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EXHIBIT 1

NCC 2020 US Broiler Chicken Industry Sustainability Report (Sept. 2021)

2020

U.S. Broiler Chicken Industry Sustainability Report

Issued by the National Chicken Council in September 2021

NATIONAL CHICKEN COUNCIL

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A Letter from Mike Brown

President of the National Chicken Council

It has been a decade since I was named president of the National Chicken Council. In those 10 years, much has changed. And no changes hit as profoundly – or as quickly – as those that we both responded to and initiated in 2020.

Change arrives in fits and starts. We can see it coming and it can surprise us. I have been constantly impressed by and grateful for the resilience and the creativity of our industry when responding to change – both the long view solutions that are best implemented slowly and the rapid deployments demanded by immediate need. We have shown ingenuity and commitment in the face of change, regardless of the challenge.

Nowhere has the industry's commitment to innovate been better revealed than in our sustainability efforts. So, in a time of quick and unquestionable change, the moment seems right to celebrate those efforts in a way that gathers an overview of our sustainability progress, stories and commitments.

What you will read in the following pages represents National Chicken Council's (NCC's) inaugural sustainability report. It is the culmination of many years of work and, also, humbly, the starting point for many more years of collective effort by the U.S. chicken industry. Effort that brings to life our commitment to environmental and social responsibility, and recognition that continuous improvement is critical to address today's sustainability challenges. Effort made to ensure both a healthier industry and a healthier planet into the future. Effort that proves, again, our mission to always change for the better.

As this report is coming out, NCC and many of our members are also actively engaged in a multi-year effort by the U.S. Roundtable for Sustainable Poultry & Eggs to capture the sustainability of all U.S. poultry through a framework that will help us guide future work and change.

So, about all this change…

The chicken industry has a long history of adapting to difficult situations and meeting changing demand. 2020 was no different in that way. The COVID-19 outbreak reminded us that our food system has long been "critical" and "essential" before those words became part of our daily pandemic vocabulary.

Our top priorities in 2020 were two-fold: keeping our essential workers safe and keeping chicken stocked in the meat case. Chicken producers and their industry allies went above and beyond to ensure America's No. 1 protein continued flowing to store shelves.

In this, it was imperative that a proper balance was struck between ensuring a steady supply of food while maintaining the health and welfare of the people who work tirelessly to produce and deliver that food. Chicken producers did everything they could to keep workers healthy and safe while keeping America fed — in that order.

The impact of this balance? Half of Americans who eat chicken say they ate it more than any other protein during the

COVID-19 challenges of 2020. In fact, during the first nine months of COVID-19 in the U.S., retail chicken sales increased 19.5% from the same period in 2019. We more than kept pace with Americans' demand for chicken while simultaneously implementing crucial safeguards that protected our workers.

If we can rally and adapt this effectively in a time of crisis, I have no doubt we can combine our historical knowledge with newfound capabilities born of the pandemic and apply them to sustainability opportunities in the brighter times ahead of us. In fact, what you will find in these pages should be inspirational, highlighting our successes to date and the promise of innovations to come.

Innovation is at the core of our inception as an industry – and remains at our core today.

In 1923 – just shy of 100 years ago – Cecile Long Steele of Delaware faced down a surprising challenge and ended up inventing the modern chicken industry. She ordered 50 chicks for egg production and received, instead, 500 due to a clerical error. She kept and raised the chicks, selling them for meat. Within two years, she was raising 10,000 meat-type chickens.

In her world, chickens generally ended up in a stew pot only when they got older and their egg-laying days were dwindling. But happenstance and her entrepreneurial ingenuity harnessed by the Roaring 20's economy, advances in refrigeration, and improved transportation technology – and the rest is broiler history.

Cecile Long Steele's pioneering spirit nearly a century ago still drives us. Over the past decades, our industry has made huge strides in embracing innovation to increase the sense of responsibility that is also at our core – a responsibility to care for the planet, our workers, and our most important asset: our chickens.

You will see this pioneering spirit and commitment come to life here through the passion of small farmers, the technology breakthroughs of processors, the impactful commitments of distributors, and more.

This report is by no means exhaustive. Nor is it our final report. For the chicken industry, sustainability means being responsible stewards of land and water, animal and feed management, our people, and communities into the future. Sustainability is a journey – our journey as a national industry and member of the international community.

My home in Delaware isn't too far from where Mrs. Steele started raising her chickens. I have a special appreciation for the land and water on the Eastern Shore, and I see firsthand everything chicken producers do to protect and preserve it.

And while the modern version of our industry may have started very near where I write this in Delaware, it now extends to nearly every corner of this country and, in fact, much of the world.

You will see in the pages ahead, based on new data from the *Broiler Production System Life Cycle Assessment: 2020 Update*, that the efforts and leadership of those who carry on and improve upon this tradition are making measurable progress.

The numbers tell us that collectively we have made significant improvements in key sustainability intensity metrics (environmental footprint per bird) between 2010 and 2020.

We are feeding more people and we are raising each bird with less environmental impact and resources.

Having come so far in the past 10 years, we are nevertheless committed to achieve additional progress in the next 10 and beyond.

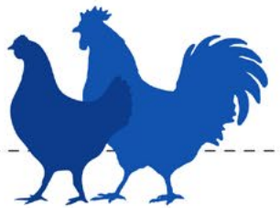
Mike Brown
President of the National Chicken Council

From **EGG** to **FARM** to **TABLE**:

A Bird's Eye View of the U.S. Broiler Chicken Industry

1 Feed Mill

Corn, soybean meal, vitamins and minerals are processed into feed and then distributed to breeder and broiler chicken farms.

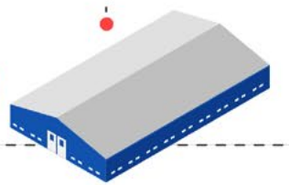


2 Breeder Farm

Breeder hens and roosters mate on the farm to produce fertilized eggs (not table eggs).

3 Hatchery

Fertilized eggs get delivered to hatcheries to be incubated and hatched into chicks raised for meat.



4 Growout House

Chicks are transported to local family farms where they are raised until they reach market weight.

95%

Over 95% of poultry litter is recycled and reused to fertilize crops.

5 Processing Plant

At a processing plant, chickens are humanely processed, thoroughly washed and cleaned, chilled, and packaged all under the watchful eyes of USDA inspectors.

6 Retail and Foodservice Outlets

Local grocers, markets and restaurants stock meat cases, prepare, and serve chicken for consumers to buy and enjoy.

7 Your Table – and Tables Around the World

Chicken is the safe, high-quality and affordable cornerstone to a nutritious meal for families everywhere.

In addition to American tables, we ship U.S. chicken to more than 100 countries around the world.

U.S. Broiler Chicken Industry Key 2020 Facts

#1

Chicken is the **No. 1 protein consumed in the U.S.**

25,000 FAMILY FARMERS

About **25,000 family farmers** have production (growout) contracts with the companies.

The **top 5 broiler producing states** are Georgia, North Carolina, Arkansas, Alabama and Mississippi.

NEARLY 1,600,000

Nearly 1,600,000 people are directly and indirectly **employed by the U.S. broiler industry.**

What's a BROILER CHICKEN?
A chicken raised for meat.

Our Approach to Sustainability

> **If you're not taking care of your soil and your air, then you have nothing. And, making sure that we do that, either through our cropland production or in our chicken houses, it's just our lifeblood. It's important for us to run a farm that is sustainable because we have children who will inherit this farm, and we want to make sure they can have this farm in 100 years.**
>
> **Rachel Rhodes**

Throughout every step of the chicken supply chain, our industry is looking toward the future.

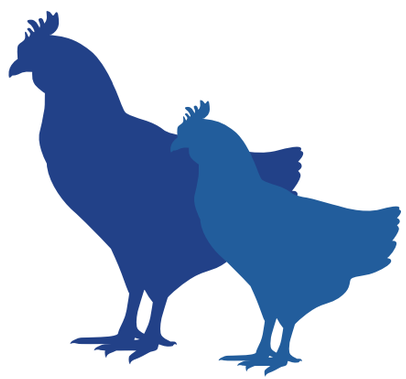
With the help of technology, modern breeding, nutrient management, feed conversion and improved animal husbandry practices, the U.S. chicken industry has significantly reduced the use of water, farmland, electricity, and other valuable natural resources, while reducing greenhouse gas emissions, over the last century. This past decade our industry has been particularly effective in these areas.

But our commitment to the future certainly does not end with our commitment to our planet and our birds. For us, "sustainability" encompasses the many ways that we conduct business responsibly – yes, for our planet and our birds, but also for the many people and communities affected by our work and our products.

Sustainability is a journey of collective successes and growth areas, which are driven by and include the many companies, organizations, and individuals who are diligently pushing our industry and international community toward a more sustainable future.

Our stakeholders are global – defined by the people who work in our industry, consume chicken, or are in any way impacted by the industry. We have made a conscious effort to elevate those voices in this report with information supported by data and actual human experience.

As farmer Rachel Rhodes articulates so eloquently, this industry is our lifeblood. Our commitment to feeding our country, and the world, is meaningless if it does not serve to benefit those who will follow in our footsteps for generations to come.



Arbogast Farms

Lauren Arbogast

Family Partner/Farmer

A Culture of Sustainability: Generation by Generation

Sustainability can be a tricky word. Practices vary from farm to farm and region to region, leaving a bit up to decision-makers and agriculture families. But regardless of the personal definition or area of impact, the root of sustainability packs the same punch – striving to do what's best for the next generation, one step at a time.

Our farm, Arbogast Farms, began in the 1970's with a few beef cattle and a lot of free-range turkeys. As the farm evolved over the years, the turkeys moved into cutting-edge barns, the cow herd dwindled, and farm management started the then-radical practice of no-till for the crop fields. In the early 2000s, the one remaining turkey house was converted to a chicken house, four new state-of-the-art chicken houses were built, and the beef cow herd was also strategically upgraded. Fields that had been no-till for decades now added in crop rotations and cover crops. And in 2020, our farm installed solar panels on all five chicken houses, lessening our impact on the electrical grid.

As a working multigenerational farm, there are many pieces to the puzzle of working together for the common goal of sustainability. Without a doubt, each member of the farm advocates for practices that ensure the next generation will have more opportunities on the same land and resources. Little by little, decision by decision, our farm has made sustainability common practice.

We at Arbogast Farms are looking toward the future with optimism. We have the next generation coming up on the farm, learning and watching, and, also, inventing and doing.

We hope we have created a culture that looks at innovation and sustainability as a baseline, not an end goal. We look to continually improve our practices in this generation and into the next, leaving our land and resources in a better position than where we found them.

Aviagen

Committed to Sustainability

One of the most exciting environmental sustainability projects in our industry undertaken globally is a campaign by Aviagen to gather information to better define their sustainability footprint.

This new project is their most comprehensive to date, taking into consideration their in-house footprint, while also considering the sustainability benefits to the industry with broiler chicken genetic advancements.

Knowing where we stand today helps us know where we need to be going.

Aviagen and others taking on the task of defining their footprint help us all determine our most impactful direction.

Our History of Innovation

1920s

Cecile Long Steele of Delaware faced a surprising challenge and **invented the modern chicken industry.**

1950s

The **National Broiler Council is organized** to stimulate consumer demand, headquartered in Richmond, Virginia.

1960s

New technologies allow for innovation and expansion into new markets.

1970s

The industry implements **nutritional discoveries, disease eradication programs and genetic improvements** through traditional breeding.

1980s

The industry establishes **September as National Chicken Month.**

1990s

Chicken consumption **surpasses beef consumption** in the U.S.

2000s

Chicken exported to foreign markets account for approximately **20% of total American production.**

2020

Americans eat a record **98 pounds of chicken per person.**

TODAY

The National Chicken Council represents companies that account for approximately **95% of broiler chicken production in the U.S.**

What You'll Find in This Report

We organized this report around the six broad topics that are most important for our industry:

Air, Land and Water
Our industry's environmental impacts and contributions to a healthy planet through emissions reductions and responsible use of water and land resources including the results of the *Broiler Production System Life Cycle Assessment: 2020 Update.*

Broiler Health and Welfare
Our industry's animal husbandry practices that support broilers' health, nutrition, comfort and overall wellbeing.

Employee Safety and Wellbeing
Our commitment to worker safety and wellbeing, and the ways that we keep workers safe.

Food and Consumer Safety
The many ways that our industry supports consumers' health, by providing affordable, safe and essential nutrition.

Community Support
This is about our industry's support for local communities through the creation of jobs and donations of money and food to businesses, charity organizations and others.

Food Security
Our industry's contributions to ensuring uninterrupted access and availability of affordable, nutrient-dense food.

These are the areas where our industry's efforts matter most – for supporting industry growth and for producing and providing food to people responsibly, in ways that protect communities and the planet and ensure food is available when people want and need it.

These also are the broad topics that consumers and our many other stakeholders have told us are important to them. While our industry's environmental impacts (Air, Land and Water) might be top of mind for many people, we recognize that other individuals might feel as strongly, or more strongly, about animal welfare or one of the other topics we have included here.

We also recognize there is overlap of these material topics, with progress in some areas helping to drive progress in others. For these reasons, all six topics are important and discussed in this report to demonstrate how the industry is innovating to meet needs and expectations.

As you will read, poultry operators across the entire value chain are making commitments and taking action. From feed mills to breeder farms, hatcheries, growout houses (the barns where broiler chickens live and grow), processing plants, and retail/foodservice operators. From large integrators to small family farms. Organizations of all sizes and types are making meaningful progress and contributing to the industry's collective journey of continuous sustainability improvement.

Foreword on Global Impact

The U.N. Sustainable Development Goals (SDGs) guide our responsibility approach. Collectively, the 17 SDGs provide a blueprint for a better and more sustainable future for all people and for the planet. The SDGs present a challenge and an opportunity for all of us – a global call to action to drastically decrease poverty, hunger, climate change and inequality by 2030.

By delivering on these goals, we believe we can have the biggest positive impact.

These are the areas where our contributions are most important for improving lives and fostering environmental stewardship.

The U.S. chicken industry is doing its part to drive progress, and we intend to continue our efforts.

To guide the path forward on behalf of the entire U.S. chicken industry, the NCC actively seeks partnerships and alliances with other organizations, to identify opportunities for synergy and leverage collective strengths.

Feeding people, and doing so equitably and sustainably, requires combined effort.

The constellation of activities involved in producing, processing, transporting, and consuming food (i.e., entire food systems) must all operate cohesively and in sync.

Food systems must withstand many disruptions – everything from extreme weather events to pandemics like COVID-19, biosecurity issues, and cybersecurity breaches. The U.S. chicken industry stood up to all of these challenges in 2020 alone.

We are particularly inspired by four of the SDGs:

Goal #2

Zero Hunger

End hunger, achieve food security and improved nutrition, and promote sustainable agriculture.

Goal #8

Decent Work and Economic Growth

Promote sustained, inclusive and sustainable economic growth, full and productive employment, and decent work for all.

Goal #12

Responsible Consumption and Production

Ensure sustainable consumption and production patterns.

Goal #17

Partnerships for the Goals

Strengthen the means of implementation and revitalize the global partnership for sustainable development.

The U.N. is calling for transformation of the world's food systems to be healthier (nutrient-based), more sustainable, and more equitable.

As an active member of the **Animal Agriculture Alliance**, we are aligned with the animal agriculture community, which seeks to promote practical, broad-based, action-oriented solutions backed by science, innovation and proven impact – solutions that include producers of all sizes and types at many points in their journey for continuous improvement and more sustainable systems.

The US Roundtable for Sustainable Poultry & Egg (US-RSPE) is another one of NCC's key partners. We are working closely with them on the first-ever sustainability reporting framework for the full U.S. supply chains for chicken, turkey and eggs, which will launch in early 2022.

The NCC will continue to look for opportunities to collaborate with others to achieve greater progress toward sustainable development.

By collaborating whenever possible, and by supporting our members' efforts to deliver sustainable, safe, affordable, and nutrient-dense food, we are continuing to drive the solutions that the world needs.

Leadership Profile

National Chicken Council

Ashley Peterson

Senior Vice President of Scientific & Regulatory Affairs

An Appreciation for Seasons, Blisters and Wholesome Food

Growing up in rural Kentucky, spending countless hours with my granddaddy on our small farm and working until my hands were blistered, I quickly learned how to appreciate where my food came from and the sacrifices it took to feed our family – generation after generation.

The acres and acres of vegetable gardens were never weeded or tilled enough as the summer crops were going to be canned, frozen, or otherwise preserved to feed everyone for the coming year. I thought I'd never get to the bottom of the bushels of ripe tomatoes, shuck enough corn, or shell enough black-eyed peas and lima beans under the big oak trees surrounding the old farmhouse.

When it got cold, it was time for butchering. I'll never forget one Saturday afternoon I was hanging out in the chicken house (a common place to find me as a kid - which, in hindsight, makes sense of my work in this amazing industry), and the rooster decided he didn't like me hanging out with his ladies... and spurred me up my leg.

Not sure how old I was, but I went to the house and found my granddaddy. Without a word he headed off to let that rooster know who was boss. My grandma made the best chicken and dumplings ever – not to mention the fried okra. I'm not sure why but she couldn't make good fried chicken to save her life – not that you'd want to make fried chicken with a mean old rooster anyhow...but he went well with those dumplings.

Every year a steer and three hogs would be subject to my granddaddy's appreciation, expertise, and dexterity. I'll never forget the time I was finally "old enough" to help slaughter a steer – that was something for a ten-year-old. We'd hang the steer in the tobacco barn off the bucket of an old John Deere Crawler until it was cold enough for butchering.

For the hogs, we had a large trough we'd put over a fire to heat up the water for scalding. Once we started the butchering and had enough fat separated from the carcasses, it was my job to render the fat – separate the lard from the cracklins.

