documents among contract growers. AMS expects that firms that contract with few growers will have lower costs. Larger live poultry dealers will tend to have more contracts and will likely have more costs. Section 201.104 only concerns poultry ranking systems. Smaller live poultry dealers that do not have tournament contracts will not have any of the costs associated with § 201.104, and some live poultry dealers have few contracts with broiler growers and raise broiler in their own facilities. Those dealers will have relatively lower costs.

AMS does not regulate poultry growers, and the rule has no requirements of poultry growers. To benefit from the disclosures, growers will need to review the information provided. Growers are not required to review the disclosure information in §§ 201.102 and 201.104, and growers that do not expect a benefit from reviewing the disclosure information likely will not review it.

AMS estimates aggregate growers' costs for reviewing disclosures associated with §§ 201.102 and 201.104 combined to be \$93,000 in the initial year. After broiler growers become familiar with the disclosures, they will likely require less time to review the documents, and AMS expects annual aggregate costs to growers will be \$41,000 for years two through five and \$38,000 each year thereafter. This

¹⁸⁴ U.S. Small Business Administration. *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*. Effective December 19, 2022.

amounts to \$117 per grower in the first year. The table below summarizes costs of §§ 201.102 and 201.104 to small live poultry dealers and small broiler growers.

TABLE 5—ESTIMATED COSTS TO SMALL BUSINESSES OF §§ 201.102 AND 201.104

Type of cost	Regulated live poultry dealers (dollars)	Unregulated growers (dollars)	Total (dollars)
§ 201.102:			
First-year Cost	374,000	58,000	432,000
First-year Cost per Firm	19,000	73	NA
PV of Ten-year Cost Discounted at 3 Percent	1,031,000	137,000	1,168,000
PV of Ten-year Cost Discounted at 7 Percent	888,000	120,000	1,008,000
Ten-year Cost Annualized at 3 Percent	121,000	16,000	137,000
Ten-year Cost Annualized at 7 Percent	126,000	17,000	143,000
Average Ten-Year Cost per Firm Annualized at 3 Percent	6,100	20	NA
Average Ten-Year Cost per Firm Annualized at 7 Percent	6,300	22	NA
§ 201.104:			
First-year Cost	204,000	35,000	239,000
First-year Cost per Firm	10,000	45	NA
PV of Ten-year Cost Discounted at 3 Percent	891,000	252,000	1,144,000
PV of Ten-year Cost Discounted at 7 Percent	749,000	209,000	958,000
Ten-year Cost Annualized at 3 Percent	105,000	30,000	134,000
Ten-year Cost Annualized at 7 Percent	107,000	30,000	136,000
Average Ten-Year Cost per Firm Annualized at 3 Percent	5,300	37	NA
Average Ten-Year Cost per Firm Annualized at 7 Percent	5,400	37	NA
§§ 201.102 and 201.104:			
First-year Cost	578,000	93,000	671,000
First-year Cost per Firm	29,000	117	NA
PV of Ten-year Cost Discounted at 3 Percent	1,923,000	389,000	2,312,000
PV of Ten-year Cost Discounted at 7 Percent	1,637,000	329,000	1,965,000
Ten-year Cost Annualized at 3 Percent	225,000	46,000	271,000
Ten-year Cost Annualized at 7 Percent	233,000	47,000	280,000
Average Ten-Year Cost per Firm Annualized at 3 Percent	11,300	58	NA
Average Ten-Year Cost per Firm Annualized at 7 Percent	11,700	59	NA

Live poultry dealers report net sales in annual reports to AMS. Table 6 below groups small live poultry dealers' 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 § 201.102 and § 201.104 and total first-year costs. Estimated first-year costs are

higher than 10-year annualized costs, and for the threshold analysis, first-year costs will be higher than annualized costs as 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 6. 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 small. The ratio is less than 0.1 percent of average net sales in the three largest quartiles. Percentage of net sales are about 0.26 percent in the smallest quartile.

TABLE 6—COMPARISON OF SMALL LIVE POULTRY DEALERS' NET SALES TO EXPECTED ANNUALIZED COSTS OF §§ 201.102 AND 201.104

Quartile	Average net sales (dollars)	First year costs related to § 201.102 as a percent of net sales (percent)	First year costs related to § 201.104 as a percent of net sales (percent)	Total first year costs as a percent of net sales (percent)
0 to 25 percent	11,173,037	0.260	0.101	0.105
25 to 50 percent	30,021,116	0.097	0.038	0.039
50 to 75 percent	73,471,776	0.039	0.015	0.016
75 to 100 percent	193,207,736	0.015	0.006	0.006

AMS also estimated costs of an alternative proposal that would exempt most small live poultry dealers from the requirements of the regulations. The alternative would exempt all live poultry dealers that process less than 2 million pounds of poultry per week

from all reporting requirements. The alternative would only apply to five small business under the SBA standard.

AMS estimated the alternative to § 201.102 would require a one-time first year aggregate investment of 488 hours of management time at \$84.27 per hour

costing \$41,000, 180 hours of attorney time at \$131.38 per hour costing \$24,000, 145 hours of administrative time at \$41.71 per hour costing \$6,000, and 163 hours of information technology staff time at \$92.91 per hour costing \$15,000. Aggregate total first-

year setup costs are expected to be \$86,000. AMS expects the alternative proposal for § 201.102 will annually require an additional aggregate 198 hours of management time at \$84.27 per hour costing \$17,000, 29 hours of attorney time at \$131.38 per hour costing \$4,000, 92 hours of administrative time at \$41.71 per hour costing \$4,000, and 64 hours of information technology staff hours at \$92.91 per hour costing \$6,000 to keep and maintain records and produce and distribute the disclosures. Aggregate total first-year costs to small live poultry dealers for § 201.102 are expected to be \$116,000. After the first year AMS expects aggregate costs to small live poultry dealers to be \$30,000 annually.

AMS estimated alternative § 201.104 will require a one-time first year

aggregate investment of 75 hours of management time at \$84.27 per hour costing \$6,000, 55 hours of administrative time at \$41.71 per hour costing \$2,000, and 210 hours of information technology staff time at \$92.91 per hour costing \$20,000. Aggregate total first-year setup costs are expected to be \$28,000.

AMS expects alternative § 201.104 will annually require an additional aggregate 70 hours distributed evenly across management, administrative, and information technology staff at \$84.27, \$41.71, and \$92.91 per hour, respectively, costing \$2,000, \$1,000, and \$2,000 respectively to keep and maintain records and produce and distribute the disclosures. Aggregate total first-year costs to small live poultry dealers for alternative § 201.104 are

expected to be \$33,000. After the first year, costs are expected to be \$5,000 annually.

The alternative would have a relatively small effect on costs to broiler 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 and acknowledging receipt of disclosures associated with §§ 201.102 and 201.104 to be \$55,000 in the initial year. AMS expects annual aggregate costs to growers would be \$24,000 for years two through five and \$22,000 each year thereafter. Table 7 below summarizes aggregate costs of alternative §§ 201.102 and 201.104 combined to small live poultry dealers and small broiler growers.

TABLE 7—ESTIMATED COSTS TO SMALL BUSINESSES OF ALTERNATIVE §§ 201.102 AND 201.104

Type of cost	Regulated live poultry dealers (dollars)	Unregulated growers (dollars)	Total (dollars)
Alternative § 201.102:			
First-year Cost	116,000	34,000	150,000
First Year-Cost Per Firm	6,000	43	NA
PV of Ten-year Cost Discounted at 3 Percent	342,000	81,000	422,000
PV of Ten-year Cost Discounted at 7 Percent	293,000	71,000	364,000
Ten-year Cost Annualized at 3 Percent	40,000	9,000	50,000
Ten-year Cost Annualized at 7 Percent	42,000	10,000	52,000
Average Ten-Year Cost per Firm Annualized at 3 Percent	2,000	12	NA
Average Ten-Year Cost per Firm Annualized at 7 Percent	2,100	13	NA
Alternative § 201.104:			
First-year Cost	33,000	21,000	54,000
First Year-Cost Per Firm	2,000	26	NA
PV of Ten-year Cost Discounted at 3 Percent	71,000	149,000	220,000
PV of Ten-year Cost Discounted at 7 Percent	62,000	123,000	185,000
Ten-year Cost Annualized at 3 Percent	8,000	17,000	26,000
Ten-year Cost Annualized at 7 Percent	9,000	17,000	26,000
Average Ten-Year Cost per Firm Annualized at 3 Percent	400	22	NA
Average Ten-Year Cost per Firm Annualized at 7 Percent	500	22	NA
Alternative §§ 201.102 and 201.104:			
First-year Cost	150,000	55,000	204,000
First Year-Cost Per Firm	7,000	69	NA
PV of Ten-year Cost Discounted at 3 Percent	413,000	229,000	642,000
PV of Ten-year Cost Discounted at 7 Percent	355,000	193,000	549,000
Ten-year Cost Annualized at 3 Percent	48,000	27,000	75,000
Ten-year Cost Annualized at 7 Percent	51,000	28,000	78,000
Average Ten-Year Cost per Firm Annualized at 3 Percent	2,400	34	NA
Average Ten-Year Cost per Firm Annualized at 7 Percent	2,600	35	NA

Net sales for small live poultry dealers that will be required to make disclosure under alternative §§ 201.102 and 201.104 averaged \$159 million for their fiscal year 2020. Expected first-year cost per live poultry dealer will be well below 0.1 percent. Clearly, exempting live poultry dealers that process less than 2 million pounds of poultry per week will reduce cost to small live poultry dealers, but the benefits of the rule will also be less. AMS prefers the final §§ 201.102 and 201.104 to the alternative because it considers the

information in the disclosures to be important for broiler growers for making investment and production decisions and necessary for the efficient functioning of the market.

AMS made considerations for small live poultry dealers in drafting §§ 201.102 and 201.104. Section 201.102 makes several exemptions for live poultry dealers producing less than 2 million pounds of poultry per week. AMS chose not to make the final rule applicable to live poultry dealers that deal in turkeys, ducks, geese, or other

fowl, which were some of the smallest live poultry dealers.

Although costs would be smaller with the alternative, the costs associated with §§ 201.102 and 201.104 are relatively small. The rule seeks only to require live poultry dealers to provide its contract growers with information relevant to their operations, and AMS made every effort to limit the disclosures to information that live poultry dealer already possessed. First-year costs to regulated live poultry dealers are expected to be \$578,000,

which would be about \$29,000 per firm. Present value of ten-year costs annualized at 7 percent are expected to be \$1.6 million, and ten-year costs annualized at 7 percent are expected to be \$233,000. These amounts are small considering that small live poultry dealers averaged nearly \$60 million in sales annually. Although estimates of costs relative net sales increase for the smallest live poultry dealers, §§ 201.102 and 201.104 only apply to tournament contracts. Some of the smallest live poultry dealers do not use tournament contracts and will not incur any costs. While §§ 201.102 and 201.104 would have an effect on a substantial number (20) of small businesses, the economic impact would not be significant.

Costs to growers will be limited to the time required to review the disclosure and acknowledge receipt of the disclosures. AMS expects that §§ 201.102 and 201.104 will have effects on a substantial number of growers however, the costs will not be significant for any of them.

Based on the above analyses regarding §§ 201.102 and 201.104, this 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.*)

D. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS published a 60-day notice and requested comments on the information collection and recordkeeping requirements of the proposed rule when it proposed revisions to §§ 201.100 and 201.214 in the **Federal Register** on June 8, 2022 (87 FR 34980).¹⁸⁷ The proposed information collection was for a total of 19,993 hours for the first year, and 6,066 hours per year thereafter. In response to comments, AMS revised the information collection requirements for the final rule and recalculated the information collection burden estimates accordingly, for a total of 17,205 hours for the first year, and 6,615 hours thereafter. The comment period was open for 60 days and was extended for an additional 15 days. The comment period closed on August 23, 2022. Below is a summary of the final rule's information collection requirements, the comments AMS received relating to the information collection requirements of the proposed

rule, and any changes AMS made in response to the comments.

This final rule requires live poultry dealers engaged in the production of broilers to provide certain disclosures to broiler growers in advance of entering into production contracts. Under the final rule, live poultry dealers engaged in the production of broilers are required to make certain disclosures to poultry growers with whom they contract. To assist with compliance, AMS is providing Form PSD 6100 (Live Poultry Dealer Disclosure Document Form Instructions), which includes instructions for developing the Disclosure Document and performing necessary calculations.

This final rule also requires live poultry dealers engaged in the production of broilers who group and rank broiler growers for settlement purposes to disclose essential information to broiler growers about the flocks placed with individual growers at the time of placement. Live poultry dealers are also required to disclose information about the flocks and associated production inputs delivered to all broiler growers in the settlement group, as well as each grower's ranking within the group, at the time of settlement. Broiler growers are not required to provide information but can use the information provided by live poultry dealers to improve flock management practices and evaluate grower treatment under broiler grower ranking systems.

Summary information on the burdens of these new information collection and recordkeeping requirements follows below. Additional detail can be found in the Regulatory Impact Analysis (RIA).

AMS estimates each of 42 live poultry dealers engaged in the production of broilers would develop an average of 472 Disclosure Documents for broiler growers relating to new, renewed, revised, or updated broiler growing arrangements, as required under § 201.102. AMS arrived at its estimate of 472 developed Disclosure Documents per live poultry dealer from AMS records which show 42 live poultry dealers engaged in the production of broilers filed annual reports with AMS, and their reports indicate that they had 19,808 growing contracts with broiler growers during their fiscal year 2021. AMS divided the 19,808 growing contracts by the 42 live poultry dealers to arrive at 472 Disclosure Documents per live poultry dealer.

Live poultry dealers with current contracts with broiler growers would not be required to provide the Disclosure Document to those growers unless the dealer is renewing, revising,

or replacing an existing contract or proposing modifications to the broiler housing specifications under the existing contract. AMS estimates first year development, production, and distribution of the Disclosure Documents in § 201.102, including management, legal, administrative, and information technology time, would require an average 0.59 hours each, while ongoing annual production and distribution of each Disclosure Document would take 0.20 hours. AMS arrived at the estimates of the number of hours per response to set up, produce, distribute, and maintain each Disclosure Document by dividing the annual number of hours to set up, produce, and distribute the disclosures (11,709 first year hours and 3,975 ongoing hours) by the annual number of responses for all live poultry dealers (19,808). AMS estimated the number of hours for all live poultry dealers to develop, produce, distribute, and maintain each Disclosure Document required under § 201.102 from the number of hours estimated and the expected cost estimates in Tables 1 and 2 in Appendix 1.

AMS estimates 42 live poultry dealers engaged in the production of broilers would each provide placement and settlement records to an average of 628 broiler growers annually under tournament ranking systems, as required under § 201.104. AMS estimated the annual number of placement and settlement records by multiplying the number of relevant slaughter plants in AMS records from the reports that live poultry dealers file with AMS (188) by the average number of tournaments at each plant per week from AMS subject matter experts (1.35) by 52 weeks. This product is then multiplied by two to account for both placement and settlement records. AMS then divided the estimated annual number of responses (26,395) by the number of live poultry dealers (42) engaged in the production of broilers to arrive at its estimate of 628 placement and settlement disclosure records for each live poultry dealer on an annual basis.

AMS estimates first year development, production, and distribution of the required placement and settlement records, as required under § 201.104, including management, legal, administrative, and information technology time, will require approximately 0.21 hours. AMS estimates ongoing annual production and distribution of required tournament placement and settlement information would require an average of 0.10 hours. AMS arrived at the estimates of the number of hours per response to set up,

¹⁸⁷ The new sections that AMS proposed in §§ 201.100 and 201.214 are now §§ 201.102 and 201.104 in the final rule, respectively.

produce, distribute, and maintain each disclosure document by dividing the annual number of hours to set up, produce, and distribute the disclosures (5,496 first year hours and 2,640 ongoing hours) by the annual number of responses for live poultry dealers (26,395). AMS estimated the number of hours for all live poultry dealers engaged in the production of broilers to develop, produce, and distribute each placement and settlement disclosure document required under § 201.104 from the number of hours estimated and the expected cost estimates in Tables 3 and 4 in Appendix 1.

Under § 201.102, live poultry dealers are required to certify as to the accuracy of the Disclosure Documents and are required to maintain records relating to the Disclosure Documents for three years following expiration of the broiler growing arrangement. Under § 201.104, live poultry dealers are required to maintain records related to broiler grower tournament placements and settlement for 5 years.

The required disclosures under § 201.102 include essential information about the contract, the live poultry dealer's business history, and financial projections the grower could use to evaluate entering into the contract. Under the rule, live poultry dealers are required to provide the Disclosure Documents, which include specified information and boilerplate grower notifications. AMS will make available PSD Form 6100 that dealers can download from the AMS website to assist with development of the required Disclosure Document. Live poultry dealers are required to obtain grower signatures as evidence of the grower's receipt of the Disclosure Document, or obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt. Live poultry dealers are also required to retain the signature pages for three years following contract expiration.

Section 201.104 requires live poultry dealers engaged in the production of broilers who group or rank broiler growers for settlement purposes to disclose information about each flock of broiler placed with growers for growout at the time of placement. Additionally, live poultry dealers are required to provide to each broiler grower in the group, at the time of settlement, information about the flocks placed with every grower in the group, as well as each grower's performance ranking within the group. Growers can use placement disclosures to inform flock management decisions during growout, and can use settlement disclosures to evaluate their growout performance,

potentially improve future performance, and evaluate whether group members are treated fairly. Live poultry dealers are required to maintain records related to these disclosures for 5 years following settlement.

Costs of Final §§ 201.102 and 201.104

The combined costs to live poultry dealers engaged in the production of broilers for compliance with the reporting and recordkeeping requirements of final §§ 201.102 and 201.104 are expected to be \$1,437,096 in the first year, and \$511,788 in subsequent years. The total hours estimated for the live poultry dealers to create, produce, distribute, and maintain these documents are 17,205 in the first year, and 6,615 in subsequent years. Complete details showing how AMS arrived at these cost estimates appear in Tables 1–4 in Appendix 1.

Comments From the Proposed Rule and Changes to the Final Rule

After consideration of public comments, AMS determined to adopt the proposed rule as a final rule with several modifications. This section provides an overview of the comments and how the final rule differs from the proposed rule.

The proposed rule would have required all live poultry dealers, and not just those engaged in the production of broilers, to provide the new disclosures required in revised § 201.102 and new § 201.104. Based on public comments and other information, AMS subsequently decided to require the new disclosures only of live poultry dealers involved in broiler production. Thus, the number of entities affected by the final rule is substantially lower than originally estimated. This change significantly reduced the recordkeeping burden. This and other changes between the proposed and final rule are discussed in more detail below.

Live poultry dealers commented that the full cost of the proposed rule would likely be many times greater than predicted by AMS. The commenters asserted AMS greatly underestimated the costs of creating the recordkeeping systems needed to comply with the proposed rule.

In drafting and in estimating the costs of proposed §§ 201.100 and 201.214, AMS consulted auditors and supervisors who are familiar with live poultry dealers' records from many years of experience in auditing live poultry dealers for compliance with the Act. AMS expects that recordkeeping systems that most live poultry dealers already have in place will enable them to gather much of the information in the

disclosures from records they already have available to them and limit the necessity of developing new recordkeeping systems. Thus, AMS made no changes to the information collection requirements of the proposed rule based on this comment.

As mentioned above and will be explained in further detail below, AMS did change the language of the proposed rule to limit its application to broiler production. In order to make compliance with the final rule as easy as possible for regulated entities to follow, AMS reorganized the final rule by moving the new disclosures required into revised § 201.102 and new § 201.104.