Now if you've never had fresh hot (and I mean burn the skin off your mouth hot) cracklins, you haven't lived.

Once rendered, we'd ladle the fat into a lard press (which also served as the sausage stuffer) lined with cloth and collect the lard would be used for cooking and topping off jars - my grandma even made lye soap. We also made our own sausage, and I've never had the same since.

Looking back over these experiences, one thing was for certain – I learned to keep cold things cold, hot things hot, and keep things clean when it came to food preparation. I learned that though the animals we raised were raised for a purpose, they would always be treated humanely and with the respect they deserved.

In today's world, most people do not have these experiences, and I am thankful for the blisters, countless working hours, and appreciation it instilled in me about where our food comes from and all of the hard work that goes into feeding the world safe and wholesome food.

Air, Land and Water

It takes a healthy planet, fresh water, fertile soil, and clean air to raise and produce chicken.

Through continuous innovation, the chicken industry has become significantly more efficient in its use of water, farmland, electricity, and other valuable resources over time, and has reduced greenhouse gas emissions.

New Life Cycle Assessment Shows Substantial Progress Across All Key Impact Categories

For this report, we commissioned an updated sustainability assessment of U.S. broiler production to better reflect current production systems. And what a difference a decade of dedication can make.

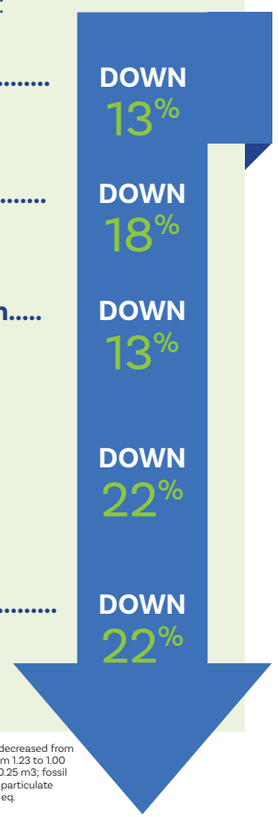
Using new life cycle inventory data, highly regarded third-party expert Dr. Greg Thoma and his colleague Ben Putman quantified the environmental impact of U.S. broiler production across a broad range of impact categories. The results of the assessment are documented in the *Broiler Production System Life Cycle Assessment: 2020 Update*, a fresh Life Cycle Assessment (LCA) that showcases where we are now, how the sustainability impacts have changed in the past 10 years, and where we might focus next to make continuous improvements.

An LCA is a quantitative environmental method used to compile and assess environmental impacts of products, processes, and services over their entire life cycle. The goal of the 2020 LCA was to focus on the chicken industry's three primary levers of sustainability:

1. Feed conversion ratio and average daily gain (including typical market live weight)
2. Feed composition (industry average ration formulation), and
3. Litter production and management.

What happened between 2010 and 2020 in U.S. broiler production? **Broiler production increased 21%.**

In addition, all key sustainability intensity measures improved between 13% and 22%. For every kg live weight of broiler (and cull breeder hen) produced during the 10-year time period:



Per kg live weight broiler and cull breeder hen: Land use decreased from 2.13 to 1.85 m2a crop eq; carbon footprint decreased from 1.23 to 1.00 kg CO2 eq; water consumption decreased from 0.29 to 0.25 m3; fossil resources use decreased from 0.27 to 0.21 kg oil eq; and particulate forming emissions decreased from 2.36 to 2.03 g PM2.5 eq.

Keep in mind that these improvements were made on the heels of substantial improvements made between 1965 and 2010. According to the prior life cycle assessment, producing the same amount of chicken in 2010 as in 1965 was already having 50% less impact on the environment. By 2010, our industry data showed:

75% fewer resources required in poultry production

36% reduced impact of poultry production on greenhouse gas emissions

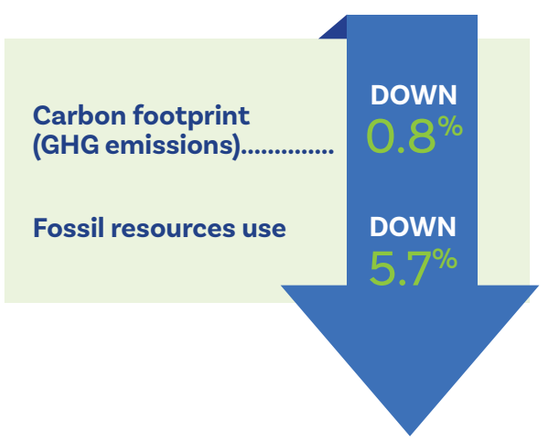
72% decrease in farmland used in poultry production

58% decrease in water used in poultry production

The improvement in intensity metrics does not tell the complete story.

We recognize that cumulative sustainability impacts are also very important. In contrast to the intensity metrics relating to each bird (or each kg of bird) produced, "cumulative" measures reflect overall environmental impacts by the entire U.S. broiler industry – the total amount of resources used and greenhouse gases emitted – in a given year.

The 2020 LCA shows that, from a cumulative standpoint, there were improvements in two key sustainability measures, despite the 21% increase in broiler production between 2010 and 2020.



The three other key sustainability measures showed increases during the 10-year time period, from a cumulative standpoint.

Land use
up 5.4%

Water consumption
up 5.4%

Particulate forming emissions
up 4.4%

Percentage change in five key sustainability measures between 2010 and 2020 (total production of broilers and cull breeder hens):

Impact category	2010	2020	Percent change
Land use (m^2a crop eq)	47,157,854,711	49,701,161,527	5.4%
Carbon footprint (kg CO_2 eq)	27,225,935,616	27,000,732,155	-0.8%
Water consumption (m^3)	6,401,558,672	6,748,789,920	5.4%
Fossil resources use (kg oil eq)	6,035,302,938	5,691,972,956	-5.7%
Particulate forming emissions (kg PM2.5 eq)	52,283,488	54,568,949	4.4%

These increases are still far below the increases in broiler production, which is an impressive and promising trend. It is often the case that growth of a sector outpaces the improvement in intensity. Had the impact categories shown increases that kept pace with broiler production in the past ten years, then all impacts would have seen a 21% increase. Feed is the primary driver of the impacts. What's happening on the farms in terms of feed, and feed conversion ratio, is driving the progress. As compared to 2010, in 2020, we saw an 8.7% improvement in feed conversion ratio – total broiler production increased by 21%, with only an 11% increase in total feed consumed.

Simply put, our industry is producing more and using less.

We have bigger birds, we have more birds, and we are achieving these gains with greater efficiency and a lighter environmental footprint than ever before.

Chicken production has long had a less significant environmental footprint than almost any other animal agriculture industry. We have made meaningful strides in minimizing environmental impact with the help of technological advancements and improved animal husbandry practices.

Now, let's dive deeper into why chicken production in the U.S. is more sustainable today than ever before...

Point of View

Aviagen

Jan Henriksen

CEO

Our climate is changing, and people and governments around the world are seeking ways to protect our planet.

Because food production is a primary driver of climate change, our challenge will be to feed the world's expanding population with a reliable and quality source of nutrition, while reducing the effects of production. One promising solution lies with poultry.

Chickens are naturally gentler on the environment than other livestock. On top of that, chicken companies have been working for decades to breed efficiencies that not only produce healthier birds, but also make commercial chicken production environmentally responsible. Simply, we see poultry as the responsible protein.

Sustainable intensification has become a global aspiration in the quest to increase food production from existing farmland while lowering pressure on the environment.

Over the past decade, broiler breeding companies have put significant resources and effort into creating efficiencies in chicken production that support sustainable intensification.

One such efficiency is a healthy feed conversion rate (FCR). Today's farmers can raise a healthier and more robust chicken more efficiently.

Another benefit is in the area of land use. As our global population continues to swell, agricultural land will become more and more limited.

With a lower FCR, less land will be needed to grow feed. The grain not used for poultry feed can be used for other purposes, and the land can be repurposed for other crops.

The important conclusion is that poultry's naturally lower resource consumption, coupled with innovative breeding efficiencies, means fewer resources are required to produce an increasing volume of high-quality chicken meat.

- **Poultry greenhouse gas emissions are naturally low.**
- **Chicken production demands far fewer resources.**
- **Using less land means less destruction of natural wildlife habitats.**
- **Chickens are more water-efficient than other livestock.**

Air

The production of all food – whether it's meat, seafood or fruits and vegetables – results in greenhouse gas (GHG) emissions.

Farmers want the best air quality not only for their chickens, but for the health of their family, employees and communities. The following are some of the ways our members act on their commitment to clean air.

The Role of Technology

Even with a relatively small footprint, chicken companies are regularly seeking accessible and affordable technology upgrades that will improve the ways broiler production affects air quality.

1. LED lighting
2. Computer controls
3. Solar panels

LED Lighting

In recent years, most chicken farms have switched to LED lighting, which can result in energy savings of 80-85% compared to traditional incandescent lightbulbs.

Michelle Chesnik's farm in Maryland
LED bulbs on the farm help her realize a 25-35% savings in energy. By using energy efficient lightbulbs, they lower their cost while taking better care of the environment.

Tim and Deena Morrison's farm in Kentucky
They minimize their energy use by regulating the lighting inside their chicken houses. Dimmable lightbulb technology aids in maintaining a healthy environment for the chickens and decreases inefficient use of lighting.

Rachel Rhodes' farm in Maryland
LED lights on the farm help mitigate energy usage. And, controllers tell them when the lights go on and when the lights go off. If something's askew it can be checked right away.

Computer Controls

Modern growout houses are mostly controlled by sophisticated computers that make continuous changes in temperature and ventilation to maintain optimal environmental conditions for the chickens, while saving gas and electricity.

Tim and Deena Morrison's farm in Kentucky
Their chicken house is monitored by a master computer that controls the chickens' dimmable lights based on outdoor temperatures, time of day and age of the flock. Along with lighting, the control computer also regulates airflow and temperatures to maximize chicken health over each stage of the flock's life. While chicks grow, their environment also needs to change. The controller makes these environmental changes efficiently and effectively.

Terry Baker's farm in Delaware
Each chicken house has its own computer and it's the brain of the chicken house. It controls the fans, the light, the feed, the water, the temperature, the heaters – all with an app on his phone – which gives him instant access to maintain the health of the birds, regardless of where he is.

Solar Panels

Some chicken farmers are installing solar panels in order to limit their energy use, producing their own electricity on-site.

Terri Wolf-King's farm in Maryland
She installed solar panels on her farm to help lower the energy bill and environmental footprint. Since installation, she has seen a significant reduction in energy use.

Tim and Deena Morrison's farm in Kentucky
Their solar panels have saved the equivalent usage of 60-70 tons of coal per year.

Terry Baker's farm in Delaware
The farm is now entirely run on solar.

Ammonia Mitigation

Ammonia is a natural byproduct of chicken production. For farmers, there are many solutions to help improve air quality on their farms and reduce ammonia – starting with planting foliage around their chicken houses to capture ammonia and collect dust. These plants often serve a dual purpose of reducing potential odors.

Farmers also regularly monitor ammonia levels within their chicken houses. Although useful in fertilizers, certain levels of ammonia in the chicken house can be damaging to the chicken, the farmer and the environment. For this reason, farmers use litter treatments to aid in the retention of ammonia, as well as ventilation and monitors to ensure the health of their flock.

“We planted miscanthus, arundo and switchgrass between the chicken houses and in front of tunnel fans to capture ammonia and collect dust and particles. The plants also help reduce potential odors from the houses. Using computer technology, I can track gas levels in the chicken house, like ammonia, from a smartphone. Terry Baker

“We planted greenery around the farm to help lower our carbon footprint. The pollinators, especially, provide a resource for insects and other wildlife that call the local ecosystem home. Jenny Rhodes

“Our farm is encircled with a vegetative buffer that consists of hybrid willows and green giant arborvitaes. This vegetative buffer acts as a windbreak saving electricity and fuel, helps capture dust and particulates from the fans, and makes the farm more aesthetically pleasing to neighbors. Georgie Cartanza

Staying Local

In addition to technologies, creative foliage solutions, and various ventilation and ammonia mitigation techniques, localizing production facilities is another way the chicken industry works hard to be efficient with resources. Despite its global reach, American chicken production is an extremely local business.

The distance from the hatchery to the farm to the processing plant is usually no more than 60 minutes away from one another. Localized production between the hatchery, farm, and processing plant reduces time traveled, emissions, and costs. This efficiency and localization ties directly to a reduction of GHG emissions.

Air Leadership Snapshots

JBS Makes Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040

In March of 2021, JBS announced a commitment to achieve net-zero greenhouse gas (GHG) emissions by 2040. The commitment spans the company's global operations, including Pilgrim's Pride Corporation as well as its diverse value chain of agricultural producer partners, suppliers, and customers in their efforts to reduce emissions across the value chain.

Sanderson Farms Sees Continuous Improvement in Energy Use Reduction

In 2008, a baseline of gas, water, and electricity usage was established at Sanderson Farms. The Company continues to measure against this baseline to improve our operations and to show continuous improvements across all locations. Since 2008, Sanderson Farms has seen a 20.4% reduction in electricity usage, 38.3% reduction in natural gas usage, and 44.6% reduction in water usage (all per WOG lb).

Air Leadership Profiles

Tyson Foods

Leigh Ann Johnston

Director, Sustainable Food Strategy

Tyson Foods' ambition is to be the most sustainable and transparent food company in the world and we're working hard every day to make the ambition a reality. Tyson recently announced a target to achieve net zero greenhouse gas (GHG) emissions across our global operations and supply chain by 2050. Tyson is excited about the work that will be done to achieve this target, but realize we cannot do this alone. Partnership and collaboration is critical and we're looking forward to working with our supply chain partners, NGO's, customers, academia, and other stakeholders in order to make the greatest impact.

Sanderson Farms

Stephanie Shoemaker

Manager, Environmental (Regulatory & Permitting)

Sanderson Farms has been installing Pressure Swing Adsorption systems at every new facility since 2012, which reduces our dependence on purchased natural gas, and creates a renewable energy resource that can be used seamlessly used in the processing facility. The Environmental and Engineering Departments of Sanderson Farms perform daily reviews of utility usage (gas, water, electricity) of all facilities to ensure all are operating as efficiently as possible. Any corrections and adjustments are made immediately to improve efficiencies, without waiting for the monthly utility bill to arrive.

Land

What goes on the land and in the land impacts everything that comes from the land – and how that land might be engaged for generations to come.

No one is more aware of this than our farmers.

As measured by our 2020 LCA Update, assessing land use helps us see how that use – and changes in that use – affect biodiversity. Biodiversity is protected and supported when less land is used for agricultural (and other human) purposes. The 2020 LCA Update showed that our chicken industry is doing a great job conserving land resources.

Specifically, land use per kg of production (broilers plus culled hens) decreased by 13% between 2010 and 2020. Although cumulative land use by the industry increased by 5.4%, production increased by a full 21% to serve the critical societal benefit of feeding people.

Litter management is another important land-related measure for our industry. We learned from the 2020 LCA Update that poultry litter is not a strong driver of climate impacts. Only the emissions from litter that is classified as "waste" get assigned back to the animal husbandry stage – a tiny fraction, as shown below. *

Litter management is a key sustainability lever that is being impacted directly by our chicken breeders. In practical, on-the-ground terms, chicken litter, or poultry litter, is not a waste product. It is, in fact, an extremely valuable resource in agriculture. This mix of chicken manure, spilled feed, feathers, and material used for bedding in the houses is something our farmers value highly. Most often, our farmers collect and store litter to be used as an organic fertilizer for crops – on their farms or nearby farms. Plants feed the chickens and chickens fertilize the plants – it's a closed, sustainable nutrient loop.

The nature of transactions regarding poultry litter disposal in the U.S., and their consequences on output classification according to U.N.-supported Livestock Environmental Assessment and Performance (LEAP) guidelines.

Disposal transaction	Fraction of litter from		Classification
	Broilers	*Breeders*	
Sold	50%	36.3%	Co-product
Hauled off for a fee	3.2%	4.2%	Waste
Bartered	36.1%	39%	Residual
Given away	10.7%	20.5%	Residual

* The 2020 LCA update followed the U.N.-supported LEAP guidelines, which is a science-based methodology that defines three specific options for allocating and accounting for litter emissions: residual, co-product, and waste.

Our Farmers Speak: Land, Litter and Longevity

Rachel Rhodes

"Like many chicken farmers, we've installed concrete heavy use area pads (HUA pads) at the entrance of each chicken house. These concrete pads allow for easier collection of chicken litter without any elements getting lost or spread into the ground. This litter is then composted and recycled to be used as a natural and organic fertilizer."

Two-Time Winners
Family Farm Environmental Excellence Award

Deena & Tim Morrison

"We make sure that 100% of our chicken litter supply is used as all-natural slow-release plant food on row crops. About half of our litter is sold to a broker who sells the fertilizer to other local crop growers. On Morrison Farm, a soil nutrient management plan is created that optimizes the spread of the rest of the fertilizer."

Terri Wolf-King

"All poultry litter from my chicken houses is stored and composted, and then used as a fertilizer for my row crops. Litter from poultry farming is a community recycling effort. I often buy litter from other farmers to be used as fertilizer on my crops.
To maximize the effectiveness of the litter as fertilizer, I work with outside counsel to create a nutrient management plan."