In the final rule, AMS removed the proposed revisions to § 201.100 requiring all live poultry dealers to provide certain additional disclosures to prospective or current growers and placed the requirements in new § 201.102. AMS also amended the proposed requirements to apply exclusively to live poultry dealers engaged in the production of broilers who use a broiler growing ranking system to calculate grower payments, and moved the requirements from proposed new § 201.214 to new § 201.104. This reorganization of the rule does not impact the recordkeeping requirements or costs of the final rule.

A commenter representing the turkey industry noted the proposed rule was largely based on research into the broiler industry. The commenter asserted it would be extremely difficult for turkey companies to implement the rule due to differences between turkey and chicken production. AMS analyzed a sample of turkey production contracts from across the country and concluded that, although research suggests broiler grower contract payments span a wide range, a similar disparity is not readily apparent in turkey production. Based on the comment and our further study, AMS has limited the applicability of final §§ 201.102 and 201.104 to live poultry dealers engaged in the production of broilers. The final rule does not apply to live poultry dealers engaged in the production of turkeys, ducks, geese, and other domestic fowl. This change reduced the information collection burden from 89 respondents made up of live poultry dealers engaged in the production of broilers, turkeys, ducks, geese, and other domestic fowl to 42 live poultry dealers engaged in the production of broilers. Accordingly, this change reduced the information collection burden on live poultry dealers between the proposed §§ 201.100 and 201.214 and final §§ 201.102 and 201.104.

AMS proposed to require live poultry dealers to make various financial disclosures to broiler growers, including a table showing “average annual gross payments” made to growers at all complexes owned or operated by the live poultry dealer for the previous calendar year, as well as to growers at the local complex. Poultry and meat trade associations suggested AMS require dealers to disclose average annual gross payments only for the grower’s local complex. These commenters noted that complexes in different geographic areas face different economic conditions, arguing that information about payments at other complexes would not be useful and would potentially confuse growers. Therefore, AMS removed the requirement proposed in § 201.100(d)(1) to disclose payment information for all complexes owned or operated by the dealer. AMS maintains the requirement proposed in § 201.100(d)(2) for live poultry dealers engaged in the production of broilers to disclose payment information only relating to the broiler grower’s local complex at § 201.102(d)(1) of the final rule. Accordingly, this change reduced the information collection burden on live poultry dealers between the proposed and final rule.

Both growers and live poultry dealers also requested in comments that AMS provide more specificity on how to calculate average annual gross payments. While the proposed rule provided detail on calculations, the commenters felt the instructions lacked sufficient specificity to assure that live poultry dealers could comply and that broiler growers received adequate data on which to base business decisions. Therefore, AMS developed more in-depth instructions on how to calculate them, which are included in Form PSD 6100 (Live Poultry Dealer Disclosure Document Form Instructions). AMS added a modest amount of time to its cost estimates for live poultry dealers to review the instructions.

Several commenters recommended that AMS also require the disclosure of grower turnover data. Grower turnover rates relate to the general risk of termination and non-renewal of contracts with a live poultry dealer. This information would allow growers to compare the turnover rates of multiple live poultry dealers as a risk factor when making contracting decisions. Therefore, AMS added a provision at § 201.102(c)(5) of the final rule requiring live poultry dealers engaged in the production of broilers to disclose average annual broiler grower turnover rates for the previous calendar

year and the average of the 5 previous calendar years at both the company level and the local complex level. AMS developed instructions for how to calculate average annual broiler grower turnover rates, which are included in Form PSD 6100. AMS added a modest amount of time to its cost estimates for live poultry dealers to review the instructions and calculate grower turnover rates.

Numerous commenters from the grower and live poultry dealer sectors expressed that these provisions should be in plain and unambiguous language to avoid discrepancies in interpretation among the various parties, regulators, and courts. Some commenters also indicated a need to ensure growers who are not native speakers of English can understand the disclosures. Therefore, AMS added a provision at § 201.102(g)(3) of the final rule to require live poultry dealers engaged in the production of broilers to present the information in the Disclosure Document in a clear, concise, and understandable manner for growers.

AMS also added a provision at § 201.102(g)(4) to require that the live poultry dealer must make reasonable efforts to ensure that growers are aware of their right to request translation assistance, and to assist the grower in translating the Disclosure Document at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement although the grower can waive 7 calendar days of that time period. Reasonable efforts include but are not limited to providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the broiler grower’s geographic area. A live poultry dealer may not restrict a broiler grower or prospective broiler grower from discussing or sharing the Disclosure Document for purposes of translation with a person or organization that provides language translation services. Nothing in the rule prevents companies from providing a translation provided it is complete, accurate, and not misleading. AMS added a modest amount of time to its cost estimates for live poultry dealers to comply with these new requirements.

In the proposed rule, AMS did not specifically propose to require live poultry dealers to disclose their policies on grower payments with respect to increased lay-out time, diseased flocks, natural disasters and other depopulation events, feed issues or outages, or

policies on grower appeal rights and processes. Multiple commenters suggested AMS include these disclosures. In the final rule, AMS added a provision at § 201.102(c)(4) requiring live poultry dealers engaged in the production of broilers to disclose policies and procedures on increased lay-out time; sick, diseased, or high early mortality flocks; natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility; other events potentially resulting in massive depopulation of flocks, affecting grower payments; feed outages including outage times; and grower complaints relating to feed quality, formulation, or suitability, as well as any appeal rights arising out of these events. AMS added a modest amount of time to its cost estimates for live poultry dealers to comply with this new requirement.

The proposed rule would have required live poultry dealers to provide growers with copies of the disclosure document and a true written copy of the contract 7 calendar days prior to executing the contract. The final rule changes the 7-day requirement to a 14-day requirement, but the broiler grower has the option to waive 7 calendar days of that time period.

The proposed rule also would have required live poultry dealers to obtain the broiler grower’s or prospective broiler grower’s dated signature as evidence of receipt or obtain alternative documentation acceptable to the Administrator as evidence of receipt. The final rule will require live poultry dealers to obtain the broiler grower’s or prospective broiler grower’s dated signature as evidence of receipt or obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt.

AMS proposed in § 201.100(f)(1)(i) to require live poultry dealers to establish, maintain, and enforce a governance framework reasonably designed to audit the accuracy and completeness of the disclosures in the Disclosure Document, which must include audits and testing, as well as reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers. AMS determined that the requirement in § 201.102(f)(2) for the principal executive officer or officers to certify the governance framework and the accuracy of the Disclosure Document adequately covers the intended requirement for officers of this level to be focused on the effectiveness of the governance framework. AMS concluded that this level of detail about the audit process for the Disclosure

Document was not necessary, particularly as AMS seeks to balance the need to ensure reliability of these statements with the burden on the principal executive officers regarding details of the governance process. Therefore, AMS removed the requirement proposed in § 201.100(f)(1)(i) for audit, testing, and reviews of an appropriate sampling of Disclosure Documents by the principal executive officer or officers.

E. 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.

F. Executive Order 12988—Civil Justice Reform

This final rule has been reviewed under Executive Order 12988—Civil Justice Reform. This rule is not intended to have retroactive effect. This rule does not preempt State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this final rule is intended to interfere with a person's right to enforce liability against any person subject to the Act under authority granted in section 308 of the Act.

G. Executive Order 13175—Consultation and Coordination With Tribal Indian Governments

This rule has been reviewed in accordance with the requirements of Executive Order 13175—Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.

AMS has determined that this final rule does not have substantial direct effects on one or more Tribes that would require consultation. If a Tribe requests consultation, AMS will work with USDA's Office of Tribal Relations to

ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress. AMS will also conduct outreach to ensure that Tribes and Tribal members are aware of the requirements and benefits under this final rule.

H. Civil Rights Impact Analysis

AMS has considered the potential civil rights implications of this final rule on members of protected groups to ensure that no person or group will be adversely or disproportionately at risk or discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, or protected genetic information. The rule does not create a program that would recruit or require the opt-in participation of poultry producers, growers, or live poultry dealers. This rule does not contain any requirements related to eligibility, benefits, or services that will 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 fact, the regulation will create means by which AMS may be able to address potential civil rights issues in violation of the Act.

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 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 rule. The final regulations will nevertheless provide benefits to all poultry growers. AMS will institute enhancement efforts to notify the groups found to be disproportionately impacted of the regulations and their implications. AMS outreach will specifically target several organizations that regularly engage with or otherwise may represent the interests of these impacted groups.

I. Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this final rule as not a major rule as defined by 5 U.S.C. 804(2).

List of Subjects in 9 CFR Part 201

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

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 9 CFR part 201 as follows:

PART 201—ADMINISTERING THE PACKERS AND STOCKYARDS ACT

- 1. The authority citation for 9 CFR part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

- 2. Section 201.2 is revised to read as follows:

§ 201.2 Terms defined.

The definitions of terms contained in the Act shall apply to such terms when used in Administering the Packers and Stockyards Act, 9 CFR part 201; Rules of Practice Governing Proceedings Under the Packers and Stockyards Act, 9 CFR part 202; and Statements of General Policy Under the Packers and Stockyards Act, 9 CFR part 203. In addition, the following terms used in these parts shall be construed to mean:

Act means the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*).

Additional capital investment means a combined amount 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. Such term includes the total cost of upgrades to the structure, upgrades of equipment located in and around each structure, and goods and professional services that are directly attributable to the additional capital investment. The term does not include costs of maintenance or repair.

Administrator or agency head means the Administrator of the Agricultural Marketing Service or any person authorized to act for the Administrator.

Agency means the Agricultural Marketing Service of the United States Department of Agriculture.

Breeder facility identifier means the identification that a live poultry dealer permanently assigns to distinguish among breeder facilities supplying eggs for the poultry placed at the poultry grower's facility.

Breeder flock age means the age in weeks of the egg-laying flock that is the source of poultry placed at the poultry grower's facility.

Broiler means any chicken raised for meat production.

Broiler grower means a poultry grower engaged in the production of broilers.