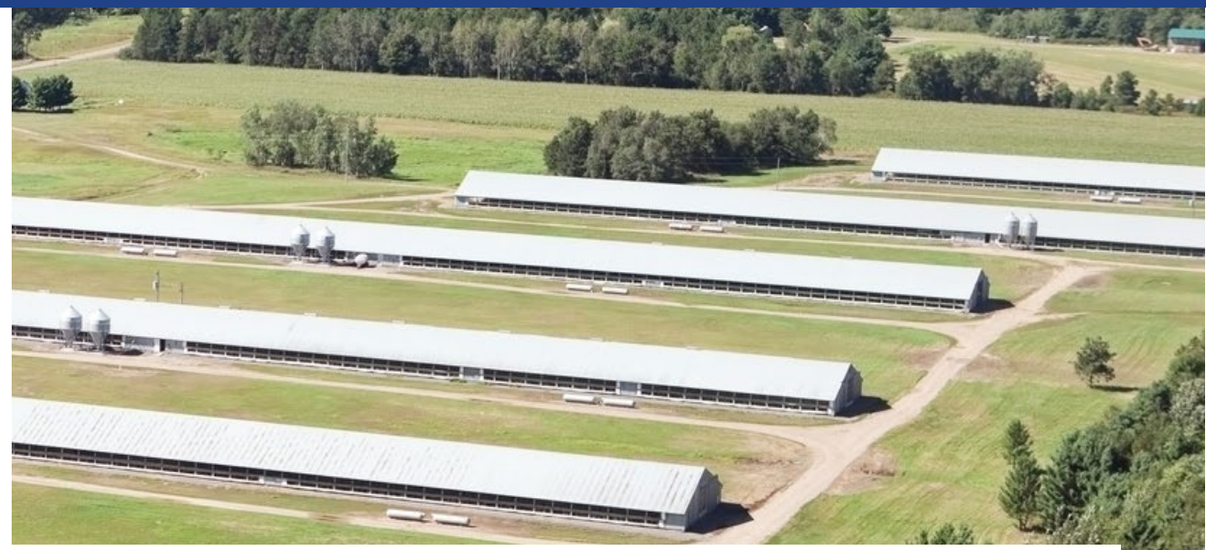
2018 Winner
Family Farm Environmental Excellence Award

Terry Baker

"100% of the poultry litter on our farm is recycled and reused. We collect poultry litter from the chicken houses and move it to a secured shed. We then work with a broker to find other farmers who recycle the chicken manure as an organic fertilizer on row crops and mushrooms. Nutrients generated as a byproduct are accurately tracked and reported to the state in our annual nutrient management report."

Heather & Mike Lewis on Land Management

In 2020, Heather and Mike's exemplary commitment to environmental stewardship was recognized by the U.S. Poultry and Egg Association when the couple was awarded the Family Farm Environmental Excellence Award. The prestigious award reflects the industry's commitment to serving as responsible stewards of land, water, and feed management, and maintaining and advocating for the humane treatment of our most important asset: our chickens. In their own words, hear how they approach their commitment to the land in particular reduce time traveled, emissions and costs. This efficiency and localization ties directly to a reduction of GHG emissions.

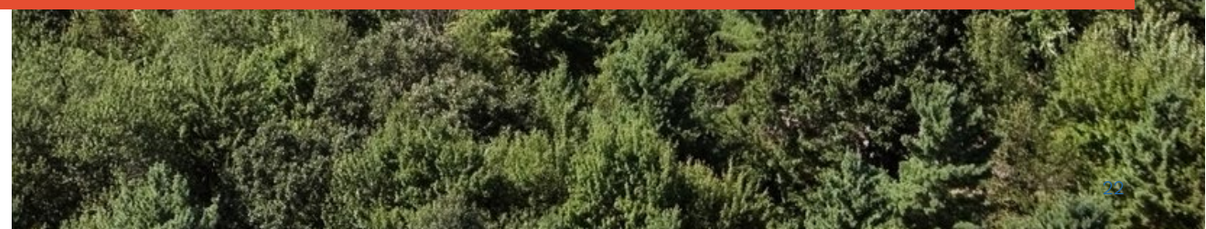


"We practice no-till farming on our land to help prevent soil erosion as well as protect the nutrients that are in the soil. Leaving a crop residue on the ground and using a cover crop also helps to improve soil health. The years that we have corn in our fields, we save some of the fodder and grind it up into new bedding for the chickens. We also use recycled pallets for bedding. We bring a shredder in that has a large magnet on it-in go the pallets, out comes nice bedding for our chickens.

Heather Lewis

"We have a Nutrient Management Plan that is written by a trained engineer/agronomist. The expert helps us ensure that we are doing what's best for our soil and the land around it. We windrow our litter between flocks letting it heat up to kill any pathogenic bacteria or organisms and equalize the moisture throughout. Then we reuse it, spreading it back out for even bedding.

Mike Lewis



Land Leadership Profile

Deerfield Farms

Jenny Rhodes

Farmer & Owner

I am a 10th generation farmer. I am able to farm today because the generations before me took care of the land the best way they knew how. Today, I am able to use the latest research-based information to make my farm the most sustainable it can be. I have learned to lead by setting an example for other farmers to follow.

Every day I am thinking, "What is the next step in sustainability?" Artificial and machine intelligence-even remote sensing-will help us as farmers and growers become even more efficient. I am also very interested in blockchain technology to help trace food from farm to fork. All of this potential makes this exciting and important work.

We recently installed pollinator plots on the farm. The plots provide nectar or pollen for a variety of pollinators like bees, butterflies, and birds. We have a few deer, groundhogs, and turkeys that like to graze the plants. My grandchildren like to walk in the plot, too. This has reduced my carbon footprint on my farm, with no grass cutting in these areas, the plot is a cover crop scavenging nutrients, keeping soil in place and improving soil heath.

Foster Farms

From Waste to Agricultural Value

Much of the waste material from Foster Farms poultry ranches is rendered into by-products that can be used in cattle and aquaculture feed as well as pet food.

Each year, Foster Farms poultry operations produce more than 450,000 tons of manure almost all of which is converted into compost, soil amendments, conventional and organic fertilizers.

Since 2016, Foster Farms has been working with local California farmers to grow organic feedstock utilizing our organic fertilizers for our organic poultry ranches thereby creating a renewable cycle of sustainability. More recently, Foster Farms has begun working with the Food to Fork project to develop feedstock from recovered commercial food waste. Even feathers are finding a new use.

Owing to feather absorbency, Foster Farms is participating in a U.S. Air Force project aimed at developing flotation mats that could be used to clean up fuel spills over water.

Water

From the farm to market, water is required throughout the various steps of broiler production – and water consumption (per kg of bird produced) is down an additional 13% this past decade.

There are several ways that water is used throughout the production process:

1. To water crops (namely corn and soybeans) for chicken feed
2. For the chickens to drink on the farm
3. To cool the birds via evaporative cooling cells during warmer temperatures
4. To clean and rinse chicken carcasses at the processing plant
5. To clean and sanitize equipment at the processing plant

Water conservation is a pivotal part of running a successful chicken farm. Farmers today monitor and record water usage to ensure their flock is receiving the essential amount of clean water. Wells and waterlines are sanitized on a regular basis. Following are some of the innovative practices farmers implement to sustainably reduce, save and recycle water on their farms:

Computer Monitoring

Growout houses are equipped with computer systems that measure and monitor water usage on the farm. Farmers diligently watch for any abnormal water use patterns to help identify any problems such as water leaks, which saves water.

Nipple Dispenser Systems

Most modern chicken farms use “nipple” watering systems as another water-saving tool. Nipple watering systems are pin-activated water dispensers, much like a rabbit or hamster water bottle with the ball bearing. When the birds press the pin, water is released. This helps limit any water being spilled on the poultry litter, or floor, and it only dispenses water when the birds want to drink.

Cooling Pads

Most growout houses are also equipped with cooling systems that consist of cool cell pads, which evaporate water at one end of the house and have large tunnel exhaust fans at the other end. This not only keeps the chickens cool, but also recycles water on the farm.

The Role of Technology at Processing Plants to Improve Air Quality and Water Conservation

- Enhanced air handling systems and ventilation to boost air quality.
- Modernized water reuse, filtration and treatment systems to conserve water and increase water efficiency.

Water Usage and Feed Conversion

Chicken feed is primarily a mix of corn and soybean meal that is formulated by certified animal nutritionists. This ensures that each bird gets the right nutrients at the right time. Nutritious feed results in chickens requiring less food to grow. Chicken feed never contains added hormones or steroids – it's the law.

Growing corn and soybeans for the production of chicken feed is the largest source of water consumption in broiler production. The good news, however, is that broiler production requires a very small amount of feed.

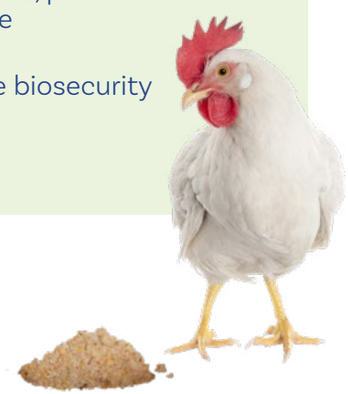
The feed conversion for broilers (amount of feed needed to produce one kg of broiler live weight) is among the lowest in all of U.S. animal agriculture. And the feed conversion ratio has decreased significantly in the past decade.

As previously noted in this report, the industry has achieved an 8.7% improvement in feed conversion ratio for broiler production (enabling a 21% increase in production with only 10.7% increase in feed consumed).

All of these factors result in chicken requiring less feed and water to grow to market weight, which results in chicken having less of an environmental impact.

Chickens are the most efficient converters of feed into meat of all land-based livestock species due to several key factors:

- Traditional breeding
- Nutritious feed tailored to each stage of a chicken's life
- Better living conditions through climate-controlled barns and new technology, and protection from extreme temperatures, predators and disease
- Up-to-date biosecurity practices



Nutrient Management Plans and Water Quality

Farmers are required, by U.S. federal law, to follow what are called "Nutrient Management Plans" when fertilizing crops and managing animal manure. These plans specify how much fertilizer, manure, or other nutrient sources may be safely applied to crops to achieve yields and prevent excess nutrients from impacting waterways.

Nutrient Management Plans are generally required for all agricultural land used to produce plants, food, feed, fiber, animals or other agricultural products, and serve as key mechanisms for protecting water quality.

A specific solution that is widely used and helps protect water quality is the use of heavy use area concrete pads (HUA pads) around the entrances to growout houses. HUA pads help with water quality by keeping litter from being washed away. Litter that farmers do not immediately use is placed in a shed, which further ensures that the litter does not enter local water sources.

In addition, farmers often minimize water runoff from their farms (and emissions) by planting vegetative buffers between chicken houses, which help to absorb any water, dust, or emissions on the farm.

Our Farmers Speak

Rachel Rhodes

"The latest tech allows us to check for leaks in our waterlines, conserve energy usage, and flag potentially harmful ammonia levels. These efforts reduce waste, runoff and emissions."

Nuffield International Farming Scholar
First winner from the U.S. (2017)

Georgie Cartanza

"I adopted conservation practices to reduce infiltration of nutrients into groundwater - like construction of manure storage buildings, use of composters, and plenty of HUAs."

Michelle Chesnik

"We use waterline technology to get chickens the water they need while limiting waste or spillage. These waterlines -nipple systems-allow us to be certain the only water going into a grow house is going into the bird. With this technology, we can easily check that there are no leaks."

Janice Vickers

"Evaporative cooling pads capture dew and rainwater, recycling an important resource and saving energy. Natural or applied heat to the cooling pad releases this stored moisture and cools the chicken house on hot days, lowering our reliance on additional energy sources and cutting costs."

Our Farmers Speak

Terri Wolf-King

"Our farm has one well for each of the two chicken houses. By monitoring and recording the water usage on the farm daily, I can see how much water is being used, to ensure the wellbeing of the chickens without being wasteful. Wells and water lines are inspected regularly, and they are sanitized at least twice a week."

Jenny Rhodes

"In the Chesapeake Bay area of Maryland, newly established farms in the state are required to have a storm water management plan, so we make sure that all water leaving the farm, including water running off the top of the chicken houses, percolates through a pond."

Terry Baker

"We installed a number of bogs and plant material to filter water before it leaves the farm. These serve as environmental buffers to guide, utilize, and retain rainwater. Grassy swales help guide and retain storm water and plants maximize the absorption of any nutrients moved by precipitation. We also have a pond that isn't just scenic – it collects and holds much of the rainwater that falls here and is regularly stocked with a variety of fish to keep it self-sustaining."

Water Leadership Profiles

Harrison Poultry

David Bleth

President & CEO

My favorite aspect of sustainability initiatives is they actually reduce costs; they do not increase them as many may believe.

We believe that clean potable water is our most precious resource and conserving it is a daily conscious effort. Whether at home or work, repairing any dripping issues saves so much water over time.

We have invested over $1 million in water conservation equipment that has reduced our company's water usage by 78 million gallons annually.

Sanderson Farms

Stephanie Shoemaker

Manager, Environmental (Regulatory & Permitting)

The Environmental and Engineering Departments of Sanderson Farms collaborate to address water conservation and other resource usage. Not only is prioritizing sustainability critical to our success, it is simply the right thing to do. A prominent goal of ours over the next 5-10 years will be to identify new methods to renew, reuse, reduce and recycle waste from our wastewater treatment and processing facilities.

Water Leadership Snapshots

Tyson Foods

Water In Context

A specific example of our current water stewardship efforts is the work we're doing to establish contextual water targets at several of our plant locations. Contextual water targets consider local environments and conditions in order to make meaningful change in water usage. We've currently implemented targets at four priority facilities and will continue to develop targets for additional locations in the future.

Simmons Foods

Clean Water: A Point of Pride

Sparkling, clean water is a point of pride at the Simmons Foods wastewater treatment facility in Southwest City, Missouri. In fact, because of the sustainability efforts of our team members, two million gallons of clean, safe water is released back into nature each day.

Simmons award-winning facility treats wastewater from adjacent poultry and ingredient processing plants. Since it's in a rural setting without municipal infrastructure, Simmons Foods built a system dedicated to treating the daily volume of process water flowing out of those production facilities.

As an industry leader that uses about four gallons of water per chicken during processing, about twenty percent less than the industry average, it's significant that Simmons Foods is not only using less water, but also returning clean and safe water to Cave Springs Branch, a tributary of Honey Creek and Grand Lake in Southwest Missouri.

Since 1982, Simmons team members treat water and liquid organic matter called "process water" in compliance with federal and state environmental standards. Team members use physical, chemical and biological processes to remove solids, bacteria or any other organic matter before it is released about 350 yards from the processing facility.

In addition to maintaining healthy aquatic ecosystems around Simmons' Southwest City operations, the facility has achieved more than two decades without a notice of violation and has earned the U.S. Poultry Clean Water award twice since 2008.

The water treatment facility is so effective, it's used to host classes in partnership with the Crowder College Environmental Science Program. In addition to students, community members, local leaders and elected officials are invited to tour the facility to see the process first-hand and hear about our commitment to sustaining the environment.

House of Raeford Farms

Prioritizing Water Wherever We Are

Bob Johnson, CEO and owner, along with a dedicated board of directors, have made the quality of our wastewater systems a priority across the company.

Under the oversight of environmental manager Chris Murray, new and upgraded treatment systems have resulted in dramatic improvements in wastewater quality.

Since 2014, the company has invested nearly $20 million in upgrading our wastewater treatment facilities at all locations across the southeast U. S.

This has been a major commitment to safeguarding the environment, especially in water conservation and pollution control.

1 Rose Hill, North Carolina

In 2014, we installed a new Diffused Air Flotation (DAF) system at this processing plant in an effort to clean up our staging lagoon and reduce the volume of Plant Available Nitrogen (PAN) released on the spray fields. Within three months, the PAN level decreased by over 50%, thereby reducing pollution significantly. Rose Hill is continuing improvements to the wastewater operation by expanding the amount of land used for spraying treated water, thus reducing the concentration in any one area.

2 Wallace, North Carolina

We rebuilt this processing facility after a devastating fire destroyed the plant in 2017. As a result, we decided to upgrade the wastewater treatment operation to allow for future growth and to install new equipment with the latest environmentally friendly features. One of the most significant gains from the improvements was the water reuse system that pushes back 80,000 gallons of treated water per day to the plant. This is a major savings in annual water usage of over 20 million gallons.

3 Arcadia, Louisiana

To control the toxicity of treated wastewater, we added an anoxic basin, the first ever used in the company, to reduce nitrates and achieve toxicity testing compliance. This innovation inspired upgrades in our Greenville, West Columbia, and Hemingway, South Carolina, locations as well as our Forest Park, Georgia, operation.

Broiler Health and Welfare

From when baby chicks arrive at the farm, to the time when broiler chickens are taken to be processed, the health and welfare of the flock is a priority for chicken farmers and poultry companies.

Without healthy, properly cared for broiler chickens, there would be no chicken industry. We recognize that we have an ethical obligation to make sure that the chickens on American farms are well-cared for and treated with respect.

Broiler health and welfare begin at the farm level. Chicken farmers have long recognized the need to properly care for their animals.

The industry continues to innovate and improve animal husbandry practices to help protect the birds' health, nutrition, care and comfort during their lives.

NCC's Animal Welfare Guidelines Certified by Leading Welfare Auditor Organization

To help ensure that broiler chickens receive optimum care during their lives, NCC developed the NCC Animal Welfare Guidelines and Audit Checklist, which have been widely adopted by chicken farmers and processors. The NCC Welfare Guidelines were developed based upon the opinions of the World Organization for Animal Health.

According to the World Organization for Animal Health Terrestrial Animal Health Code, good welfare is when the animal is healthy, comfortable, well-nourished, safe, and not suffering from pain, fear, or distress. Animals must also be able to express behaviors that are important for their physical and mental state. Animals' physical needs are relatively easily discussed, described, and studied, but their mental states and needs can be more difficult to characterize. We recognize this understanding is an ongoing discussion and evolving science. With that in mind, the NCC Broiler Welfare Guidelines are updated every two years to include new science-based parameters.