Broiler growing arrangement means a poultry growing arrangement pertaining to the production of broilers.

Commerce means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

Complex means a group of local facilities under the common management of a live poultry dealer. A complex may include, but not be limited to, one or more hatcheries, feed mills, slaughtering facilities, or poultry processing facilities.

Custom feedlot means any facility which is used in its entirety or in part for the purpose of feeding livestock for the accounts of others, but does not include feeding incidental to the sale or transportation of livestock.

Department means the United States Department of Agriculture.

Gross payments are the total compensation a poultry grower receives from the live poultry dealer, including, but not limited to, base payments, new housing allowances, energy allowances, square footage payments, extended lay-out time payments, equipment allowances, bonus payments, additional capital investment payments, poultry litter payments, etc., before deductions or assignments are made.

Grower variable costs means those costs related to poultry production that may be borne by the poultry grower, which may include, but are not limited to, utilities, fuel, water, labor, repairs and maintenance, and liability insurance.

Housing specifications means a description of—or a document relating to—a list of equipment, products, systems, and other technical poultry housing components required by a live poultry dealer for the production of live poultry.

Inputs means the various contributions to be made by the live poultry dealer and the poultry grower as agreed upon by both under a poultry growing arrangement. Such inputs may include, but are not limited to, animals, feed, veterinary services, medicines, labor, utilities, and fuel.

Letter of intent means a document that expresses a preliminary commitment from a live poultry dealer to engage in a business relationship with a prospective poultry grower and that includes the chief terms of the agreement.

Live poultry dealer means any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce.

Live Poultry Dealer Disclosure Document means the complete set of disclosures and statements that the live poultry dealer must provide to the poultry grower.

Minimum number of placements means the least number of flocks of poultry the live poultry dealer will deliver to the grower for growout annually under the terms of the poultry growing arrangement.

Minimum stocking density means the ratio that reflects the minimum weight of poultry per facility square foot the live poultry dealer intends to harvest from the grower following each growout.

Number of placements means the number of flocks of poultry the live poultry dealer will deliver to the grower for growout during each year of the poultry growing arrangement period.

Original capital investment means the initial financial investment for facilities used to grow, raise, and care for poultry or swine.

Packers and Stockyards Division (PSD) means the Packers and Stockyards Division of the Fair Trade Practices Program (FTPP), Agricultural Marketing Service.

Person means individuals, partnerships, corporations, and associations.

Placement means delivery of a poultry flock to the poultry grower for growout in accordance with the terms of a poultry growing arrangement.

Poultry grower means any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry.

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

Poultry growing arrangement means any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares

for live poultry for delivery, in accord with another's instructions, for slaughter.

Poultry growout means the process of raising and caring for poultry in anticipation of slaughter.

Poultry growout period means 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.

Principal part of performance means the raising of and caring for livestock or poultry, when used in connection with a livestock or poultry production contract.

Prospective broiler grower means a person or entity with whom the live poultry dealer is considering entering into a broiler growing arrangement.

Prospective poultry grower means a person or entity with whom the live poultry dealer is considering entering into a poultry growing arrangement.

Regional director means the regional director of the Packers and Stockyards Division (PSD) for a given region or any person authorized to act for the regional director.

Registrant means any person registered pursuant to the provisions of the Act and the regulations in this part.

Schedule means a tariff of rates and charges filed by stockyard owners and market agencies.

Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department authorized to act for the Secretary.

Stocking density means the ratio that reflects the number of birds in a placement, expressed as the number of poultry per facility square foot.

Stockyard means a livestock market which has received notice under section 302(b) of the Act that it has been determined by the Secretary to come within the definition of "stockyard" under section 302(a) of the Act.

■ 3. Amend § 201.100 by revising paragraphs (a) and (b) to read as follows:

§ 201.100 Records to be furnished poultry growers and sellers.

(a) *Poultry growing arrangement; timing of disclosure.* A live poultry dealer who offers a poultry growing arrangement to a poultry grower must provide the poultry grower with a true written copy of the offered poultry growing arrangement on the date the dealer provides the poultry grower with poultry housing specifications.

(b) *Right to discuss the terms of poultry growing arrangement offer.* A live poultry dealer, notwithstanding any confidentiality provision in the poultry

growing arrangement, may not prohibit a poultry grower or prospective poultry grower from discussing the terms of a poultry growing arrangement offer or, if applicable, the accompanying Live Poultry Dealer Disclosure Document described in § 201.102 (b) through (d) of this part with any of the following:

- (1) A Federal or State agency.
- (2) The grower's financial advisor or lender.
- (3) The grower's legal advisor.
- (4) An accounting services representative hired by the grower.
- (5) Other growers for the same live poultry dealer.
- (6) A member of the grower's immediate family or a business associate. A business associate is a person not employed by the grower, but with whom the grower has a valid business reason for consulting with when entering into or operating under a poultry growing arrangement.

* * * * *

■ 4. Add § 201.102 to read as follows:

§ 201.102 Disclosures for broiler production.

(a) *Obligation to furnish information and documents.* In addition to the requirements of § 201.100 of this part, a live poultry dealer engaged in the production of broilers must provide the documents described in this section to the prospective or current broiler grower.

(1) Except as provided in paragraph (e) of this section, when a live poultry dealer seeks to renew, revise, or replace an existing broiler growing arrangement, or to establish a new broiler growing arrangement that does not contemplate modifications to the existing housing specifications, the live poultry dealer must provide the following documents at least 14 calendar days before the live poultry dealer executes the broiler growing arrangement (provided that the grower may waive up to 7 calendar days of that time period):

- (i) A true, written copy of the renewed, revised, replacement, or new broiler growing arrangement.
- (ii) The Live Poultry Dealer Disclosure Document, as described in paragraphs (b), (c), and (d) of this section.

(2) When a live poultry dealer seeks to enter a broiler growing arrangement with a broiler grower or prospective broiler grower that will require an original capital investment, the live poultry dealer must provide the following to the broiler grower or prospective broiler grower simultaneously with the housing specifications:

(i) A copy of the broiler growing arrangement that is affiliated with the current housing specifications.

(ii) The Live Poultry Dealer Disclosure Document, as described in paragraphs (b), (c), and (d) of this section.

(iii) A letter of intent that can be relied upon to obtain financing for the original capital investment.

(3) When a live poultry dealer seeks to offer or impose modifications to existing housing specifications that could reasonably require a broiler grower or prospective broiler grower to make an additional capital investment, the live poultry dealer must provide the following to the broiler grower or prospective broiler grower simultaneously with the modified housing specifications:

(i) A copy of the broiler growing arrangement that is affiliated with the modified housing specifications.

(ii) The Live Poultry Dealer Disclosure Document, as described in paragraphs (b), (c), and (d) of this section.

(iii) A letter of intent that can be relied upon to obtain financing for the additional capital investment.

(b) *Prominent Disclosures.* The Live Poultry Dealer Disclosure Document must include a cover page followed by the disclosures as required in paragraphs (c) and (d) of this section. The order, form, and content of the cover page shall be and include:

(1) The title "LIVE POULTRY DEALER DISCLOSURE DOCUMENT" in capital letters and bold type.

(2) The live poultry dealer's name, type of business organization, principal business address, telephone number, email address, and, if applicable, primary internet website address.

(3) The length of the term of the broiler growing arrangement.

(4) The following statement: "The income from your poultry farm may be significantly affected by the number of flocks the poultry company places on your farm each year, the density or number of birds placed with each flock, and the target weight at which poultry is caught. The poultry company may have full discretion and control over these and other factors. Please carefully review the information in this document."

(5) The following minimums established under the terms of the broiler growing arrangement:

(i) The minimum number of placements on the broiler grower's farm annually.

(ii) The minimum stocking density for each flock to be placed on the broiler grower's farm.

(6) The applicable of the following two statements:

(i) "This disclosure document summarizes certain provisions of your broiler growing arrangement and other information. You have the right to read this disclosure document and all accompanying documents carefully. At least 14 calendar days before the live poultry dealer executes the broiler growing arrangement (provided that the grower may waive up to 7 calendar days of that time period), the poultry company is required to provide you with: (1) this disclosure document, and (2) a copy of the broiler growing arrangement." or

(ii) "This disclosure document summarizes certain provisions of your broiler growing arrangement and other information. You have the right to read this disclosure document and all accompanying documents carefully. The live poultry dealer is required to provide this disclosure document to you simultaneously with (a) a copy of the broiler growing arrangement, (b) any new or modified housing specifications that would require you to make an original or additional capital investment, and (c) a letter of intent."

(7) The following statement: "Even if the broiler growing arrangement contains a confidentiality provision, by law you still retain the right to discuss the terms of the broiler growing arrangement and the Live Poultry Dealer Disclosure Document with a Federal or State agency, your financial advisor or lender, your legal advisor, your accounting services representative, other growers for the same live poultry dealer, and your immediate family or business associates. A business associate is a person not employed by you but with whom you have a valid business reason for consulting when entering into or operating under a broiler growing arrangement."

(8) The following statement in bold type: "Note 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."

(c) *Required disclosures following the cover page.* The live poultry dealer shall disclose, in the Live Poultry Dealer Disclosure Document following the cover page, the following information:

(1) A summary of litigation over the prior 5 years between the live poultry dealer and any broiler grower, including the nature of the litigation, its location, the initiating party, a brief description of the controversy, and any resolution.

(2) A summary of all bankruptcy filings in the prior 5 years by the live poultry dealer and any parent,

subsidiary, or related entity of the live poultry dealer.

(3) A statement that describes the live poultry dealer's policies and procedures regarding the potential sale of the broiler grower's facility or assignment of the broiler growing arrangement to another party, including the circumstances under which the live poultry dealer will offer the successive buyer a broiler growing arrangement.

(4) A statement describing the live poultry dealer's policies and procedures, as well as any appeal rights arising from the following events described in paragraphs (c)(4)(i) through (c)(4)(vi) of this section. If no policy or procedure exists, the live poultry dealer will acknowledge "no policy exists" relating to the items in paragraphs (c)(4)(i) through (c)(4)(vi) of this section.