The NCC Welfare Guidelines define the following essential elements of broiler chicken care:

- Raised by personnel trained to properly handle and care for the chickens
- Access to adequate amounts of nutritious feed and clean water
- Room to grow and express normal behavior
- Housing that provides protection from the environment, disease and predatory animals
- Professional veterinary care

The NCC Welfare Guidelines were certified by the Professional Animal Auditor Certification Organization (PAACO), a leading authority on animal welfare auditing, which provides high quality training and certification credentials for auditors and audits.

These guidelines cover every phase of a chicken's life and outline science-based recommendations for proper treatment. The guidelines are updated every two years with assistance from an academic advisory panel consisting of poultry welfare experts and veterinarians as well as industry experts from across the U.S.

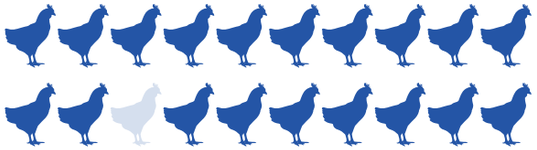
Chickens Today Are Healthier Than Ever Before

Chicken companies, farmers and veterinarians take pride in the way they care for their chickens so much so that chickens today are as healthy as they've ever been.

All current measurable data – livability, disease, condemnation, digestive and leg health – reflect that the national broiler flock is healthier than in years past.

Since 1925
broiler chicken on-farm mortality rates have decreased by

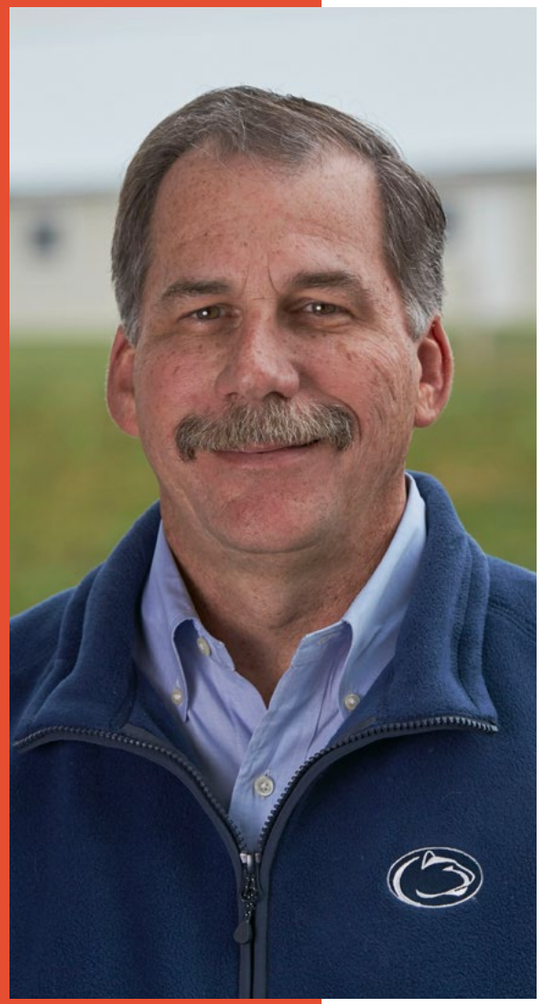
72%



In 2020, broiler chicken-on-farm livability rates were

95%

Leadership Profile



Perdue Farms

Mike Levengood

Vice President, Chief Animal Care Officer & Farmer Relationship Advocate

Perdue has been raising poultry for more than 100 years, and I have been for 37 years. We have implemented many innovative technologies that help us address birds' needs, such as improved water systems, environmental controls in the housing, and advances in animal care that yield improved nutrition and health.

As part of Perdue's pioneering Commitments to Animal Care that we rolled out in 2016, we are continuously elevating the standards to which our poultry is raised and remaining open and transparent with our customers and consumers who are interested in knowing about how their poultry's quality of life.

My main daily focus is communication with our farmers and flock advisors. Our team makes a great effort to not only ensure compliance with our raising standards, but also to make sure that our farming partners understand the "why" behind our drive to constantly raise the bar. My goal is to foster our culture of dedication to animal husbandry. At the end of the day, it's good for the farmers, the birds, and the consumer.

Our thinking extends beyond the "needs" of our birds to include their "wants."

We continuously look for ways to do more to keep our birds happy – things like increasing natural light, enrichments and outdoor access. We are also looking very hard at ways to refine our processes, including how we move birds from the farmer's house to the harvest plant, automate catching, and modernize stunning equipment.

Leadership Profile

Merck Animal Health

Jessica Meisinger

Ph.D., Veterinary & Consumer Affairs

I've always loved animals and sustainability, and this job has been the perfect melding of the two. One of my favorite aspects of my role is helping Merck be more sustainable and be a better company. I interact and help connect all of the pieces of the company. We are focused on diversity, equity and inclusion, animal welfare, veterinary well-being, anti-microbial resistance in addition to reducing our environmental impact.

The Merck Sustainability Team of Excellence is cross-functional. People across the company from the human pharmaceutical side to the animal health side are involved. We have a real opportunity to make a difference in our products and packaging that promotes greater animal health while achieving our sustainability goals. Packaging is a big concern of our customers. One initiative we are working on is looking at ways to reduce, eliminate or produce recyclable packaging for our animal health products.

One of the biggest trends in animal health is incorporating new monitoring and identification technologies. These new technologies are bringing efficiencies to our customers' operations that are focused on animal health and prevention. Innovations like these help us continue to be the best and most sustainable company we can be.

In my personal life, living sustainably can be challenging because I have a 2-year-old and a 3-year-old – but I want them to learn by example and see everyone's efforts matter. Our family has started composting, and we have a garden where we grow our own vegetables. We buy a lot of items like clothes second-hand and use them for as long as possible. I research and support brands that are socially responsible, including Merck products.

What's Good for the Chicken Is Good for the Farmer

Put simply, a farmer's livelihood depends on the health of their flock.

Farmers dedicate their lives to the safety and health of their chickens and, with that, Americans can feel secure about the meat they are buying for themselves and their families.

There is a tremendous amount of science and animal husbandry that goes into breeding and raising today's chickens.

Through traditional breeding, breeders ensure bird size and growth rate never comes at the expense of the birds' health or welfare.

Farmer Profile

Rachel Rhodes

Our top priority as farmers is 100% focused on our birds' health and well-being – watching our freshly-hatched chicks arrive, caring for them, making sure that they have enough food and water, and that they have the perfect environment to grow and thrive so we can provide healthy, affordable food for the consumer.

The health of our birds is just as important as the health of our children, because our birds are just like our children. When our children aren't feeling well, I make a little 'treatment sheet,' detailing when they receive medication, how much they are given, etc. The same goes for our birds. When they aren't feeling well, we carefully monitor how much water they drink, if they're not as active, if they're given a probiotic, and how much they're given.

These practices ensure that we're proactively meeting the well-being of our birds by providing them with the care and commitment that we would give our own family.

How Do Chicken Farmers, or Contract Growers, Partner with Chicken Companies?

A contract chicken grower is an independent farmer who chooses to invest and build chicken houses, working under contract with a chicken production and processing company to raise chickens for them.

More than 90% of all chickens raised for meat in the U.S. (broiler chickens) are raised by contract farmers, who are thriving in helping to produce America's No. 1 protein. In fact, chicken companies have waiting lists of potential family farms who want to partner with them and enter into the chicken business.

Chicken companies work closely with their farmers to build relationships based on a shared goal of success, and these relationships have helped family farms succeed.

This system has allowed us to insulate farmers from the risk of changing market prices for chicken and feed ingredients, such as corn and soybean meal, which represent the vast majority of the cost of growing a chicken. In other words, farmers are guaranteed a consistent price for their efforts, no matter what the markets are doing.

Those who perform better receive bonuses. The system has worked well for decades and kept tens of thousands of families on farms who otherwise would have had to get out of agriculture altogether.

Farmers take on about 20% of the cost of raising a flock

How does partnering with poultry companies benefit farmers?

Chicken companies remove about **97%** of the economic risk from farmers, compared to independent growers.

Chicken companies remove about **80%** of the total cost of raising a flock

65% of the cost of raising a chicken is the feed

Ongoing Commitment to Research and Improving Broiler Care

For decades, chicken producers have evolved on-farm care, transport, handling, processing and genetics to improve welfare outcomes while meeting ever-changing consumer preferences.

Whether it's looking at space and housing, studying different nutrition programs, breeding for the healthiest birds, or working to eradicate diseases, the industry remains committed to continual improvement to do what is best for the bird, and ultimately, the consumer.

The Role of Technology at Processing Plants to Enhance Animal Welfare

Installed cameras and monitoring systems to observe the handling of the birds to optimize their welfare and offer auditing transparency.

Tyson Foods

Leading the Way In Animal Welfare Through the Tyson Foods Broiler Research Farm

Tyson Foods' Broiler Welfare Research Farm is a testing ground for research on key aspects of broiler chicken welfare, such as lighting, enrichments and stocking density. The research is based on an approach that allows animal choice to guide our actions. Because chickens can't tell us what types of housing they prefer, we create a variety of options within one environment and then observe animals' behavior. We use a science-based approach to evaluate the impact of the different choices on measurable outcomes of animal welfare and health.

We are conducting ongoing research of the optimum lighting conditions for chickens' welfare. Findings suggest birds are best able to display their natural behaviors in housing with a gradient lighting from bright to subdued, so they can feed in the bright area and rest where there's less light.

We're also conducting ongoing enrichments research to evaluate natural behaviors. Objects like ramps, huts and boxes are placed in the house to provide a more interesting or "enriching" environment for the chickens. Initial results of the research have shown a strong preference toward the huts.

Employee Safety and Wellbeing

The U.S. chicken industry puts safety above all else. We are always looking for ways to improve safety across the supply chain in order to keep our employees safe and supported.

Our collective commitments and investments in safety have made a big difference over the years, especially in processing plants. Chicken processors continue to focus on the prevention of workplace injuries. By acknowledging the benefit of implementing ergonomics and medical intervention principles, while continually implementing new technology and automation in the workplace, processors have dramatically improved employee safety.

The Industry's Safety Record Speaks for Itself

The poultry processing sector has achieved an 86% decline in Occupational Safety and Health Administration (OSHA) recordable injuries and illnesses over the past 25 years, and injuries and illnesses continue to decline, according to the most recent report released by the U.S. Department of Labor's Bureau of Labor Statistics (BLS).

The total recordable poultry processing illness and injury rate for 2019 was 3.2 cases per 100 full-time workers (per year), down from 3.5 in 2018. This was below the total recordable illness and injury rate for the entire food manufacturing sector, which was 4.0 cases per 100 full-time workers per year.

In fact, injuries in poultry processing have fallen below the levels of "all manufacturing," not just food manufacturing, for the first time since OSHA began recording rates.

Leadership Profiles

Pilgrim's

Lisa Burdick

Head of HR, Safety and Operational Excellence

Lisa Burdick says that diversity is one of the company's greatest strengths: Our life experiences are as unique as we are, but we all have one thing in common: we've found opportunity here. A perfect example of this is Jordan Shaw, a production supervisor at our Nacogdoches, Texas, facility.

In 2016, Shaw found himself homeless and sleeping in a park. He started on the cone lines at Pilgrim's cutting shoulders, but he wanted to show the team that he was a hard worker, a team player and he could motivate the people around him. Jordan's determination led him to earn Employee of the Month, and shortly after, he became a lead person on the production floor.

Jordan says working at Pilgrim's taught him discipline and transformed him into a role model for his family. Our team members, like Jordan, are what I love about my job: helping open doors of opportunity.

OK Foods, a Bachoco Company

Bryan Burns

General Counsel and Vice President, Environmental Health and Safety

In late 2018, I was asked to lead our Risk and EHS Department. Our EHS, Operations, and Human Resources Teams collaborated and engaged in coordinated efforts to promote a safety culture within our company and to reduce our injury rates. In a two-and-a-half-year period, we have achieved more than a 50% reduction in our OSHA recordable injuries, and our OSHA and DART rates are now better than industry averages. We did this through a boots-on-the-ground approach that included eliminating hazards, improving training, and encouraging employees to report any hazards or concerns. Most recently, we began regular wall-to-wall inspections by the CEO and other members of the Executive Team, who walk through the facilities alongside our hourly team members to identify potential hazards and listen to their concerns.

For us, sustainability starts with protecting our own people and making sure they have a safe and healthy workplace. We believe nothing we do at work is more important than taking care of each other.

The Role of Technology at Poultry Processing Plants to Enhance Employee Safety

- Computerized rehang, portioning, and debone machines to decrease repetitive motion issues and protect workforce safety

Harrison Poultry

Researching Innovative Tech Solutions to Improve Employee Safety

At Harrison Poultry, we are going all-in on several artificial intelligence robotic projects. We have a team of engineers and industry veterans at our company who work together to brainstorm possible project ideas, and then give them the freedom to pursue them. Also, we are heavily involved with state university engineering departments, partnering on various cutting-edge projects.

We believe artificial intelligence machines that have the ability to teach themselves how to improve on their daily performance is the most exciting five-year trend. Vision system technology that communicates directly with equipment is starting to impact our world in really positive ways. Plus, we are developing “smart” machines that will be able to do the strenuous, heavy lifting, which will take the burden off our workers and help to keep them safe.

Evonik

Highlighting the Sustainability Benefits of Bulk PAA in the Protein Industry

Poultry processors use peracetic acid (PAA) solutions to maintain food safety compliance. Peracetic acid is the most widely used antimicrobial chemistry within the U.S. poultry industry. Over the past decade, expanded regulation and additional treated applications resulted in larger volume usage of PAA in processing plants. This increased volume, combined with a drive to improve safety and efficiency, led to the implementation of our bulk system, which provides a safe and sustainable solution to processors.

Our first bulk system was installed at a customer site in 2012. Since then, we have transitioned much of our product volume to bulk and safely installed our systems at over 20 locations. Bulk delivery of PAA eliminates the need for one-way totes – and that’s a big deal in terms of what’s good for poultry customers, our business, and the environment.

From an environmental footprint perspective, in addition to the tote materials, there are also significant transportation and water waste aspects to consider. Totes are shipped between manufacturing, customer, and recycling facilities, and these totes must be rinsed multiple times during their lifespan. These material, transportation, and water savings may seem meager, but consider that just one poultry bulk customer facility eliminates over 1,300 totes annually through this program.

Keeping Workers Safe and Healthy During the Pandemic

As COVID-19 stay-at-home orders expanded and increased demand for fresh chicken resulted in empty grocery store shelves, thousands of industry workers answered the call as federally designated frontline workers to help meet the demand. Workers showed up to help maintain a steady supply of food to keep our fellow Americans fed, and collectively our industry worked diligently to keep them safe.

Chicken companies are keeping workers safer than ever because of additional protective measures adopted in response to COVID-19. Companies have been following CDC and local health department guidelines. Many have also consulted with infectious disease physicians to develop site plans.

Their heightened protective measures include:

- Increasing cleaning and sanitation frequencies and intensities for equipment and common areas, such as the breakroom and vending machines, at processing facilities.
- Increasing frequency of handwashing/ sanitation and expanding access to hand sanitizing stations.
- Encouraging employees to stay home if they are not feeling well or believe they may have been exposed to the virus, while still receiving pay.
- Heightened employee screening for any signs of illness, including temperature checks before entering the plant.
- Practicing social distancing not only in common areas, such as breakrooms and cafeterias, but also on production lines where possible.
- Implementing travel restrictions and only allowing essential personnel into the plant.
- Educating employees about the virus and ways to avoid catching it, along with posting posting educational information in a variety of languages.
- Training company nurses on CDC protocols for COVID-19.
- Providing personal protective equipment (PPE), including masks and gloves, installing plastic dividers between workstations and in breakrooms.

Supporting Employees' Overall Wellbeing

We recognize that supporting our employees is a broad responsibility, which covers much more than safety programs, training, and other hallmark protections of safe workplaces.

Chicken companies are finding additional ways to care for employees and their families – to show appreciation for hard work in helping to support an entire nation, and to support employees' health and wellness.

Although policies vary, companies are doing things like offering paid sick leave, bonus/hazard pay and free chicken for employees, waiving the waiting period for short-term disability, and making personal time off policies more flexible.

Fieldale Farms

Prioritizing Employee Health and Wellness

Fieldale Farms is prioritizing health and wellness by establishing Fieldale Family Health Centers to provide employees and their families with low-cost medical services. Starting in 2004, Fieldale Farms established a family health center in Baldwin, Georgia. It was such an overwhelming success in meeting employees' needs that Fieldale opened a second family health center in Gainesville, Georgia, in 2012, and then a third one on-site at the Fieldale Murrayville, Georgia, processing plant in 2020.

The Fieldale Family Health Centers provide a comfortable, inviting, and easy access point for employees and their families to seek care. The cost for medical treatment at these centers is only $15 per visit, and many are open for extended hours to provide medical services for employees working all shifts.

Employees also get access to nutritional counseling, diabetes counseling, tobacco cessation products and services, and gym memberships. Every year over 500 employees take advantage of free mammogram services.

Perdue Farms

Caring for Employees During COVID-19

Take a look at how Perdue Farms responded to care for their workers during the pandemic:

We extended the hours of many of our on-site Wellness Centers, which are staffed with local healthcare providers and are available to our associates and their families free of charge.

- We provided support to associates who were directly impacted – either due to illness or CDC-mandated quarantine requirements.
- We maintained an ongoing dialogue with associates and our communities about the impact of COVID-19 on our business and provided important information to our associates in multiple languages to educate them on safety requirements and CDC best practices for when they were at work, at home, and out in the community.
- We temporarily waived the five-day waiting period of short-term disability for any associate who contracts COVID-19, so that he or she could receive immediate benefits.
- All hourly associates received a temporary $1-per-hour pay increase and all Piece Rate associates, such as truck drivers, a $40-per-week pay increase.
- We fully funded our annual Profit-Sharing Bonus Program payout to eligible associates two months early.
- Because the pandemic caused many associates to cancel their vacation or personal time off (PTO), we temporarily removed the PTO accrual maximum for all associates until July 6, 2020.
- We provided our production associates with food products to take home for themselves and their families.
- Through our partnerships with local and state health organizations, we worked persistently to fulfill our commitment to provide all associates access to a vaccine.

Perdue Farms

Mentoring Young Farmers to Support Their Development and Long-term Success

As part of Perdue Farms' desire to be the Farmer's Choice, Perdue Farms will launch a young farmer development group in recognition of their distinct needs.

In consultation with young farmers, Perdue Farms will explore their priorities for mentoring, information and engagement, and establish a program to support their development and long-term success.

Pilgrim's

Investing In the Futures of Team Members, Their Families and Communities

Throughout the global pandemic, Pilgrim's team members and communities have looked to Pilgrim's for reassurance during the crisis. Toward that end, Pilgrim's has committed to providing $20 million of meaningful investments in projects that have a lasting impact in our communities for generations to come. Pilgrim's is committed to supporting ongoing learning and professional development.

In March, 2021, Pilgrim's launched the Better Futures Program to provide meaningful investments in the futures of team members, their families and communities. The company is building the largest free college tuition program in rural America. The Better Futures Program provides team members and their child dependents the opportunity to pursue their higher education dreams for associate degrees and trade certificates at community and technical colleges tuition-free. "We recognize and believe in the transformative power of higher education and the opportunities that come from education, coursework, and technical skill training."

As of July 2021, more than 1,250 team members and dependents have enrolled in community colleges across rural America as part of the program.

Tyson Foods

Providing Frontline Team Members With Job Skills Training and Workforce Certifications

At Tyson Foods, a key way we support our frontline team members is through Upward Academy – an innovative education program we created to help team members develop important life skills. In FY2020, we increased the number of locations offering free and accessible classes in English as a Second Language (ESL), General Educational Development (GED), citizenship and financial and digital literacy to 59 locations. When the COVID-19 global pandemic disrupted in-person classes, Upward Academy pivoted to offer virtual classes so team members could continue their education.

We also launched Upward Pathways, a new approach to create opportunities for upward mobility to team members who exit Upward Academy or those who are not fully utilizing their skills and experience and looking for a next step. These career pathways leading to advanced training and opportunities are a first for Tyson Foods. The addition of Upward Pathways gives all team members access to a robust and equitable career pathway, strengthening an internal pipeline of skilled team members in an increasingly complex production environment.

Food and Consumer Safety

Americans eat more chicken than any other protein – approximately 160 million servings every day. In addition to being nutritious and affordable, chicken producers spend considerable time and resources to make sure our products are as safe as possible and meeting stringent U.S. Department of Agriculture (USDA) standards.

Our Strong Food Safety Record

The U.S. chicken industry has an excellent food safety record. Our industry's strong safety record is based, in part, on strict federal monitoring and inspection.

All chicken produced in the United States is closely monitored and inspected by the USDA's Food Safety and Inspection Service (FSIS)

The FSIS is the public health agency in the USDA that is responsible for inspection at chicken processing facilities.

Federal inspectors are present at all times during operation in chicken processing plants. In a federally inspected slaughter operation, every bird is inspected, and inspectors have the authority to stop production for food safety violations. The U.S. meat and poultry inspection system complements industry efforts to ensure that the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged. Food safety standards are applied to all chicken products produced in the U.S.

Applying Effective Food Safety Controls

To comply with food safety standards and protect consumers, organizations across the entire broiler value chain implement food safety management controls. Standard operating procedures include quality assurance and food safety training, sanitation protocols, hazard controls, and interventions that are designed to eliminate or reduce foodborne pathogens.

While recalls are rare, our industry has robust trace-back and trace-forward capabilities to ensure that products can be identified, if needed, and promptly removed from the marketplace. Our industry also performs a comprehensive root cause analysis to identify in the issue in the system that resulted in the recall and to prevent future incidents.

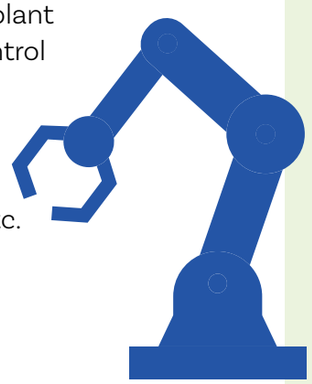
USDA FOOD SAFETY

Improving Food Safety through Research and Investment in Innovative Technologies

Poultry companies have invested tens of millions of dollars in technology and other scientifically-validated measures to enhance the safety of chicken products. By supporting food safety research and applying the best science, research and technology available, the entire industry is better equipped to break the chain of foodborne illness at every stage of production.

We're working every day to improve:

- Expanded and more sensitive detection technologies for pathogens
- Continued research and focus on on-farm and in-plant interventions to control pathogens
- Expanded use of robotics, imaging systems, sensors, etc.



The Prevalence of Salmonella In Raw Chicken Is at All-Time Lows

According to the most recent data available during this report (August 20, 2021) published by FSIS, over 93% of large and small establishments are meeting and exceeding the FSIS performance standard for Salmonella on whole broiler carcasses.

88% of all broiler establishments are **meeting and exceeding the FSIS performance standard for Salmonella** on chicken parts like wings, breasts and drumsticks.

Why the U.S. chicken industry has such an excellent food and consumer safety record:

Vertical integration – industry has the ability to influence the entire process and implement practices that improve food safety

Strict biosecurity procedures – impacts the rate at which pathogens get introduced to flocks

Focus on controlling pathogens throughout the entire process - from primary breeders supplying breeding stock all the way to packaging and distribution of chicken products

Use of a multi-hurdle approach - from farm to fork

Has an arsenal of interventions at its disposal – water/feed treatment, litter treatments and management, vaccinations, pre- and probiotics, organic acids, etc.

Tyson Foods

Ensuring Food Safety, While Conserving Water

Water conservation is a leading sustainability challenge that Tyson's Food Safety and Quality Assurance (FSQA) team is working to address as part of our management of food safety and quality. USDA regulation prescribes specific conditions under which water can be reused for the same purpose (i.e., chilling or washing). That said, there is some need for technical expertise in developing the parameters for the reuse as we have food safety objectives that must be considered. This is where the FSQA team leads. We work collaboratively with the plant operations, engineering, environmental, and laboratory services to identify the best applications and methods for water reuse while addressing the regulatory requirements for demonstrated reduction in microbiological, physical, and chemical concerns.

Key Role Consumers Play In Ensuring Food Safety

We all play an important role in ensuring food safety for our families. Here are some important steps you can take at home to significantly reduce any risks of foodborne illnesses:

Clean — Wash hands and surfaces often.

Separate — Don't cross-contaminate. Use a separate cutting board for raw chicken. Do not rinse raw poultry in the sink.

Cook — Cook chicken to 165º Fahrenheit.

Chill — Refrigerate promptly.

Instructions for safe handling and cooking are printed on every package of meat and poultry sold in the United States. For additional information on safe handling and cooking practices, visit The Partnership for Food Safety Education's The Fight BAC!® site.

Chicken Check In: Where You Can Learn More About the Chicken You Serve to Your Family

When the National Chicken Council first introduced Chicken Check In over five years ago, it was one the first resources in the industry to offer a consumer-friendly and transparent look at chicken production in the U.S. Chicken Check In remains a key resource where consumers can learn and see how broiler chickens are raised and get answers to frequently asked questions about all things chicken.

For additional information on how broiler chickens are raised and produced, and the benefits and safety of eating chicken, visit Chicken Check In.

Community Support

Our members may feed the nation – and the world-but they are acutely aware of their reliance on local talent and passion in the communities they call home. Our broader ambitions and hopes for this industry are meaningful and possible only to the extent that we are anchored on the best interests of the places and unique cultures where we create our livelihoods.

In this section you will find some poignant examples of the commitments our members make daily to assure we collectively play a visible, positive role in our communities.

Pandemic Giving and Beyond

Throughout the pandemic and 2020, chicken companies all around the country gave back-and continue to give back-to their local communities by making donations to food banks, soup kitchens, local health care facilities, police, and fire stations. Companies are providing free chicken for their employees so they don't have to look for it in the store. Every weekend, you can find a company selling chicken at reduced prices right out of trucks in the local community.

In coordination with Meatingplace News, we have compiled a snapshot of NCC member community donations in 2020. This does not represent every commitment by every member, but provides a rough estimate of meals – and hope – delivered in a challenging year.

2,540,000+
pounds of protein

132,800,000+
million dollars

981,000+
in grants

22,000,000+
meals

Mountaire Farms

Giving Back to Local Communities

During COVID, Mountaire Farms was dedicated to helping feed the communities where we do business. When food was disappearing from store shelves as people began panic buying, we stepped up to help – and we were determined to make sure that our local community was fed first.

We partnered with one of our customers, Hocker's Super Store, and brought a truckload of chicken to the parking lot to sell directly from the back of the truck so customers didn't even have to leave their vehicles. It proved so popular our company began partnering with local fire departments and churches who kept a portion of the proceeds as a fundraiser. We held dozens of truckload sales events across multiple states on the East Coast. Additionally, we donated almost a million pounds of chicken to first responders, health care workers, and those in the community who were laid off during the pandemic.

Our Mountaire Cares program works with numerous non-profits and community groups to benefit the community. Our quarterly service projects involve making a big impact through volunteer efforts with groups like the Boys and Girls Club and Habitat for Humanity. Our signature event – Thanksgiving for Thousands – prepares a complete meal in a box and we've fed more than a million people in the 26 years we've been organizing this event. We've expanded to Christmas and Easter, too. Every month, our food pantry program delivers free chicken to more than 40 organizations that rely on our chicken to feed people in need.

Elanco Animal Health

A Foundation That Feeds

While Elanco has long committed to caring for the health and well-being of its employees, customers, animals and the communities in which they operate, 2020 brought about heightened challenges. In the U.S., the Elanco Foundation awarded grants to several food banks to purchase 900,000 pounds of food that provided nearly 750,000 meals for hungry families. Additionally, a grant from the Foundation to the European Food Bank Federation helped address heighted EU food security needs by funding the installation of cold and frozen storage rooms at three food banks in the Czech Republic and one in Greece, and the purchase of two refrigerated delivery trucks, one in Estonia and one in Lithuania.

Established in 2019 by Elanco Animal Health, the Elanco Foundation amplifies the company's philanthropic impact by improving the well-being of people and animals around the world. The Foundation is committed to advancing sustainable growth by making strategic investments in programs focused on promoting food security and the human-animal bond.

Established in 2019 by Elanco Animal Health, The Elanco Foundation is a private, corporate foundation that amplifies Elanco's philanthropic impact by improving the wellbeing of people and animals around the world.

The Foundation is committed to advancing sustainable growth in its focus areas of human-animal bond, food security and the environment.

Its ability to pivot in 2020 with a strong focus on food security proves the Foundation's flexibility and resilience will be able to help others for years to come.

Perdue Farms

Delivering Hope to Our Neighbors® Amid the Pandemic

As a food company, we are uniquely positioned to help thousands of Americans experiencing food insecurity amid the pandemic through our "Delivering Hope To Our Neighbors®" initiative.

Since 2000, Perdue Farms has partnered with Feeding America® and its network of food banks to help neighbors in our communities who are struggling with food insecurity. During our fiscal year 2020, we delivered more than 86 million pounds of protein to regional food banks serving our communities – the equivalent of 71 million meals. Perdue Farms was one of the first meat companies to implement a formal program for ongoing donations of perishable protein products, creating a model for other companies to follow.

Since March 2020, Perdue delivered more than four million pounds of protein to support food bank pandemic-relief efforts in our communities and beyond, and in support of frontline healthcare workers, first responders, and community-based hunger-relief programs.

Throughout the pandemic, Perdue Farms provided support to its neighbors in numerous ways.

One of the co-founders at West Annapolis Pop Up Pantry, Diana Love, a recipient of 33,000 Perdue Farms protein meals in 2020 states perfectly the reason our food bank work is so important: "Hungry bellies can't fight illness, foster children's growth or contribute to productive lives. This donation helps our families do all of these things."

Wayne Farms

One Nurse, Many Families, Amazing Impact

Dobson is a small community in the foothills of the Blue Ridge Mountains and home to a Wayne Farms processing plant. When COVID-19 had a ripple effect, both professionally and personally for Wayne Farms team members, Candace Wilmoth became her own pebble in a pond to create rings of influence, positivity, and to meet the moment with creative thinking and action.

As a nurse at the facility and accustomed to providing on-site medical care for any number of needs on a given day, Candace knew that unprecedented times called for unprecedented measures.

> **Caring doesn't start and stop at the front door. It's something I've always been drawn to, and whether it's at the plant or in our community, I can't help but extend a hand when I see a need. I'm just one person but each person has the ability to make a big difference if they want to.** **Candace Wilmoth, Nurse at Wayne Farms**

Internally, along with a group of team members who made-up a "COVID-19 Vaccine Task Force," Candace leveraged county relationships and collaborated to hold vaccination events, and oversaw the coordination of transportation and logistics to make getting vaccinated easier, for those who wanted it.

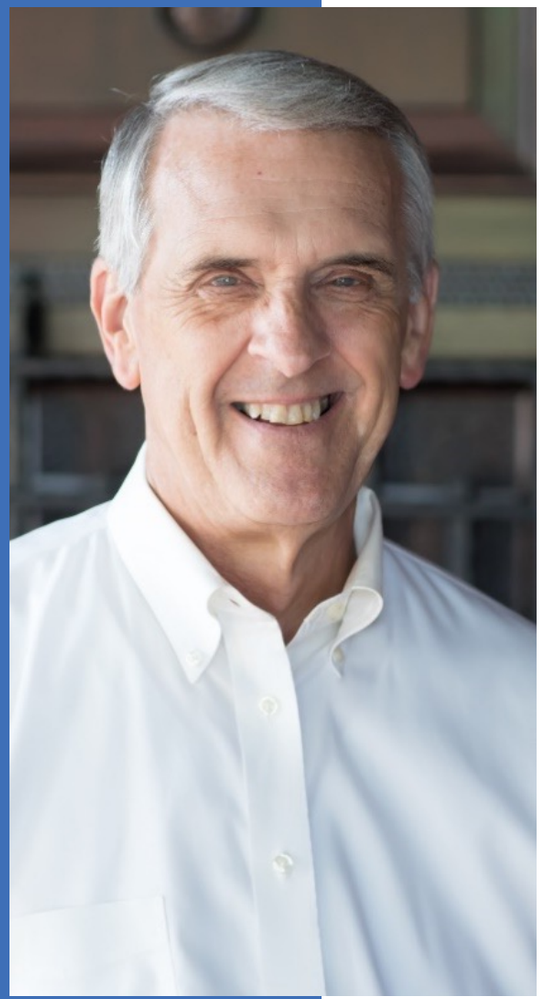
Outside, in her community, Candace saw area families struggling with new distance learning requirements. Many did not have access to the technology or supplies they needed. In response, Candace organized fundraisers and collection drives for computers, notebooks, pens, earbuds, and other school supplies needed for online learning. As a result of her leadership, Wayne Farms' Dobson facility donated $10,000 to the Surry County School system. All her efforts made a significant impact for her Dobson team members and area families.

Candace Wilmoth is just one example among many who take to heart the company's philosophy of "Amazing Starts with Me."

Just one idea, one person, one step forward can lead to bigger and better ideas for our companies and communities.

Candace's leadership is a positive example of how the chicken industry improves the lives of many, each day.

Leadership Profiles



House of Raeford Farms

Dave Witter

Manager, Corporate Communications & Sustainability

I have always been passionate about outreach to those in our communities needing assistance.

Through my work with our non-profit organization House of Raeford Farms FLOCK, I have been able to contribute to the company's continuing efforts in food security and youth development especially.

Driven by compassion for others, FLOCK walks alongside folks who are already doing great work in their communities and supports them in their mission. We believe companies in our industry that do well should also do good.

Wayne Farms

Candace Wilmoth

Nurse

During a time when so many could have just given up, I witnessed quite the opposite.

Through my personal experiences at Wayne Farms in Dobson, North Carolina, I have seen people really show up when they did not have to. For example, community chicken sales, fundraisers for school supplies, canned food drives, and just being present to ensure our world of poultry kept turning during a pandemic.

Witnessing that unity and teamwork for the greater good is life-changing, honestly. It was an honor to be a part of it all. It made us all stronger.

Leadership Profiles

Pilgrim's

Brian Paulsen

Head of Environment

Our facility environmental teams work to be active stewards in the local community environment efforts and wildlife management. In 2020, we helped manage local tree planting events with 19 elementary schools, planting more than 500 trees. It was great to see the younger generation's excitement about environmental stewardship.

Aviagen North America

Sara Reichelt

Director of Animal Welfare and Sustainability

We regularly engage in local environmental outreach programs and recently teamed up with a local high school in Elkmont, Alabama, for an outdoor clean-up to help the school prepare to grow vegetables, while giving students a space to be proud of. No sustainability action is too small to make a difference.

Leadership Profile

Zoetis

Jeff Sizelove

Senior Vice President,
U.S. Poultry

This year, Zoetis announced long-term sustainability goals as our Driven to Care initiative. While sustainability has always been a part of our business, Driven to Care guides how we integrate sustainability in all aspects of our strategic business planning and resource allocation. It focuses on three strategic areas:

1. **Communities**
   (Care and Collaboration)
2. **Animals**
   (Innovation in Animal Health)
3. **Planet**
   (The Drive to Protect Our Planet)

Under each of these areas, we will build upon our experiences in supporting communities when disasters strike; increase veterinary care for animals in emerging markets; provide innovative solutions that assist productive and sustainable farms; combat diseases that pose the biggest risks to animals and humans; and minimize our operations' impact on the planet, including rethinking our packaging to reduce its environmental footprint.