(i) Increased lay-out time.

(ii) Sick, diseased, and high early-mortality flocks.

(iii) Natural disasters, weather events, or other events adversely affecting the physical infrastructure of the local complex or the grower facility.

(iv) Other events potentially resulting in massive depopulation of flocks, affecting grower payments.

(v) Feed outages, including outage times.

(vi) Grower complaints relating to feed quality, formulation, or suitability.

(5) A table showing the average annual broiler grower turnover rates for the previous calendar year and the average of the 5 previous calendar years at a company level and at a local complex level.

(d) *Financial Disclosures.* The live poultry dealer must include in the Live Poultry Dealer Disclosure Document the following information:

(1) Tables showing average annual gross payments to broiler growers at the local complex for each of the 5 previous years. The tables must express average payments in U.S. dollars per farm facility square foot. The tables must be organized to present the following elements:

(i) Year.

(ii) Housing specification tier (lowest to highest).

(iii) Distribution of payments, specifically either—

(A) Quintile (lowest to highest), for a local complex comprising 10 or more growers, or

(B) Mean and one standard deviation from the mean, for a local complex comprising 9 or fewer growers.

(2) If poultry housing specifications for broiler growers under contract with the complex are modified such that an additional capital investment may be required, or if the 5-year averages

provided under paragraph (d)(1) of this section do not accurately represent projected grower gross annual payments under the terms of the applicable broiler growing arrangement for any reason, the live poultry dealer must provide the following information:

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

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

(3) A summary of information the live poultry dealer collects or maintains relating to grower variable costs inherent in broiler production.

(4) Current contact information for the State university extension service office or the county farm advisor's office that can provide relevant information about broiler grower costs and broiler farm financial management in the broiler grower's geographic area.

(e) *Small Live Poultry Dealer Financial Disclosures.* A live poultry dealer engaged in the production of broilers is exempt from the requirements in paragraph (a)(1) of this section if the live poultry dealer, together with all companies controlled by or under common control with the live poultry dealer, slaughters fewer than 2 million live pounds of broilers weekly (104 million pounds annually).

(f) *Governance and Certification.* (1) The live poultry dealer engaged in the production of broilers must establish, maintain, and enforce a governance framework that is reasonably designed to:

(i) Audit the accuracy and completeness of the disclosures required under paragraphs (a) through (d) of this section.

(ii) Ensure compliance with all obligations under the Packers and Stockyards Act and regulations thereunder.

(2) The principal executive officer or officers, or persons performing similar functions, must certify in the Live Poultry Dealer Disclosure Document that the live poultry dealer has established, maintains, and enforces the governance framework and that, based on the officer's knowledge, the Live

Poultry Dealer Disclosure Document does not contain any untrue statement of a material fact or omit to state a material fact which would render it misleading.

(g) *Receipt by Growers.* (1) The Live Poultry Dealer Disclosure Document must include a broiler grower's signature page that contains the following statement: "If the live poultry dealer does not deliver this disclosure document within the timeframe specified herein, or if this disclosure document contains any false or misleading statement or a material omission (including any discrepancy with other oral or written statements made in connection with the broiler growing arrangement), a violation of Federal and 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."

(2) The live poultry dealer must obtain the broiler grower's or prospective broiler grower's dated signature on the broiler grower's signature page in paragraph (g)(1) of this section as evidence of receipt or obtain alternative documentation to evidence delivery and that best efforts were used to obtain grower receipt. The live poultry dealer must provide a copy of the dated signature page or alternative documentation to the broiler grower or prospective broiler grower and must retain a copy of the dated signature page or alternative documentation in the dealer's records for 3 years following expiration, termination, or non-renewal of the broiler growing arrangement.

(3) Information in the Live Poultry Dealer Disclosure Document must be presented in a clear, concise, and understandable manner for growers. Live poultry dealers may refer to Form PSD 6100 for further instructions on the presentation of information and certain calculations.

(4) The live poultry dealer must make reasonable efforts to ensure that growers are aware of their right to request translation assistance, and to assist the grower in translating the Disclosure Document at least 14 calendar days before the live poultry dealer executes

the broiler growing arrangement that does not contemplate modifications to the existing housing specifications (provided that the grower may waive up to 7 calendar days of that time period) or where modifications to the existing housing specifications are contemplated when the live poultry dealer provides the grower with the Disclosure Document. Reasonable efforts include but are not limited to providing current contact information for professional translation service providers, trade associations with translator resources, relevant community groups, or any other person or organization that provides translation services in the broiler grower's geographic area. A live poultry dealer may not restrict a broiler grower or prospective broiler grower from discussing or sharing the Disclosure Document for purposes of translation with a person or organization that provides language translation services.

(h) *Contract terms.* A live poultry dealer engaged in the production of broilers must specify in the true written copy of the broiler growing arrangement the following:

- (1) The minimum number of placements of poultry at the broiler grower's facility annually.
- (2) The minimum stocking density for each flock placed with the broiler grower under the broiler growing arrangement.

■ 5. Add § 201.104 to read as follows:

§ 201.104 Disclosures for broiler grower ranking system payments.

(a) *Poultry grower ranking system records.* If a live poultry dealer engaged in the production of broilers uses a poultry grower ranking system to calculate broiler grower payments, the live poultry dealer must produce records in accordance with paragraphs (b) and (c) of this section. The live poultry dealer must maintain these records for 5 years.

(b) *Placement Disclosure.* Within 24 hours of flock delivery to a broiler grower's facility, the live poultry dealer must provide all the following information to the broiler grower regarding the placement:

- (1) The stocking density of the placement.
- (2) Names and all ratios of breeds of the poultry delivered.
- (3) If the live poultry dealer has determined the sex of the birds, all ratios of male and female poultry delivered.
- (4) The breeder facility identifier.
- (5) The breeder flock age.
- (6) Information regarding any known health impairments of the breeder flock or of the poultry delivered.
- (7) Adjustments, if any, that the live poultry dealer may make to the calculation of the grower's pay based on the inputs in paragraphs (b)(1) through (b)(6) of this section.

(c) *Poultry grower ranking system settlement documents.* In addition to the requirements of § 201.100 of this part, a live poultry dealer must provide disclosures to all broiler growers on the grouping or ranking sheets as described in paragraphs (c)(1) and (c)(2) of this section. The disclosures need not show the names of other growers.

(1) Live poultry dealers must disclose the housing specification for each broiler grower grouped or ranked during the specified period.

(2) Live poultry dealers must disclose all the following information to each broiler grower participant ranked under a poultry grower ranking system:

- (i) The stocking density for each placement in the ranking.
- (ii) The names and all ratios of breeds of the poultry for each placement in the ranking.
- (iii) If the live poultry dealer has determined the sex of the birds, all ratios of male and female poultry for each placement in the ranking.
- (iv) All breeder facility identifiers for each placement in the ranking.

(v) The breeder flock age(s) for each placement in the ranking.

(vi) The number of feed disruptions each ranked broiler grower endured during the growout period where the grower was completely out of feed for 12 hours or more.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1. Details of the Estimated One-Time, First-Year Costs and On-Going Annual Costs of Providing Disclosure Documents Required in §§ 201.102 and 201.104

Table 1 below provides the details of the estimated one-time, first-year costs to live poultry dealers (LPD) of providing disclosure documents required in § 201.102. AMS expects that the direct costs will consist entirely of the value of the time required to produce and distribute the disclosures and maintain proper records. The number of hours the second column were provided by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in auditing live poultry dealers for compliance with the Act. They provided estimates of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements listed in the "Regulatory Requirements" column. 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 41.82 percent to account for benefits. The "Adjustment" column allows for estimation of costs that will only apply to a subset of the poultry growers or to the live poultry dealers. A blank value in the Adjustment column indicates that no adjustments were made to the costs. Each adjustment is different and described in the relevant footnote. 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 first-year, one-time costs for setting-up and producing the disclosure documents associated with § 201.102.

TABLE 1—EXPECTED FIRST-YEAR DIRECT COSTS ASSOCIATED WITH § 201.102

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs	Adjustment (percent)	Expected cost (\$)
201.102(b)(1)–(8)	1	Manager	84.27	42		3,539
	4	Lawyer	131.38	42		22,072
201.102(c)(1)–(3)	10	Manager	84.27	42		35,393
	5	Administrative	41.71	42		8,759
201.102(c)(4)	10	Lawyer	131.38	42		55,180
	2	Manager	84.27	^a 188		31,685
	4	Manager	84.27	42		14,157
	1	Lawyer	131.38	42		5,518
201.102(c)(5)	1	Manager	84.27	^a 188		15,843
201.102(d)(1)(2)(i)	30	Manager	84.27	^b 27	^c 90	61,432
	8	Administrative	41.71	^b 27	^c 90	8,108
	22	Information Tech	92.91	^b 27	^c 90	49,667
201.102(d)(1)(2)(ii)–(v)	60	Manager	84.27	42	^d 5	10,618
	16	Administrative	41.71	42	^d 5	1,401

TABLE 1—EXPECTED FIRST-YEAR DIRECT COSTS ASSOCIATED WITH § 201.102—Continued

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs	Adjustment (percent)	Expected cost (\$)
201.102(d)(3)	44	Information Tech	92.91	42	^d 5	8,584
	20	Manager	84.27	42	^e 5	3,539
	5	Administrative	41.71	42	^e 5	438
	15	Information Tech	92.91	42	^e 5	2,927
201.102(d)(4)	6	Manager	84.27	42	.....	21,236
	2	Administrative	41.71	42	.....	3,504
201.102(d)(5)	0.5	Manager	84.27	42	.....	1,770
	0.5	Administrative	41.71	42	.....	876
201.102(f)	40	Manager	84.27	42	.....	141,572
	20	Lawyer	131.38	42	.....	110,360
	10	Administrative	41.71	42	.....	17,518
	10	Information Tech	92.91	42	.....	39,020
201.102(g)(1)(2)	1	Manager	84.27	42	.....	3,539
	1	Administrative	41.71	42	.....	1,752
201.102(i)(2)	1	Manager	84.27	42	.....	3,539
	1	Lawyer	131.38	42	.....	5,518
Total Cost .....	.....	.....	.....	.....	.....	^f 689,063

^a AMS estimated a manager's time required for each of the 188 broiler complexes rather than the 42 live dealer firms.