By supporting and partnering with our customers, colleagues, communities and the people who care for animals, we achieve more by working together toward our common sustainability goals.

Food Security

We recognize that food is a basic human need and fundamental right. Everybody needs, and deserves, reliable access to sufficient safe, affordable, and nutrient-dense food. This is food security. Unfortunately, food security is a serious challenge for many people, both in the U.S. and around the world.

As chicken producers, we play an important role: supplying the world with safe and nutritious food. Over the past decade, we have expanded chicken production dramatically to meet growing demand. We now produce 21% more chicken by weight than we did ten years ago.

Our chicken is not only feeding Americans, but people all over the world. **IN 2020, BROILER EXPORTS TOTALED 7.4 BILLION POUNDS.**

Providing Americans and People Around the World with Affordable, Nutritious Protein

According to the 2020-2025 Dietary Guidelines for Americans, chicken is a lean protein food that can help people across all life stages.

- Provides vitamins and minerals involved in brain function
- Builds muscle
- Promotes heart health
- Strengthens bones
- Aids in weight loss

Continuing Our Efforts to Enhance Food Security

Our industry is positioned to help enhance food security. CEO Jan Henriksen of global poultry breeding company, Aviagen, says it well:

> **“Our challenge [as a society] will be to feed the world’s expanding population with a reliable and quality source of nutrition, while reducing the effects of production. One promising source lies with poultry.**

We are continuously looking for ways to improve the world’s food systems – through collaborations and support for our members – to help ensure that everyone has reliable access to the food they need and deserve.

> **“The pandemic shed a harsh light on the ongoing issue of food insecurity. For many Americans, the pandemic forced thousands of people to seek assistance with putting a meal on the table for the first time. As a food company, Perdue Farms was uniquely positioned to help.**

Applying Biosecurity Measures to Safeguard Health

One way that our industry seeks to enhance food security is by implementing what are called “biosecurity measures.” Biosecurity measures are things we do, as part of chicken production and care, to reduce the risk of introduction and spread of diseases. These activities and innovations go hand in hand with veterinary care to keep our birds healthy while also reducing the need for antibiotics.

Leadership Profile

Zoetis

Jeanette Ferran Astorga

Head of Sustainability and President of the Zoetis Foundation of HR, Safety and Operational Excellence

As Head of Sustainability at Zoetis and President of the Zoetis Foundation, I spearhead our commitments to communities, animals, and the planet, which we recently formalized through Driven to Care, our long-term sustainability initiative.

We believe that healthier animals make a healthier world, and our sustainability aspirations build on our purpose to nurture the world and humankind by advancing care for animals.

We recently announced a $35 million commitment through our newly-formed Zoetis Foundation, which will focus its grantmaking on strategic priority areas to enable thriving professions and livelihoods for veterinarians and farmers.

As the leading animal health company, Zoetis is uniquely positioned to drive a healthier, more sustainable future for animals, people, and the planet. For example, our African Livestock Productivity and Health Advancement (A.L.P.H.A.) initiative is helping us achieve one of our aspirations to grow access to veterinary care in emerging markets.

Through innovative solutions, diagnostics and education, Zoetis is making an impact not only for smallholder farms and veterinarians, but for entire communities.

In Africa, we've committed to treating 200 million chickens with positive implications on smallholder livelihoods, food security and the environment by 2025. In the four years since A.L.P.H.A.'s inception, we have administered 1.7 billion doses of vaccines and medicines, established 10 serology labs, and reached hundreds of thousands of farmers, veterinarians and para-veterinarians through training programs.

True leadership in sustainability requires innovation. One example is our collaboration with Colorado State University, where we have established the Zoetis Incubator Research Lab to explore the livestock immune system and target new immunotherapies-paving the way for new alternatives to antibiotics in food-producing animals, as a way to combat diseases that pose the biggest risks to animals and humans. The initial focus is biotherapeutics for cattle, which could yield broader implications for pigs and poultry.

We're also committed to helping our customers achieve their sustainability goals with healthier, more productive chickens. As an example, in ovo vaccination with our Embrex® Inovoject® and Embrex® Inovoject® NXT® biodevices helps provide effective immunization results and supports better bird health and welfare, as well as increasing hatchery efficiency.

Teaching Others to Produce Chickens

Knowledge of best practices also supports food security. With decades of experience and expertise, the U.S. chicken industry is the foremost expert in chicken production

We know how to produce chickens sustainably and safely. And, while we export our U.S.-produced chicken to people all over the world, we also go to other countries to teach local farmers to better care for their own birds.

By doing so, we empower these farmers to improve food security for themselves, their families and their communities.

Leadership Profile

Cobb Vantress

Leasea Butler

Director of Business Development

I've always had a passion for caring for animals, which came from a deep-rooted culture in my family. Although my parents worked in plumbing, it was the family farm that had my heart. I didn't know then that bottle-feeding calves and butchering chickens on the farm would lead me to a life serving others.

Farm life was not easy, but I loved it, and I would learn much later in life a word to describe my passion for agriculture. I didn't know after high school where I was heading, but I knew I sought knowledge of animals. So, straight off the farm to school I went to study poultry science at the university. I learned so much through school, but my 20+ years at Cobb Vantress have given me the opportunity to fill my "life book" with not only knowledge about chickens, but knowledge of cultures, people, differences, and how agriculture and poultry intertwine to bring us all together.

Recently, Cobb has allowed me the opportunity to take my book of knowledge to African communities to teach others about sustainable food production and agriculture, leading me back to my roots.

Specifically, two years ago, I had the opportunity to volunteer in Mozambique. During a project focused on global sustainability and agriculture development in rural East Africa, I taught farmers how to meet the nutritional, health, and husbandry needs of chickens. This in turn allowed the farmers to care for the birds to provide their families with nutritious protein from locally grown chicken meat or eggs. Business skills were also taught to the farmers to encourage best management practices and economic practices.

Farmers not only use the poultry to provide for their local families, but also sell the birds or eggs for a profit. When a chicken is properly cared for, they produce more eggs and meat, making them the most economic protein source for African small holder farmers and their families. I've learned from so many of the women and men that I've worked with in Africa. I've learned how much poultry has been a part of their culture as it is in our company culture.

My most cherished memory of my volunteer effort in Africa was teaching a little girl named Agape and her family how to care for their chickens. Agape, full of life, was so excited to hold a baby chicken that would ultimately provide food security for her family. The image of her smile and little hands holding that day-old layer chicken and how I was able to partner with her family's future will never escape my memory.

I was led to share my book of knowledge with communities in Africa to show them how to raise and care for chickens, to empower them to have a sustainable source of protein and to provide income for their families. Back home in North America, I continue to share that same book in my daily life to help people care for poultry and to provide for their families on commercial broiler and breeder farms. Agape, abounding love of a little girl to care for animals to care for her family. Agape, to give to others the precious gift of knowledge.

What's Next?

We are proud of our industry's sustainability efforts, and proud to have shared this first U.S. broiler chicken industry sustainability report with you.

This is an important step in our collective journey as an industry. Our efforts will continue, as they must, to support our planet and society for the decades to come.

Looking ahead, we are focused on sustainable development and the critical role of food systems that include our chicken industry. We recognize the importance of continuing progress on the SDGs through the work of our members and through partnerships with other organizations to leverage our collective strengths.

We look forward to the US-RSPE's release of the first-ever multi-stakeholder reporting framework for the full U.S. supply chains for chicken, turkey, and eggs. The new framework will become a valuable tool to guide our members on their sustainability strategies and reporting. We will encourage members to use the framework to measure their sustainability impacts and make meaningful disclosures – whether they are beginning their sustainability journeys or already have mature programs.

Opportunities revealed by the described *Broiler Production System Life Cycle Assessment: 2020 Update* also set the groundwork for next steps for the chicken industry. Based on the data, we know that all five key sustainability intensity metrics improved significantly in the past decade. We also know that additional improvements are possible going forward.

The research revealed that our continued areas of greatest impact and improvement will come from factors affecting feed consumption and feed conversion ratio. Therefore, further innovations in genetics, feed additives and supplements should be seen as part of our next sustainability frontier.

Also based on the 2020 LCA, we learned that external factors associated with increasing crop production, improving fuel efficiency, and increasing adoption of renewable energy sources should become an integral part of our extended purview.

Finally, we are mindful of regional differences that affect the opportunities for achieving sustainability progress. Knowing that one-size-does-not-fit-all regarding geography, we will consider regional differences when we advance new solutions. This is true for NCC as well as for our members.

Individual NCC members might use learnings from the 2020 LCA as the starting point for their own footprint assessments, to help them identify organization-specific opportunities for continuous improvement, as will US-RSPE's sustainability framework.

Our chicken industry will continue to innovate as responsible stewards to advance sustainability while feeding the world.

The future of our planet, people and communities depends on us doing our part, and we are committed.

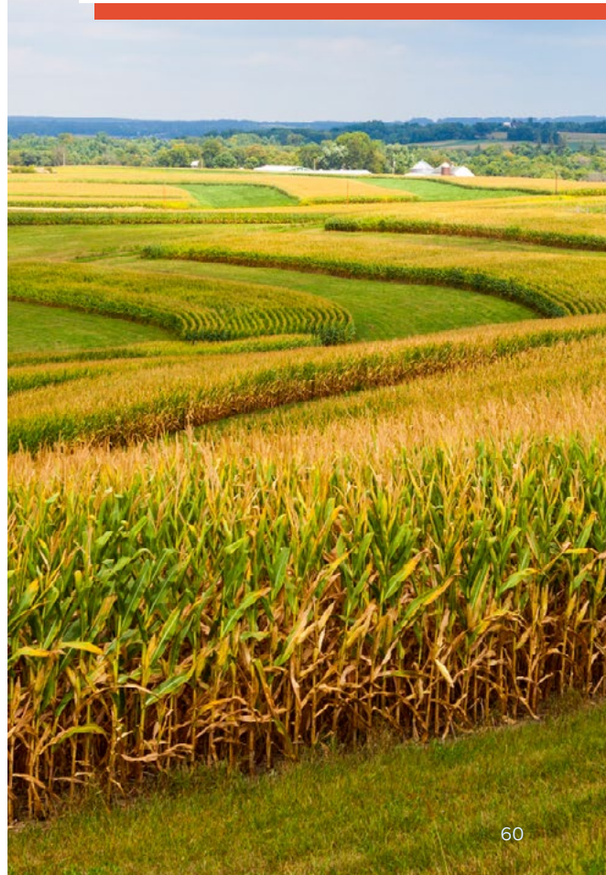


EXHIBIT 2

NCC Comments to Docket No. AMS-FTPP-21-0044 Transparency in Poultry Grower Contracting and Tournaments (Aug. 23, 2022)

1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622

August 23, 2022

Submitted electronically via regulations.gov

Bruce Summers
Administrator
Agricultural Marketing Service
United States Department of Agriculture

Docket Clerk
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Re: Docket No. AMS-FTPP-21-0044, Transparency in Poultry Grower Contracting and Tournaments

Dear Mr. Summers:

The National Chicken Council (NCC) appreciates the opportunity to provide comments on the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) proposed rule "Transparency in Poultry Grower Contracting and Tournaments" (Proposed Rule).[1] NCC is the national, non-profit trade association that represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. NCC members would be directly affected by the Proposed Rule.

As explained in more detail in these comments, NCC is deeply concerned that the Proposed Rule would have a devastating financial impact on the U.S. chicken industry by raising costs and administrative burdens, contributing to increased food prices for consumers, and ultimately destabilizing a successful compensation system. This would lead to negative ancillary impacts on other related sectors through less efficient use of inputs and resources used for producing poultry such as feed and energy. NCC opposes the Proposed Rule. We urge AMS to withdraw it and refrain from further steps that would undermine a successful compensation system. If

[1] 87 Fed. Reg. 34980 (June 8, 2022), https://www.govinfo.gov/content/pkg/FR-2022-06-08/pdf/2022-11997.pdf.

AMS were to nonetheless proceed with this rulemaking, we have identified several issues for further consideration.

These comments begin with an Executive Summary (Part I), followed by a brief description of the benefits of the poultry grower compensation system (Part II), fundamental concerns with the Proposed Rule (Parts III and IV), and comments on specific aspects of the Proposed Rule (Part V).

I. Executive Summary

NCC opposes the Proposed Rule and urges AMS to withdraw it in its entirety. The current poultry grower compensation system has long worked well to fairly and appropriately reward high-performing growers and drive efficient use of resources. The proposal would undermine the efficiency and global competitiveness of the U.S. broiler industry by imposing needless costs and rigid mandates with no quantifiable benefit but with clear negative impacts. This will ultimately inject costs and inefficiencies into the supply chain at a time when inflation and access to affordable food are key concerns to the American public. Further, the proposal contradicts the clear intent of Congress, is well beyond AMS's mandate under the Packers and Stockyards Act (PSA), and is arbitrary and capricious under the Administrative Procedure Act (APA).

If AMS moves forward with this rulemaking despite these concerns, NCC has identified several issues requiring further consideration, including the following:

- **Assess the true cost of the Proposed Rule:** AMS's cost assessment overlooks numerous key costs industry would shoulder to comply with the Proposed Rule and significantly underestimates the actual costs of the proposal, including the Proposed Rule's potential effects on inflation.
- **Address all PSA amendments in a single rulemaking:** AMS has positioned the Proposed Rule as part of a broader set of planned changes to AMS's PSA regulation. AMS should address all amendments to PSA regulations in a single rulemaking and avoid a piecemeal approach that imposes shifting requirements and hidden costs over several years.
- **Limit scope of disclosures:** AMS should limit the scope of the proposed required disclosures to only information that would actually affect grower compensation expectations and omit all information that is publicly available or unrelated to compensation. Several of the proposed disclosures are unhelpful and introduce unnecessary complexity into an already highly regulated process.
- **Omit the proposed governance framework and certification:** AMS should omit the proposed governance framework and certification in its entirety as this proposal is an incredibly costly measure that does not provide useful information and does not address a real concern.
- **Eliminate the required disclosure of forward-looking projections:** All forward-looking projections should be omitted from a final rule, as they by definition cannot be accurate and risk causing significant confusion.
- **Eliminate the requirement that minimum annual placements and minimum stocking densities be included in contracts:** The proposal's requirement that contracts specify minimum annual placements and minimum stocking densities goes well beyond mere disclosure, imposes terms on private contracts, and would wrongfully impede the ability to adjust to market dynamics.

In addition to these points, we have identified several other aspects of the Proposed Rule that are vague, unnecessary, unworkable, or would otherwise require clarification.

II. The Current Poultry Grower Contracting System Is a Well-Designed, Efficient Structure That Benefits Growers, Dealers, and Consumers

NCC supports the current poultry grower compensation system because it rewards family farmers for their hard work efficiently raising high-quality birds. The current system's fair, honest contracts provide a target pay that high-performing growers can supplement with the efficient use of resources necessary to produce poultry. This system promotes superior results that lower the cost of raising chickens for the benefit of growers, live poultry dealers ("dealers"), and consumers.

The system also efficiently allocates economic risk to the parties best prepared to burden it—dealers supply growers with broiler chickens, feed, veterinary care, technical advice, and other resources, alleviating most of the economic risk from their contract growers as compared to independent growers. Meanwhile, contract growers provide high-quality, day-to-day care, land, and housing for their birds. This mutually beneficial partnership supports the economic viability and independence of family farms by averting risk and promoting stable and predictable income.

Indeed, a March 2022 study conducted by Dr. Tom Elam (the "Elam Study," attached as Appendix A) found widespread benefits and support for this model as mutually beneficial, successful, and profitable.[2] USDA's own data shows that over the last decade, poultry growers on average earned more than the average farm income.[3] Average grower payments per square foot and payments per pound have increased steadily over the past thirty years, and raising broilers generated more than $3.6 billion in payments to growers in 2020 (in 2012 dollars), income that sustains rural communities and gets reinvested back into American agriculture.[4] Revealingly, the Elam Study shows that even with the onslaught of the COVID-19 pandemic, lockdowns, and unprecedented economic disruption, growers earned more in payments from dealers than in any prior year, reflecting the value of the current grower compensation model. Had growers owned their own birds, they would have faced devastating market conditions and met financial ruin. Instead, under the current system, they thrived.

The American poultry industry is the most competitive in the world in significant part because the poultry grower compensation system encourages innovation and investment in the best equipment and practices. NCC is proud to represent an industry that consistently and continuously produces affordable protein, even in times of soaring across-the-board inflation and economic distress that increase prices for consumers.

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[2] T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022), https://www.nationalchickencouncil.org/wp-content/uploads/2022/03/Live-Chicken-Production-FARMECON-LLC-2022-revision-FINAL.pdf [hereinafter "Elam Study"].

[3] *Id.* at 10 (citing USDA, Agricultural Resource Management Survey, https://my.data.ers.usda.gov/arms/tailored-reports).

[4] *Id.* at 7. Notably, this figure encompasses payments from integrators to growers. It does not encompass other payments such as COVID-19 relief payments.

The competitive nature of this industry and existing requirements incentivize and ensure poultry processors operate fairly and justly. Most growers are in a position to choose between partnering with two or more processors and can readily cut ties with a bad business partner. Over 50% of growers have been with their current dealer for ten years or more, a statistic unchanged from 2015, with an additional 20% having been with their current dealer for over five years.[5] Given that the majority of poultry growing contracts during the study were for five years or less, and one-third were flock-to-flock arrangements, these statistics show that growers find their relationships with dealers beneficial and willingly continue doing business after their initial contracts end. Moreover, chicken processing plants are expensive and only provide sufficient return on investment if they operate at full capacity. Processors that gain a reputation as bad business partners, including by attempts to manipulate a grower's performance or otherwise drive away growers, would quickly see their plants under-supplied and their grower pool taken by competitors. Notably, AMS cites no evidence of actual unfair dealings to support this proposal.

III. AMS's Proposal Exceeds Its Statutory Authority, Contradicts Congressional Direction, and Is Arbitrary and Capricious

A. The Proposed Rule exceeds AMS's statutory authority under the PSA

AMS grounds the Proposed Rule in Section 202(a) of the PSA, which makes it a violation for any live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device."[6] However, AMS fundamentally fails to identify how plainly written poultry growing arrangements are unfair, unjustly discriminatory, or deceptive. Indeed, they are not.

Instead, AMS attempts to justify the Proposed Rule by arguing that poultry growing arrangements are "incomplete contracts," by pointing to information asymmetries, and by revisiting well-worn allusions to vaguely described grievances made by unidentified growers. As explained below, we question the sufficiency of these statements to support the rulemaking record to begin with. Even if these statements were true, however, they do not establish that Section 202(a) of the PSA authorizes AMS to mandate onerous disclosures as part of the contracting process. First, to the extent that AMS is concerned that some conditions affecting compensation may not be encompassed in the contract, that is common in many entirely lawful business arrangements. A supply agreement might not have minimum volume requirements, an author's publisher agreement does not specify how many books will be sold, an accountant's engagement letter might not specify how many of hours of work the client will request, and a farmer renting a stall at a farmer's market has no guaranteed buyers. None of those situations are unfair or deceptive practices, and indeed, the Federal Trade Commission has not prohibited them despite also having authority to address deceptive practices in other sectors. Moreover, unlike all of these examples, a dealer has an economic interest in keeping growers' farms in

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[5] *Id.* at 3.

[6] 7 U.S.C. § 192(a). AMS also cites PSA Section 410(a)'s full-payment provisions, but nowhere does AMS allege that dealers do not pay growers as called for under their contracts, nor would the Proposed Rule do anything to address actual payments; the stated aim of the Proposed Rule is to provide more information.

steady operation, as dealers also invest costs into the dealer-grower relationship and have every incentive to keep their growers in production.

Second, all markets have information asymmetry; perfect information symmetry exists only in economics textbooks. The fact that dealers may possess information about their businesses not known to growers and that growers may possess information not known to dealers does not in any way mean that dealings between the parties are unfair or involve deceptive practices. Tellingly, most, or all, of AMS's proposed disclosures in no way affect how a grower's settlement will actually be calculated. Settlement calculations are defined through contracts, and growers are provided at settlement all the information necessary to determine how the payment was determined. Growers also have ample opportunity to understand the market before entering into an agreement, including by consulting lenders, financial advisors, agriculture extension offices, and their community members. Further, other remedies are available in the exceedingly unlikely event that a dealer would actually fraudulently induce a grower to sign a contract. AMS has not established that the mere existence of a potential information asymmetry requires the proposed disclosures to remedy unfair or deceptive practices. Section 202(a) requires that parties not engage in unfair or deceptive practices; it does not require that all parties have the exact same information.

Finally, to support its position that widespread Section 202(a) violations would occur without the proposed disclosures, AMS provides only vague references to complaints by growers. AMS provides no details about these purported complaints, including what specifically they alleged happened, when they were lodged, whether they were substantiated, or even how many AMS has received. The long history of rulemaking on this topic has been peppered with allusions to thinly described complaints, but never has AMS provided any real detail. Even more tellingly, no court has ruled that the current grower compensation system violates Section 202(a), nor has AMS taken enforcement action on this basis despite decades of use. In short, AMS has failed to establish that the Proposed Rule is necessary to prevent PSA Section 202(a) violations.

B. The Proposed Rule is contrary to Congressional purpose.

More than a decade of clear Congressional direction reinforces that AMS lacks authority under the PSA to conduct this rulemaking. USDA has a long history of overseeing the PSA through established regulations and within the guardrails established by extensive federal appellate caselaw about the scope of PSA Section 202. The PSA has been law for more than 100 years, and Congress has amended it as needed over the years when it determined additional authorities or requirements were needed.

Congress also addresses PSA issues periodically through Farm Bills and the appropriations process. Congress most recently addressed PSA issues through the 2008 Farm Bill and subsequent appropriations bills. In the 2008 Farm Bill, Congress directed USDA to identify the criteria that would be used to evaluate whether four different types of conduct violated the PSA.[7] In 2008, the broiler industry was using more or less the same style of grower compensation system as is being used today. Notably, although Congress directed USDA to address several topics, the 2008 Farm Bill did not direct USDA to take any actions related to poultry grower compensation or the so-called tournament system. When USDA responded with a wide-ranging

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[7] H.R. 6124, 110th Cong. § 1106 (2008).

proposed rule that addressed poultry grower ranking systems, among other topics, in great detail, Congress used its appropriations powers to prevent USDA from finalizing and implementing the rulemaking for several years.[8] When the appropriations restriction eventually lapsed, USDA never further pursued rulemaking to address poultry grower compensation.

This history demonstrates exceedingly clear Congressional direction about the nature of topics appropriate for USDA rulemaking under the PSA. Through the 2008 Farm Bill, Congress provided USDA with clear direction to address topics that Congress determined needed additional regulations. Congress was undoubtedly well aware of the types of poultry grower compensation systems being used, as those systems had been in place for many years. Nonetheless, Congress specifically did not direct any action with respect to poultry growing arrangements. This directly reflects Congress's view that the prevailing regulatory framework for poultry growing arrangements be maintained. If that were not direction enough, when USDA attempted nonetheless to change the prevailing regulatory structure, Congress promptly stepped in and used its appropriations authority to halt further rulemaking on poultry grower compensation systems, maintaining that prohibition for years. Moreover, Congress did not intervene when USDA stopped pursuing and eventually withdrew the proposed rule on poultry grower compensation systems.

Taken together, this sequence of events clearly shows how, over more than a decade, Congress expressed its consistent view that the then-existing approach toward poultry grower compensation systems was the desired one and that USDA was overstepping by trying to change the system. Despite the current poultry grower compensation system being in use for decades, no federal court has held that the system violates Sections 202(a) of the PSA, further reinforcing that the current regulatory approach, not the proposed one, is the one intended by Congress.

Given this clear direction from Congress, whether to take any steps to change the current poultry grower compensation system is a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the currently used system. As recently stated by the Supreme Court in *West Virginia v. EPA*, in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers.[9] As evidenced by the amount of public attention devoted to chicken industry contracting and attention from the highest levels of USDA and the White House, chicken grower contracting has taken on "political significance." It is also of great economic significance, as it drives billions of dollars in revenue to growers and forms the foundation for the U.S. broiler industry, benefiting growers, processors, and consumers. Not only does AMS lack the necessary "clear congressional authorization" to advance rulemaking into this topic, Congress has also already voiced its support for the current system and its objection to USDA efforts to further regulate the existing poultry grower compensation system.

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[8] Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 731 (2014); Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. § 744 (2014); Consolidated and Further Continuing Appropriations Act, 2013, H.R. 933, 113th Cong. §§ 742–43 (2013); Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. § 721 (2011).

[9] 142 S. Ct. 2587, 2613–14 (2022).

C. The Proposed Rule is based on a flawed administrative record and thus is arbitrary and capricious.

The Proposed Rule is based on a flawed administrative record that reflects a fundamental misunderstanding of poultry contracting supported only by unsubstantiated hearsay. This flawed administrative record renders the Proposed Rule arbitrary and capricious under the APA.[10]

The Proposed Rule is fundamentally unnecessary for the efficient operation of the chicken raising market. AMS justifies the Proposed Rule as being necessary to address the perceived "gap between expected earnings and the ability to actually achieve those outcomes through reasonable efforts by the grower" by "increas[ing] transparency in all poultry growing contracting."[11] In fact, the chicken grow out market has long operated efficiently without these government-mandated disclosures, and most of the proposed disclosures would not provide any meaningful information about what income a grower might anticipate from a contract that is not already provided due to private market dynamics.

Broiler processors have long used various permutations of competitive grower compensation systems to drive efficiency in production. In many ways, this is no different than any arrangement between a business and a service provider, in which service providers compete with others to provide the highest quality services as efficiently as possible and buyers of those services compete with each other to secure the best providers at favorable prices. This process has resulted in a highly efficient market and is an important driver of the global cost-competitiveness of U.S. chicken meat. Chicken meat has never been more affordable in the U.S. on a real-dollar basis or when viewed against a typical household's overall buying power, even considering the immense inflationary pressures facing consumers and businesses from all directions. AMS fails to explain why these broadly recognized economic principles do not apply in the poultry growing market. In fact, AMS has previously conceded that the economic literature on the industry supports a finding of no anticompetitive market power effects, which one would expect to see before intervening in a market.[12]

The chicken growing contracting process is highly efficient and is also mutually beneficial for both parties. If it were not, contracts would not be extended through mutual agreement, entrepreneurs would not continue to enter the poultry raising business, and growers would shift away from poultry production to other substitute agricultural land uses. Instead, contracts are regularly renewed (even flock-to-flock arrangements), farmers willingly invest in improving their farming operations, and a thousands-strong waiting list of farmers seeking to enter the chicken raising business or expand their farms to raise even more birds, willingly investing to improve

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[10] 5 U.S.C. § 706(2)(A).

[11] 87 Fed. Reg. at 34980.

[12] *See Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act*, 81 Fed. Reg. 92711 (Dec. 20, 2016) (noting that in a review of thirty-three studies published since 1990 relevant for assessing the effect of concentration on commodity or food prices in agricultural sectors, a majority of the studies "found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects").

farming operations.[13] Although NCC understands AMS is aware of at least one study demonstrating growers' interest in renewing their agreements (the Elam Study discussed elsewhere in these comments), AMS fails to address this in its proposal.

Further, AMS's characterization of growers as being unsophisticated, financially uninformed neophytes who are unable to understand contracts and make informed business decisions does a great disservice to rural America. The history of PSA rulemaking over the past twelve years has been rife with vague suggestions and insinuations that growers are in some manner misled or mistreated during the contracting process. But at no point in numerous rulemakings over more than a decade has AMS actually identified specific instances that would constitute a PSA violation or even concretely demonstrated that the perceived harm is real and widespread at a level justifying costly and invasive regulations that will harm industry participants, including growers and consumers. Nor has AMS obtained court rulings that find the vaguely alluded-to conduct violates the PSA. Instead, AMS would base this rulemaking on conjecture and vague allusions to unsubstantiated complaints, many of which likely date back to a listening session more than a decade ago.

In fact, chicken growers are savvy small business owners, many of whom have decades of farming experience and are part of multi-generation farming families. They understand the business and enjoy average incomes that exceed that of the typical American farmer.[14] At the same time, chicken growers know they do not have nine-to-five jobs in air-conditioned offices. They choose to enter and stay in the business because they are committed to farming, and those who value hard work and innovation see their efforts rewarded. They understand how to read their contracts, project income under various scenarios, and maximize their income by raising birds as efficiently as possible.

Moreover, like most businesses in the country, many chicken farmers rely on loans to finance parts of their operations. This market attribute provides additional protection for farmers that displaces AMS's theoretical concerns. The banks that specialize in agricultural lending to chicken growers have an extremely sophisticated understanding of the chicken industry, and they are able to make informed decisions about a farmer's creditworthiness and likely income based on a farmer's experience with the industry and the contents of existing contracts. If a lender does not believe a particular contract would provide adequate income for a chicken grower to meet his or her loan obligations, the lender is unlikely to issue the loan. This aspect of the private market provides an incentive for the dealer to ensure that the chicken grower has the information necessary for the grower and lender to evaluate the contract, as the dealer has an interest in a grower being able to secure necessary financing on favorable terms. Importantly, this happens through efficient market dynamics and in the absence of costly and prescriptive regulations. And just as importantly, it works. For example, the Elam Study found that the deficiency percent and charge-off percent for poultry grower loans amount to merely one-third of the average agricultural loan, based on Small Business Administration loan quality data.[15] The data overwhelmingly show that growers and their lenders are able to effectively and accurately evaluate expected income from poultry growing arrangements without the

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13 *See* Elam Study at 3, 4, 11, 12.

14 *Id.* at 10.

15 *Id.* at 11.

burdensome and largely uninformative disclosures called for in the Proposed Rule. AMS entirely overlooks the role that lenders play in helping to structure the poultry raising market, despite the fact that agricultural loans are administered by a sister agency, yet again underscoring the arbitrary and capricious nature of this rulemaking and lack of an adequate administrative record.

Under current practices, growers are provided contracts that clearly set forth how their payments are determined. With this information, a grower can review the contract, assess his or her ability to perform as well as or better than his or her competitors, and make an informed decision as to whether to enter the chicken raising business. Other American small business owners make critical business decisions with much less information. Moreover, at settlement, dealers provide the information necessary for growers to understand their payment under the contract, and growers with concerns about payments can raise those concerns directly with the dealer or pursue numerous other avenues for relief.

Importantly, none of the factors identified in the proposed disclosures meaningfully impact grower payments over the length of a typical growing arrangement. Dealers provide growers with inputs from a common supply in an essentially random manner (with the obvious exception of growers supplied with specific types of birds or specific feeds to meet various specifications, which would already be separately addressed). While inputs may naturally vary due to the practical reality that the industry involves live animals, such as slight variations in feed supply or in breeder flock age, any natural discrepancy would naturally dissipate over the life of a typical growing arrangement, and any such variation is statistically insignificant over time. Providing precise inputs while accounting for minor flock-by-flock variations would rigidly impose extremely complicated systems on dealers that would certainly increase costs on the sector and that would not result in greater overall grower compensation or more efficient results. In fact, a grower would be disappointed to see his or her payment adversely adjusted because of a minor variation in a dealer input, when in reality his or her excellent care and hard work was the actual reason the flock performed well.

Fundamentally, the grower's skill and expertise in managing the birds and deploying the grower's resources drives grower payments under broiler production contracts. The proposed disclosures entirely fail to acknowledge this premise. In contrast, under the current system, a grower's skills and efficiency are reflected in settlement payments. The information covered in the proposed disclosures is ancillary at best and, in many cases, immaterial to grower payments. Requiring complicated disclosures as contemplated in the Proposed Rule will not improve a grower's ability to project income. AMS again glosses over the disconnect between the broad and burdensome disclosures and how settlement payments are actually determined under the parties' agreed-upon terms. There must be a "rational connection" between a regulation and the issue it is trying to address, but the clear disconnect between the disclosures and how payments are actually determined means that standard is not met.[16]

Further, the proposed governance and certification framework is entirely unnecessary, does not achieve the Proposed Rule's objectives, is well outside the scope of the basis for the rulemaking, and, as discussed further below, would impose exorbitant compliance costs on the chicken supply chain with no benefit. Even if the disclosures called for under the Proposed Rule helped growers better project their income under contracts, AMS has not identified any

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[16] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983).

compelling reason to suggest the information provided would be inaccurate or would otherwise require the proposed complex auditing and oversight scheme seemingly inspired by public financial reporting for publicly listed companies. Companies have been required to maintain various documents showing compliance with the PSA for decades and have successfully met those requirements without cumbersome and costly auditing and certification functions. There is no evidence that such a function would improve the reliability of disclosed information. However, these functions would be needlessly costly to the detriment of growers, dealers, and consumers. Including this provision is likewise arbitrary and capricious.

Moreover, proposed § 201.100(f)(1)(ii) would apparently have the proposed governance framework apply not only to the proposed disclosures but also to all of PSA compliance. PSA compliance beyond disclosures falls well outside the scope of this rulemaking. If additional compliance is considered at all, it should be addressed in a separate rulemaking appropriately focused on those issues. Many aspects of PSA compliance are not conducive to auditing systems, and nothing indicates that such a system would materially improve PSA compliance. Finally, as written, the proposed governance framework would apparently apply only to live poultry dealers, which would create troubling inconsistencies in how companies marketing different species would have to demonstrate compliance with the PSA.

AMS's rationale for the proposed governance framework suffers an even more egregious and alarming flaw in the record. As justification for the need for the burdensome governance framework, AMS points to "current civil and criminal actions" against various individuals or companies alleging certain antitrust violations, citing to a press release indicating that the Department of Justice had brought charges against certain individuals.[17] It is entirely inappropriate for an agency to point to *ongoing* criminal or civil litigation to justify rulemaking of any kind. The mere filing of a civil complaint or criminal charges in no way indicates the alleged events actually occurred or that the individuals or companies are liable for or guilty of the conduct. Defendants are presumed innocent unless proven guilty, and an agency should never use unproven charges as the basis of a rulemaking or use the rulemaking process to influence public view of a case. Otherwise, there would be nothing stopping the government from bringing charges or filing complaints solely to manufacture an administrative record. Underscoring this point, the Department of Justice has dropped charges against several of the defendants in the case that AMS references as justifying the governance framework. This stated rationale deeply reinforces the arbitrary and capricious nature of the rulemaking.

Lastly, it has come to NCC's attention that officials at USDA or the Department of Justice may have on its own accord contacted growers about submitting comments to this rulemaking, and that it is possible these communications may have had the intent or effect of dissuading growers from submitting comments not in support of the Proposed Rule. NCC and our members place great weight on all Americans' First Amendment rights to speak their opinions freely, as well as on the freedom of all stakeholders to freely share their views on proposed regulatory action (or to refrain from doing so), to do so anonymously if they so desire, and above all, to do so without coercion or influence by the regulatory agency conducting the rulemaking. To the extent USDA or the Department of Justice has contacted growers or any other stakeholders in a manner that presents even the possibility of influencing the nature of comments that may be received, such

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[17] *See* 87 Fed. Reg. at 34996.

action would irreparably poison the administrative record, and AMS would need to withdraw the rulemaking in its entirety.