^b 201.102(d)(1)(i) only applies to live poultry dealers that process more than 2 million pounds of broilers per week.

^c Reduces estimated costs by 10 percent to exclude the 5 percent for the estimated proportion of growers that require upgrades to poultry housing and 5 percent for the estimated proportion of growers that enter a contract for the first time.

^d Estimates costs for the 5 percent of the growers that require upgrades to poultry housing and enter into contracts for the first time.

^e Estimates costs for the 5 percent of the growers that require upgrades to poultry housing.

^f Total may not sum due to rounding.

Table 2 provides the details of the estimated ongoing costs of providing disclosure documents required in § 201.102. Table 2 is laid out the same as Table 1. AMS subject matter experts provided estimates in the second column of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements listed in the “Regulatory Requirements”

column. Estimates for the value of the time are from U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics released May 2022. Wage estimates are marked up 41.82 percent to account for benefits. The “Adjustment” column allows for estimation of costs that will only apply to a subset of the poultry growers or to the live poultry dealers. 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 for producing and distributing the disclosure documents associated with § 201.102 on an ongoing basis.

TABLE 2—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH § 201.102

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs/number of contracts	Adjustment (percent)	Expected cost (\$)
201.102(a)(1)	0.08	Evenly distributed among management, administrative, and information tech.	^a 72.96	19,417	^b 74.72	88,212
201.102(a)(2)	0.08	Evenly distributed among management, administrative, and information tech.	^f 72.96	19,808	^c 5	6,022
201.102(a)(3)	0.08	Evenly distributed among management, administrative, and information tech.	^f 72.96	19,808	^d 5	6,022
201.102(b)	0.5	Manager	84.27	42	.....	1,770
201.102(c)(1)–(3)	0.5	Administrative	41.71	42	.....	876
	1	Manager	84.27	42	.....	3,539
201.102(c)(4)	1	Administrative	41.71	42	.....	1,752
	1	Lawyer	131.38	42	.....	5,518
201.102(c)(5)	0.5	Manager	84.27	^e 188	.....	7,921
	1	Manager	84.27	42	.....	3,539
201.102(d)	0.5	Lawyer	131.38	42	.....	2,759
	0.5	Manager	84.27	^e 188	.....	7,921
201.102(d)(1)(i)	0.17 (10 min.)	Administrative	41.71	^e 188	.....	1,307
201.102(d)(1)(ii)–(v)	15	Manager	84.27	^f 27	^g 90	30,716
	3	Administrative	41.71	^f 27	^g 90	3,041
	6	Information Tech	92.91	^f 27	^g 90	13,546
201.102(d)(2)	30	Manager	84.27	42	^h 5	5,309
	6	Administrative	41.71	42	^h 5	526
201.102(d)(3)	12	Information Tech	92.91	42	^h 5	2,341
	10	Manager	84.27	^f 27	ⁱ 5	1,770
201.102(d)(4)	2	Administrative	41.71	^f 27	ⁱ 5	175
	4	Information Tech	92.91	^f 27	ⁱ 5	780
201.102(f)	0.25	Manager	84.27	42	.....	885
	0.25	Administrative	41.71	42	.....	438
201.102(f)	0.25	Manager	84.27	42	.....	885
	0.25	Administrative	41.71	42	.....	438
201.102(f)	20	Manager	84.27	42	.....	70,786
	5	Lawyer	131.38	42	.....	27,590

TABLE 2—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH § 201.102—Continued

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs/number of contracts	Adjustment (percent)	Expected cost (\$)
201.102(g)	3	Administrative	41.71	42	.....	5,255
	4	Information Tech	92.91	42	.....	15,608
	0.25	Administrative	41.71	^e 188	.....	1,960
Total Cost						ⁱ 319,206

^a \$72.96 is the average of the average wages for poultry processing managers, administrative professionals, and information technology staff at \$84.27, \$41.71, and \$92.91 respectively.

^b 74.72 is the percentage of the existing poultry grower contracts that are expected to come up for renewal each year. It includes all flock-to-flock and single year contracts as well as longer term contracts that are expected to expire within a year.

^c Estimates cost for the 5 percent of the growers that require upgrades to poultry housing.

^d Estimates costs for only the 5 percent of growers that enter contract for the first time.

^e AMS estimated a manager's time required for each of the 188 broiler complexes rather than the 42 live dealer firms.

^f 201.102(d)(1)(i) only applies to live poultry dealers that process more than 2 million pounds of poultry per week.

^g Reduces estimated cost by 10 percent to exclude the 5 percent for the estimated proportion of growers that require upgrades to poultry housing and 5 percent for the estimated proportion of growers that enter a contract for the first time.

^h Estimates cost for the 5 percent of the growers that require upgrades to poultry housing and enter into contracts for the first time.

ⁱ Estimates cost for the 5 percent of the growers that require upgrades to poultry housing.

^j Total may not sum due to rounding.

Table 3 below provides the details of the estimated one-time, first-year costs to live poultry dealers of providing disclosure documents required in § 201.104. Like the previous tables, AMS subject matter experts provided estimates in the second column of the average amount of time that would be necessary for each live poultry dealer to meet

each of the elements listed in the “Regulatory Requirements” column. Values in the “Expected Wage” column are taken from U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics released May 2022. Wage estimates are marked up 41.82 percent to account for benefits. The number of LPDs is the number of live poultry

dealers that filed annual reports with AMS for their 2021 fiscal years. “Expected Cost” is the estimate of the cost of each “Regulatory Requirement.” Summing the “Expected Cost” column provides the total expected first-year, one-time costs for setting-up and producing the disclosure documents associated with § 201.104.

TABLE 3—ONE TIME FIRST-YEAR COSTS ASSOCIATED WITH § 201.104

Regulatory requirement	Number of hours per LPD	Profession	Expected wage (\$)	Number of LPDs	Expected cost (\$)
201.104(a)	2	Manager	84.27	42	7,079
	4	Administrative	41.71	42	7,007
201.104(b)	2	Information Technology	92.91	42	7,804
	5	Manager	84.27	42	17,696
201.104(c)	2	Administrative	41.71	42	3,504
	18	Information Technology	92.91	42	70,237
	8	Manager	84.27	42	28,314
	5	Administrative	41.71	42	8,759
	22	Information Technology	92.91	42	85,845
Total Cost					^a 236,244

^a Total may not sum due to rounding.

Table 3 below provides the details of the estimated ongoing costs of providing disclosure documents required in § 201.104. AMS subject matter experts provided estimates in the second column of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements listed in the “Regulatory Requirements” column. They also provided

the expected number of tournaments per plant. The number of processing plants was tallied from the annual reports that live poultry dealers file with AMS. Values in the “Expected Wage” column were found in U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics released May 2022. Wage estimates are marked up 41.82 percent to account for benefits.

Multiplying across the row provides the “Cost” for each “Regulatory Requirement,” and summing the “Cost” column provides the total expected costs for producing and distributing the disclosure documents associated with § 201.104 on an ongoing basis.

TABLE 4—ONGOING EXPECTED COSTS ASSOCIATED WITH § 201.104

Regulatory requirement	Hours	Profession	Number of plants	Number of tournaments per plant	Weeks in a year	Avg. wage (\$)	Cost (\$)
201.104(b)	0.1	Evenly distributed among management, administrative, and information tech.	188	1.35	52	^a 72.96	96,291
201.104(c)	0.1	Evenly distributed among management, administrative, and information tech.	188	1.35	52	^a 72.96	96,291
Total Cost							192,582

^a \$72.96 is the average of the average wages for poultry processing managers, administrative professionals, and information technology staff at \$84.27, \$41.71, and \$92.91 respectively.

Appendix 2. Technical Overview of Estimates of the Economic Benefits of Reduction in Profit Uncertainty to Contract Broiler Growers With Rule Changes Promoting Greater Transparency in Returns

A potential benefit of the contract disclosure rules providing increased transparency would be that doing so could lower the uncertainty in the contract broiler grower's profit stream. According to economic principles, a risk averse producer will benefit economically from a reduction in profit risk, a component of the proposed rule's benefits, discussed above. Given assumptions about the level of risk aversion of the producer, the distribution of contract grower profit, and the grower's utility function (an economic concept that in this case measures the grower's preferences over a set of goods), it is possible to calculate the range of economic benefits to contract growers of decreased profit uncertainty associated with greater transparency. For this analysis, we assume that the producer maximizes an absolute risk aversion (ARA) utility function. The alternative to an absolute risk aversion function is a relative risk aversion function (RRA). For the former, the coefficient of risk aversion is the negative of the ratio of the second to first derivatives of the utility function with respect to the good (e.g., wealth or consumption) while the latter multiplies this ratio times the level of the good. We could find only two papers that used either RRA or ARA for examining North American poultry contract growers. Hu (2015) and Hegde and Vukina (2003) assume CARA for U.S. broiler contract growers. The former is an econometric exercise that does not provide sufficient information to obtain a risk aversion parameter for use in a scenario analysis and the latter is simply a simulation exercise of a wide range of arbitrary parameter values for the absolute risk aversion parameters without referring them to a given range of risk aversion premium (RAP) levels to provide context.

A benefit of relative risk aversion is that the relative risk aversion parameter is scale free, which represents a convenience for analysis. We assume that one reason for the greater use of relative risk aversion compared to absolute risk aversion is that it saves the researcher the work of having to solve the nonlinear equations necessary to scale the risk parameters to the size of the risky bet. A nice property of the absolute risk aversion is that the preferences for risk aversion are directly reflective of where the researcher wants risk preferences to be on a 0%-100% percentage of the standard deviation of the gamble that a risk averter would pay to avoid the gamble altogether. With relative risk aversion in contrast, the researcher instead refers to say, "typical" values of the relative risk aversion coefficient. Relative risk aversion measure is sensitive to what is included or excluded when defining or measuring the outcome variable, e.g., whether wealth or profits (Meyer and Meyer, 2005). When the focus is on representing and measuring the risk preferences of the decision maker, as it is in the analysis of broiler growers, either relative or absolute

risk aversion is sufficient as the basis for the analysis, and since simple arithmetic allows one to go from model to the other, only one of these approaches is needed (*ibid.*).

Another decision to be made is how the producer's risk aversion changes with wealth. Under constant absolute risk aversion (CARA), the grower's risk aversion does not change as wealth increases. Decreasing absolute risk aversion (DARA) assumes that the grower's risk aversion increases as wealth increases. Another possibility is that the grower's risk aversion is increasing in wealth (IARA). While no evidence exists one way or another for how risk preferences of broiler contract growers change with wealth, the agricultural economics literature generally assumes DARA over IARA. We have no information one way or another on how the risk aversion of contract growers changes with wealth, and hence, we use both CARA and DARA.

First, we assume that the grower has constant absolute risk aversion (CARA) and makes management decisions to maximize the expected value of a negative exponential utility function over N simulated returns, or $U(w) = (1 - e^{-\lambda w})$

where λ is the grower's absolute risk aversion coefficient and w is the grower's wealth that proxies for a set of goods and services. The higher is λ , the higher the grower's aversion variability in w . Wealth w is a stochastic variable defined as the grower's initial (fixed) wealth w_0 plus the stochastic net returns. A negative exponential utility function conforms to the hypothesis that growers prefer less risk to more given the same expected, or average, return.

The specific functional form in the equation above also assumes that growers view the riskiness of profit variability the same without regard for their level of wealth, i.e., CARA (e.g., Goodwin, 2009). A risk averse grower will be willing to accept lower mean net returns in exchange for lower variability in returns w . Let U_0 be the grower's current utility and U_1 be the grower's utility with the new contract rules and their associated lower variability of w . Assuming mean w is constant between states, for the risk averse grower, $U_1 > U_0$. The question then becomes how to translate the benefit $U_1 - U_0$ into a dollar value. We define the Risk Premium (RP), or the dollar benefit to growers of decreased profit risk, as the amount of mean profit they would be willing to give up such that $U_1 = U_0$, i.e., such that they are indifferent between the two states (e.g., Sproul *et al.* 2013; Schnitkey *et al.*, 2003).¹⁸⁸

The first step is to construct an empirical distribution of grower profit or net revenue. The market value of contracted share of broilers in 2020 was \$20.9 billion given NASS data on their total value of production and the 96.3 percent shares that are contract.

¹⁸⁸ This Risk Premium may be considered a special case of the compensating variation concept in economics. With the proposed rule changes leading to greater transparency in returns, the grower would be getting a decrease in revenue variability but would not have to pay to get this. Hence the Risk Premium is a measure of benefit to the grower of being under the new contract rules.

Eleven percent of this value goes to contract growers, based on the ratio of the USDA's Livestock Indemnity Program (LIP) payment rate for contract growers divided by the rate for livestock owners, leading to a mean gross revenue of \$2.3 billion for broiler growers. Variable and fixed costs are assumed to be non-stochastic and are set at 24 and 19 percent of the 2020 mean gross revenue, based on the proportions from Table 1 in Maples *et al.* (2020), and net revenue is the gross revenue less the variable and fixed costs. Initial (non-stochastic) wealth w_0 is set equal to 2020 mean net revenue.¹⁸⁹ Grower net revenue is assumed to follow a normal distribution. A normal distribution of net revenue will approximate the distribution in cumulative distribution function of net revenue in Figure 1 of Maples *et al.* (2020) with a coefficient of variation of revenue of 0.16.¹⁹⁰ Given this estimate of the coefficient of variation of net revenue, and the mean net revenue of \$1.33 billion for broiler contract grower net revenue, the standard deviation can be simply found as the coefficient of variation of net revenue times this mean.

The associated absolute risk aversion coefficient λ is associated with a grower's risk aversion premium (RAP), a value that varies between 0 and 100 percent (of the potential loss) and reflects the amount the grower is willing to pay to avoid the potential loss, with higher values reflecting higher risk aversion. The λ is linked to the RAP on a theoretical basis outlined in Babcock, Choi, and Feinerman (1993). The associated absolute risk aversion coefficient λ is scaled to the standard deviation of net revenue using the approach in Babcock, Choi, and Feinerman (1993). Note that since λ is scaled to the standard deviation of net revenue, the calculation of the total Risk Premium across all growers, or $RP = \sum_i RP_i$, $i = 1 \dots G$, equal size growers is invariant to assumptions about the total number of growers G , whether set to an arbitrary value or to the 16,524 contract broiler growers per the 2017 Agricultural Census.¹⁹¹ The estimated value of λ is $1.10E-09$, $1.10E-06$, and $1.1E-05$ for $G = 1$, 1,000, and 10,000 equal sized growers, respectively, with an RAP of 20 percent.¹⁹² A von Neumann-Morgenstern expected utility is estimated over $N = 1,000$ draws of w_j where EU_0 is

¹⁸⁹ The academic literature tends to be vague as to setting w_0 , with it either set at \$0 or some unspecified amount. In principle, it could be set at the producer's net equity going into the year, but if one wants initial wealth for the purposes of utility analysis to be relative liquid assets, net equity maybe too high a value.

¹⁹⁰ To put this coefficient of variation of broiler revenue of 0.16 in perspective, note that the lower-end estimate of the coefficient of variation of farm level revenue for major row crops is considerably higher as one might expect, at 0.25 even with crop insurance (Cooper 2010; Belasco, Cooper, and Smith, 2019).

¹⁹¹ USDA, NASS. 2017 Census of Agriculture: United States Summary and State Data, (April 2019).

¹⁹² For estimation, $G = 10,000$ is used to allow for a larger λ and reduce the potential for machine error in rounding.

$$EU_0(w) = \frac{1}{N} \sum_{j=1}^N [1 - e^{-\lambda w_j}],$$
 and EU_I is

$$EU_1(w_1) = \frac{1}{N} \sum_{j=1}^N [1 - e^{-\lambda(w_{1j}-RP)}],$$

where w_{1j} are draws from the normal distribution given an assumption for a lower coefficient of variation of gross revenue with the new rules, but with the same initial wealth, costs, and mean gross revenue as in the base case. The risk premium RP that solves $EU_I(w_1) = EU_0(w)$ is found using a numerical search routine.

For the DARA scenario, we follow Hennessy (1998), and the CARA utility function becomes

$U(w) = (1 - e^{-\lambda w}) + \beta w$ where β is greater than zero. Let $\rho(w)$ be the risk aversion coefficient under DARA, *i.e.*, $\rho(w)$ is decreasing in w . Hennessy (ibid.) shows that $\rho(w)$ is a function of λ and β as

$$\rho(w) = \frac{\lambda^2 e^{-w\lambda_1}}{\beta + \lambda_1 e^{-w\lambda_1}}$$

Per Hennessy (ibid.), we solve for the values of λ and β to simultaneously satisfy a $\rho(w = 0)$ associated with a RAP of 40 percent and

a $\rho(w = \bar{w})$ associated with a RAP of 20 percent. Like Hennessy (ibid.), we assume that the Babcock, Choi, and Feinerman approach to relate the risk coefficient to the RAP level holds approximately for DARA preferences. The rest of the approach for finding the risk premium RP that solves $EU_I(w_1) = EU_0(w)$ is the same as for the CARA scenarios. Appendix Table A1 summarizes the parameters and risk attitudes used in the analysis, with the RAP value denoted as θ .

APPENDIX TABLE A1—NATURE OF CHOSEN UTILITY FUNCTIONS

Parameters and risk attitudes	Low and CARA	High and CARA	DARA
λ	1.099164E-05	2.40788E-05	2.0533761e-05
β	0	0	3.9580000e-09
$\theta[w = 0]$	0.20	0.40	0.40
$\theta[w = \bar{w}]$	0.20	0.40	0.20
$\rho[w = 0]$	1.099164E-05	2.40788E-05	2.0529804e-05
$\rho[w = \bar{w}]$	1.099164E-05	2.40788E-05	1.0991640e-05

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Appendix 3. Details of the Estimated One-Time, First-Year Costs and On-Going Annual Costs of Providing Disclosure Documents Required in §§ 201.102 and 201.104 Under the Small Business Exemption Alternative

Costs for the alternative that would exempt live poultry dealers that produced and average of less than 2 million pounds of broilers per week were estimated similarly to cost for the §§ 201.102 and 201.104. AMS subject matter experts provided estimates of the average amount of time that would be necessary for each live poultry dealer to comply with each new requirement in §§ 201.102 and 201.104, and the hours were multiplied by wage estimates to arrive at an expected cost for each regulatory element. The tables are set up the same as before.

Multiplying across row for each regulatory element provides the expected cost for the element. Summing the expected costs for element provides the total cost.

Table 1 below provides the details of the estimated one-time, first-year costs of providing disclosure documents required in § 201.102. AMS expects that the direct costs will consist entirely of the value of the time required to produce and distribute the disclosures and maintain proper records. The number of hours the second column were provided by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in auditing live poultry dealers for compliance with the Act. They provided estimates of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements listed in the “Regulatory Requirements” column. Estimates for the value of the time are U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics estimates released May 2022. The wage estimates are marked up 41.82 percent to account for benefits. The “Adjustment” column allows for estimation of costs that will only apply to a subset of the poultry growers or to the live poultry dealers. A blank value in the Adjustment column indicates that no adjustments were made to the costs. Each adjustment is different and described in the relevant footnote. 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 first-year, one-time costs for setting-up and producing the disclosure documents associated with § 201.102.

TABLE 1—EXPECTED FIRST-YEAR DIRECT COSTS ASSOCIATED WITH § 201.102

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs ^a	Adjustment (percent)	Expected cost (\$)
201.102(b)(1)–(8)	1	Manager	84.27	27		2,275
	4	Lawyer	131.38	27		14,189
201.102(c)(1)–(3)	10	Manager	84.27	27		22,753
	5	Administrative	41.71	27		5,631
	10	Lawyer	131.38	27		35,473
201.102(c)(4)	2	Manager	84.27	^b 121		20,369
	4	Manager	84.27	27		9,101
	1	Lawyer	131.38	27		3,547
201.102(c)(5)	1	Manager	84.27	^b 121		10,184
201.102(d)(1)(2)(i)	30	Manager	84.27	27	^c 90	61,432
	8	Administrative	41.71	27	^c 90	8,108
	22	Information Tech	92.91	27	^c 90	49,667
201.102(d)(1)(2)(ii)–(v)	60	Manager	84.27	27	^d 5	6,826
	16	Administrative	41.71	27	^d 5	901
	44	Information Tech	92.91	27	^d 5	5,519
201.102(d)(3)	20	Manager	84.27	27	^f 5	2,275
	5	Administrative	41.71	27	^f 5	282
	15	Information Tech	92.91	27	^f 5	1,881
201.102(d)(4)	6	Manager	84.27	27		13,652
	2	Administrative	41.71	27		2,252
201.102(d)(5)	0.5	Manager	84.27	27		1,138
	0.5	Administrative	41.71	27		563
201.102(f)(1)(2)	40	Manager	84.27	27		91,010
	20	Lawyer	131.38	27		70,946
	10	Administrative	41.71	27		11,261
	10	Information Tech	92.91	27		25,084
201.102(g)(1)(2)	1	Manager	84.27	27		2,275
	1	Administrative	41.71	27		1,126
201.102(i)(2)	1	Manager	84.27	27		2,275
	1	Lawyer	131.38	27		3,547
Total Cost						^g 485,543

^a Annual reports filed by live poultry dealers indicated 27 processed an average of more than 2 million pounds of broilers per week.

^b AMS estimated a manager's time required for each of the 121 broiler complexes rather than the 27 live dealer firms.

^c 201.102(d)(1)(i) exempts live poultry dealers that process less than 2 million pounds of broilers per week.

^d Reduces estimated costs by 10 percent to exclude the 5 percent for the estimated proportion of growers that require upgrades to poultry housing and 5 percent for the estimated proportion of growers that enter a contract for the first time.

^e Estimates costs for the 5 percent of the growers that require upgrades to poultry housing and enter into contracts for the first time.

^f Estimates costs for the 5 percent of the growers that require upgrades to poultry housing.

^g Total may not sum due to rounding.

Table 2 provides the details of the estimated ongoing costs of providing disclosure documents required in § 201.102. Table 2 is laid out the same as Table 1. AMS subject matter experts provided estimates in the second column of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements listed in the “Regulatory Requirements”

column. Estimates for the value of the time are from U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics released May 2022. The wage estimates are marked up 41.82 percent to account for benefits. The “Adjustment” column allows for estimation of costs that will only apply to a subset of the poultry growers or to the live poultry dealers.

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 for producing and distributing the disclosure documents associated with § 201.102 on an ongoing basis.

TABLE 2—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH § 201.102

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs/number of contracts	Adjustment (percent)	Expected cost (\$)
201.102(a)(1)	0.08	Evenly distributed among management, administrative, and information tech.	^a 72.96	19,417	^b 74.72	88,212
201.102(a)(2)	0.08	Evenly distributed among management, administrative, and information tech.	^a 72.96	19,417	^c 5	5,903
201.102(a)(3)	0.08	Evenly distributed among management, administrative, and information tech.	^a 72.96	19,417	^d 5	5,903
201.102(b)	0.5	Manager	84.27	27		1,138
	0.5	Administrative	41.71	27		563
201.102(c)(1)–(3)	1	Manager	84.27	27		2,275
	1	Administrative	41.71	27		1,126
	1	Lawyer	131.38	27		3,547
201.102(c)(4)	0.5	Manager	84.27	^e 121		5,092
	1	Manager	84.27	27		2,275
	0.5	Lawyer	131.38	27		1,774
201.102(c)(5)	0.5	Manager	84.27	^e 121		5,092
201.102(d)	0.17	Administrative	41.71	^e 121		840

TABLE 2—EXPECTED ONGOING DIRECT COSTS ASSOCIATED WITH § 201.102—Continued

Regulatory requirement	Number of hours required for each LPD	Profession	Expected wage (\$)	Number of LPDs/number of contracts	Adjustment (percent)	Expected cost (\$)
201.102(d)(1)(i)	15	Manager	84.27	27	^f 90	30,716
	3	Administrative	41.71	27	^f 90	3,041
	6	Information Tech	92.91	27	^f 90	13,546
201.102(d)(1)(ii)–(v)	30	Manager	84.27	27	^g 5	3,413
	6	Administrative	41.71	27	^g 5	338
	12	Information Tech	92.91	27	^g 5	1,505
201.102(d)(2)	10	Manager	84.27	27	^h 5	1,138
	2	Administrative	41.71	27	^h 5	113
	4	Information Tech	92.91	27	^h 5	502
201.102(d)(3)	0.25	Manager	84.27	27	.....	569
	0.25	Administrative	41.71	27	.....	282
201.102(d)(4)	0.25	Manager	84.27	27	.....	569
	0.25	Administrative	41.71	27	.....	282
201.102(f)	20	Manager	84.27	27	.....	45,505
	5	Lawyer	131.38	27	.....	17,736
	3	Administrative	41.71	27	.....	3,378
	4	Information Tech	92.91	27	.....	10,034
201.102(g)	0.25	Administrative	41.71	^e 121	.....	1,260
Total Cost .....	.....	.....	.....	.....	.....	ⁱ 257,665

^a \$72.96 is the average of the average wages for poultry processing managers, administrative professionals, and information technology staff at \$84.27, \$41.71, and \$92.91 respectively.

^b 74.72 is the percentage of the existing poultry grower contracts that are expected to come up for renewal each year. It includes all flock-to-flock and single year contracts as well as longer term contracts that are expected to expire within a year.

^c Estimates cost for the 5 percent of the growers that require upgrades to poultry housing.

^d Estimates costs for only the 5 percent of growers that enter contract for the first time.

^e AMS estimated a manager's time required for each of the 121 broiler complexes rather than the 27 live dealer firms.

^f Reduces estimated cost by 10 percent to exclude the 5 percent for the estimated proportion of growers that require upgrades to poultry housing and 5 percent for the estimated proportion of growers that enter a contract for the first time.

^g Estimates cost for the 5 percent of the growers that require upgrades to poultry housing and enter into contracts for the first time.

^h Estimates cost for the 5 percent of the growers that require upgrades to poultry housing.

ⁱ Total may not sum due to rounding.

Table 3 below provides the details of the estimated one-time, first-year costs of providing disclosure documents required in § 201.104. Like the previous tables, AMS subject matter experts provided estimates in the second column of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements

listed in the “Regulatory Requirements” column. Values in the “Expected Wage” column are taken from U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics released May 2022. The wage estimates are marked up 41.82 percent to account for benefits. The number of LPDs is the number of live poultry dealers that filed

annual reports with AMS for their 2020 fiscal years. “Expected Cost” is the estimate of the cost of each “Regulatory Requirement.” Summing the “Expected Cost” column provides the total expected first-year, one-time costs for setting-up and producing the disclosure documents associated with § 201.104.

TABLE 3—ONE TIME FIRST-YEAR COSTS ASSOCIATED WITH § 201.104

Regulatory requirement	Number of hours per LPD	Profession	Expected wage (\$)	Number of LPDs	Expected cost (\$)
201.104(a)	2	Manager	84.27	27	4,551
	4	Administrative	41.71	27	4,505
	2	Information Technology	92.91	27	5,017
201.104(b)	5	Manager	84.27	27	11,376
	2	Administrative	41.71	27	2,252
	18	Information Technology	92.91	27	45,152
	8	Manager	84.27	27	18,202
201.104(c)	5	Administrative	41.71	27	5,631
	22	Information Technology	92.91	27	55,186
Total Cost .....	.....	.....	.....	.....	^a 151,871

^a Total may not sum due to rounding.

Table 4 below provides the details of the estimated ongoing costs of providing disclosure documents required in § 201.104. AMS subject matter experts provided estimates in the second column of the average amount of time that would be necessary for each live poultry dealer to meet each of the elements listed in the “Regulatory Requirements” column. They also provided

the expected number of tournaments per plant. The number of poultry processing plants was tallied from the annual reports that live poultry dealers file with AMS. Values in the “Expected Wage” column were found in U.S. Bureau of Labor Statistics Occupational Employment and Wage Statistics released May 2022. The wage estimates are marked up 41.82 percent to

account for benefits. Multiplying across the row provides the “Cost” for each “Regulatory Requirement,” and summing the “Cost” column provides the total expected costs for producing and distributing the disclosure documents associated with § 201.104 on an ongoing basis.

TABLE 4—ONGOING EXPECTED COSTS ASSOCIATED WITH § 201.104

Regulatory requirement	Hours	Profession	Number of plants	Number of tournaments per plant	Weeks in a year	Avg. wage (\$)	Cost (\$)
201.104(b)	0.1	Evenly distributed among management, administrative, and information tech.	121	1.35	52	^a 72.96	\$61,901
201.104(c)	0.1	Evenly distributed among management, administrative, and information tech.	121	1.35	52	^a 72.96	61,901
Total Cost							^b 123,803

^a \$72.96 is the average of the average wages for poultry processing managers, administrative professionals, and information technology staff at \$84.27, \$41.71, and \$92.91 respectively.

^b Total may not sum due to rounding.

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