For all these reasons, as well as the specific infirmities discussed further below with respect to specific proposed provisions, the proposal is arbitrary and capricious and should be withdrawn.

IV. AMS Has Significantly Underestimated the Costs of Complying with This Regulation

AMS has significantly underestimated the costs of the Proposed Rule and failed to consider other adverse consequences of these regulations, including the risk of increased frivolous litigation, industry-wide efficiency losses, costs to farmers and consumers, and the effects on inflation.

AMS predicts the ten-year aggregate combined costs to dealers and poultry growers under the Proposed Rule to be $20,492,160. AMS estimates that $9,039,442 of these costs will be carried by dealers and that an even greater amount—$11,452,718—will fall on poultry growers. These costs alone would affect the bottom line of growers and dealers with no clear benefit. Moreover, these exorbitant costs will burden food supply chains across the country in a time when severe inflation has raised the cost of food to record levels. Further, we fail to see how AMS can credibly claim this rule benefits growers when more of its financial burden is placed on the shoulders of those who it purports to protect and when AMS all but concedes the Proposed Rule will not actually increase overall grower pay.

AMS has underestimated the hourly rates, number of people involved, and time required of executives, compliance officers, regulatory consultants, attorneys, and other services required to implement the Proposed Rule. For example, to implement the proposed governance framework, dealers would need to procure new data management systems and potentially custom software and substantially expand their compliance departments to collect, maintain, organize, and verify the information. Establishing compliance programs requires highly compensated skilled professionals, and smaller dealers may suffer the most due to their lack of scale to better absorb these costs. Because the Proposed Rule would require contracts be amended directly, dealers would incur extensive costs studying and evaluating necessary modifications, renegotiating thousands of contracts, and implementing each individual change. Similarly, growers would incur legal and advisory costs as they work to understand any changes and decide whether to accept them. The proposed disclosures would almost certainly generate frivolous litigation, and the proposed requirement to disclose prior and ongoing litigation could deter settlements, further increasing legal fees for growers and dealers as cases that would have otherwise settled drag out and cases that should never have been filed have to be litigated. AMS does not adequately consider any of these costs in the Proposed Rule.

Moreover, AMS entirely fails to consider the negative effects of the proposed disclosures on growers, especially high-performing growers. AMS apparently contemplates that dealers might adjust payment based on various factors. AMS's presumption is entirely misplaced. If a dealer were to increase pay for lower-performing growers, that money would have to come from somewhere, and it might have to be offset by decreasing the income of high-performing growers who are accustomed to being rewarded for their hard work. This would lead to payment compression and fewer incentives and rewards for the best performers. It would also harm the highest-performing growers, especially those with excellent track records who have invested in their farming operations based on an understanding that their high performance will continually be rewarded.

Removing incentives for high performance would trigger a vicious cycle of efficiency and productivity losses as growers who are no longer rewarded for high performance have fewer incentives to perform highly. This would compromise the overall global competitiveness and the resources of the U.S. chicken industry, shrinking the pool of revenue available to growers and driving up costs while also further squandering our already limited resources during a period of already historic inflation. Dismantling the current structure, which rewards higher performance, will disincentivize growers from making their operations more efficient and risks raising the cost of production, ultimately harming consumers, integrators, and growers alike. The American chicken industry is extremely competitive worldwide, due in large part to efficiencies and innovation driven by the current system. Under the proposal, AMS risks increasing costs, reducing efficiencies, and stifling innovation, which could make the American chicken industry less competitive against growing international competition to the detriment of American agriculture as a whole.

Finally, AMS fails to consider the negative consequences of injecting needless and extensive production costs into the broiler supply chain in the midst of the highest inflationary period in forty years. Chicken has earned its place on the table through a relentless focus on efficiency at all steps of production, making it America's number one, and most affordable, animal protein. However, supply chain disruptions, loose fiscal and monetary policy, labor shortages, rising feed costs, lingering effects of the coronavirus pandemic, and geopolitical events have all placed immense cost pressures on the supply chain. AMS's reckless injection of additional costs into the supply chain will hurt everyone who touches chicken—growers, dealers, and consumers. As an affordable and nutritious food, chicken is an especially important protein source for food insecure individuals and those who participate in USDA's nutrition assistance programs. AMS has failed to consider the negative consequences to society of increased production costs and especially the consequences to the nation's most vulnerable individuals who may find themselves able to afford less chicken. AMS's cost estimates are likely low by orders of magnitude.

Worse, AMS proposes to impose these costs without identifying any real quantifiable benefit. AMS can only point to a highly theoretical explanation that "a risk averse producer will benefit economically from a reduction in revenue risk."[18] In short, AMS concedes that growers will not actually earn more income overall under the proposal and alleges only that the costs of the rule may make it somewhat easier for growers to predict how much income they might earn. AMS tries to assign a theoretical dollar value to this benefit by hypothesizing the value of reduced uncertainty around revenue for individuals with theoretical amounts of risk aversion, conjuring a wide range of potential one-year and ten-year discounted values based on possible variations in net revenue. These figures range from about $1.5 million at the low end of the one-year range to $305 million at the high end of the discounted ten-year range. In other words, AMS believes that growers might benefit from the assumption that they would have a better idea of how much money a contract might bring and further attempts to assign an economic value to having that certainty. Critically, AMS does not propose that a grower would actually make more money, just that the grower might have a better idea of how much money he or she would make (in fact, the added costs would likely decrease overall grower pay in the aggregate). This attempt to quantify benefits strains credulity and belies the lack of any real benefit to justify the costs of this proposal. Put differently, under one scenario, AMS's analysis says it is worth $305 million to growers over ten years to be able to better predict how much income they will make under their

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[18] 87 Fed. Reg. at 35008.

contracts (again, not to actually make more money under the contracts, just to know with greater certainty how much they will make). This would mean that rational growers collectively should be willing to pay up to $305 million dollars right now to receive the income clarity the Proposed Rule would supposedly bring. Of course, no grower would actually make such an offer, reinforcing that AMS's attempt to quantify the benefits constitutes hand-waving at best.

At bottom, AMS is proposing to inject tens of millions of dollars of compliance costs into the chicken supply chain with no actual benefits. At a minimum, AMS must conduct a properly comprehensive cost-benefit analysis that better reflects the exorbitant costs of this Proposed Rule and compares those against any real, quantifiable benefits. AMS should withdraw the proposal entirely.

V. Comments on Proposed Regulations

Although NCC strongly urges AMS to withdraw the Proposed Rule for the reasons explained above, if AMS moves forward with the rulemaking, we urge it to revise the proposal to reduce the costs imposed on stakeholders and better focus the rule on AMS's goal of providing useful, essential information to growers. In particular, we highlight the following considerations.

A. AMS should limit the scope of the proposed regulations and ensure the timing of these disclosures reflects business realities.

1. Scope of information subject to disclosure

AMS states the goal of the Proposed Rule is to provide growers with information that USDA believes will help growers anticipate income under poultry grower contracts. To achieve its goal, AMS should focus only on those disclosures that might inform grower incomes. To this end, NCC recommends AMS omit from the required disclosures the following items that are irrelevant for determining how much income a grower may earn: dealer's bankruptcy history, litigation history, general rights and obligations under the PSA, payment information for different regions, and breeder flock information.

The scope of these data would result in extremely lengthy, burdensome disclosures, especially for large dealers, that will not be helpful for growers and will only introduce confusion and complexity into contracting. Omitting the requirements listed above would reduce the costs of the rule and the administrative burden on dealers. Similarly, its omission would help reduce confusion over the disclosures provided and focus growers' attention on information that might be indicative of income.

Likewise, AMS should not place on dealers the administrative burden of collecting publicly available information. For information like bankruptcy proceedings, anyone, including growers, can easily obtain that information at their own initiative. Similarly, growers, not dealers, are in the best position to understand a grower's variable costs. In addition, AMS should not include in its required disclosures any item that would be included in the poultry grower contract arrangement.

Further, AMS must ensure that competitively sensitive information is protected. Some of the information that would be disclosed under the Proposed Rule may be competitively sensitive information. For example, grower payments may provide information about the company's costs and live side operations. Breeder information, such as strategic changes in breed or efforts to deal with chick health, might be proprietary, especially if a third-party breeder is used. Details about feed outages or other internal operations might reveal proprietary information that

would adversely and unfairly negatively impact a company's competitive position. To the extent that any competitively sensitive or proprietary information is required to be released under a final rule, it is imperative that growers respect the proprietary nature of the information and not share it beyond their advisors, and that companies be allowed to take steps to ensure their information is properly protected.

Finally, in limiting the Proposed Rule to only those factors that might conceivably advance AMS's stated goal, AMS should eliminate the proposed governance framework, which, as explained, is unnecessary and costly.

2. Scope of regulated parties

We urge AMS to exclude from the scope of the Proposed Rule poultry grower compensation systems where there is a fixed base pay plus an incentive-based bonus, regardless of how the bonus is calculated. The regulations appear to contemplate only two contract types—flat payment or a tournament system. In today's business environment, there are many forms of contracting. NCC urges AMS to ensure its proposed regulations allow sufficient flexibility to accommodate different types of contracts and allow for innovative contracting. AMS's proposed regulations should maintain a key feature of the current grower compensation system: allowing performance incentives for global competitiveness of the industry and rewarding the top performers and those who invest in state-of-the-art practices and technologies. AMS can accommodate market innovation and other ways of contracting by revising the definition of "poultry grower ranking system" in 7 CFR § 201.2 to address grower *base* payments as follows:

> *Poultry grower ranking system* means 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.

In addition, the contract scenarios identified in the Proposed Rule are overly simplified. For example, a poultry growing contract could have both new and older housing in the same complex under the same agreement. In addition, poultry growing contracts may cover multiple complexes. AMS should ensure the Proposed Rule reflects and accommodates differing contract structures.

Further, AMS should not exempt small dealers from the requirements of this rule. In § 201.100(e), the Proposed Rule would exempt small dealers slaughtering fewer than two million live pounds of poultry weekly from needing to provide a true written copy of the poultry growing arrangement and the Live Poultry Dealer Disclosure Document ("Disclosure Document") to growers. If, as AMS asserts, the information in the Disclosure Document is necessary for growers to make informed decisions about investments in their business, no dealer should be exempt from these requirements. The exemption could result in growers leaving a dealer complying with the regulations for a small dealer not subject to the same requirements.

3. Timing of disclosures

The Proposed Rule would require dealers to furnish the Disclosure Document whenever a dealer seeks to renew, revise, or replace an existing growing contract or establish a new contract that does not contemplate modifications to existing housing specifications. Because contracts may be regularly amended to reflect changes in the business environment, NCC urges AMS to modify the Proposed Rule to require dealers to furnish the required information

only at initial signing, and then on a periodic basis (e.g., every year). This scheduled disclosure of information would reduce administrative burdens on dealers, ensure uniformity of the disclosures provided, and alleviate confusion from growers who may receive different information at different times.

B. AMS should address all amendments to PSA regulations in one rulemaking. Otherwise, all changes required of industry should have a single implementation date.

NCC is concerned that AMS is taking a piecemeal approach to promulgating regulations for industries regulated by the PSA and urges the agency to propose and implement all amendments in a single rulemaking process. This Proposed Rule and the advance notice of proposed rulemaking (87 Fed. Reg. 34814 (June 8, 2022)) issued on the same day as the Proposed Rule signal AMS intends these regulatory actions to be the first in a line of planned changes affecting the poultry industry. Imposing constant regulatory changes on poultry growers and dealers would spurn confusion, needless costs, uncertainty, and frustration with shifting requirements.

In this already highly regulated sector operating on thin margins, and given the multitude of uncertainty from external market factors, businesses need certainty and predictability from regulators. Dealers can only effectively shield growers from risk as described in section I above if dealers themselves are afforded some level of certainty from regulators. Affected parties can only evaluate the impact of proposed changes and the actual costs of regulations if they are shown the entire regulatory structure the agency proposes to implement. A piecemeal approach obscures USDA's true intent, hides costs of constant transitions, and fuels distrust in government. NCC urges AMS to be transparent with industry about its plans.

Similarly, NCC anticipates AMS plans to incorporate the changes to 7 CFR § 201.2 (terms defined) in future rulemakings. AMS should afford industry the opportunity to comment on the changes to these definitions with a full understanding of how they will apply to planned amendments.

Even if AMS moves forward with its piecemeal approach to rulemaking, it should implement a uniform effective date for all changes to PSA regulations currently identified in the Unified Agenda, including "Clarification of Scope of the Packers and Stockyards Act (AMS-FTPP-21-0046)" (RIN 0581-AE04) and "Unfair Practices in Violation of the Packers and Stockyards Act (AMS-FTPP-21-0045)" (RIN 0581-AE05). Because the Proposed Rule contemplates that firms develop and audit data in a certain way and that firms must disclose five years of data, the effective date for disclosures by definition must be five years after the implementation date for the auditing system. Any effective date before five years after the implementation of the auditing system would prevent consistent comparison and undermine the usefulness of any disclosures. This timeframe also allows industry sufficient opportunity to develop and implement the required data management systems and to educate growers on information provided. Any period less than five years is not sufficient because the industry would not be able to effectively adapt in light of the considerable differences in what and how information is maintained.

C. AMS should provide ample educational resources for regulated entities regarding the complex changes in this rule and provide clarity on how the proposed regulations would be enforced.

Based on our communications with members to date and reporting on the proposed regulations, we anticipate significant uncertainty from regulated entities as to how AMS intends to implement this rule. Given the breadth, complexity, and unique level of involvement in poultry growing contracts, NCC strongly urges AMS to provide additional clarity for industry through educational materials, information sessions, and template disclosures.

In addition, AMS should work to ensure growers fully understand the information provided to them by dealers, including what it does and does not say. Instead of requiring contracting documents to include boilerplate disclaimers, AMS should undertake education initiatives to ensure contracts are fully understood. Finally, AMS should ensure its educational initiatives reach non-English-speaking growers. Specifically, AMS should ensure any educational events, guidance, templates, and other regulatory materials are available in other languages, particularly Spanish.

As it develops implementing and educational materials, AMS should clarify how the agency plans to enforce its rule. In particular, NCC seeks clarity on the following enforcement-related components:

- How AMS will inspect the disclosure and auditing framework, including how AMS will train staff to inspect financial accounting systems;
- How frequently the Disclosure Document must be updated;
- How dealers can properly update the Disclosure Document to correct errors if identified;
- How required disclosures should reflect operational changes to placement schedules;
- If AMS moves forward with including forward-looking projections in the rule, how the agency will evaluate the accuracy of these projections. As discussed below, we reiterate AMS should not penalize dealers if it forces them to estimate projected income and costs that later turn out to be imperfect.

D. Comments on proposed 7 CFR § 201.100.

1. Requirement to include minimum placements and stocking densities in poultry growing contracts, § 201.100(b)(5)

The Proposed Rule would create a new paragraph at renumbered § 201.100(i)(2) requiring that contracts specify the minimum number of annual placements and the minimum stocking density for such placements. Imposing mandatory terms on private contracts is beyond the stated goals and scope of the rulemaking, and these changes should be removed from any final rule. According to AMS, this rulemaking is intended to address perceived information asymmetries through mandatory information disclosures to help growers better predict the income they might earn under poultry growing arrangements. But these proposed requirements are not mere disclosures. Rather, they would impose mandatory terms on private contracts, which is vastly different than requiring information disclosures.

Poultry growing contracts do not necessarily include terms addressing guaranteed placement frequencies or durations. Accordingly, this provision would potentially require amending potentially every single grower contract. Doing so would impose substantial costs not accounted for in AMS's cost analysis, and it could cause substantial confusion if growers are all

suddenly presented with new contracts to accommodate these terms. Moreover, the Proposed Rule does not account for the possibility that a grower may not wish to agree to amend a contract or, worse, could create a situation where a grower might refuse to enter into an agreement for the express goal of placing a dealer in a position of regulatory noncompliance to bolster a negotiating position. Moreover, including this information as a contract term is redundant to the information that would be included in the Disclosure Document, which would also include information about minimum annual placements and minimum stocking densities.

Further, these proposed provisions fail to accommodate the breadth of potential contracts used in the industry. Many growers operate under flock-to-flock contracts, which some growers may prefer because they provide flexibility to choose whether to take a flock and the ability to seek other business partners. It is entirely unclear how a minimum annual placement rate and minimum stocking density would even be determined for a flock-to-flock contract. To the detriment of all involved, this provision risks eliminating flock-to-flock arrangements altogether. On the other end, some growers operate under long-term contracts of ten, fifteen, or even twenty years. These long-term contracts have their own benefits, including providing stability for growers and dealers alike and helping parties commit to a long-term business strategy. But it is impossible for anyone to predict placement frequencies or stocking densities ten or fifteen years out. For example, factors like increased growth rates, faster or slower growing breeds, target bird size, and cleaning practices, to name a few, could change significantly over a ten-year period, and all affect placement frequency and stocking density (for example, faster-growing birds may reduce grow-out time, allowing for more frequent placements, or larger target weights may reduce initial stocking density). By requiring that contracts guarantee minimum annual placements and minimum stocking densities for the length of the contract, AMS risks driving many desired contract types out of the market.

Moreover, guaranteeing a minimum number of placements risks putting a party in breach of a contract and in violation of AMS regulations under situations that would not violate the parties' bargained-for agreement or constitute a PSA violation, leading to absurd results. For example, a contract signed in November that guarantees three flocks annually would likely see a grower receive at most one flock that year, which could be viewed as a breach of the contract and a violation of the Proposed Rule. A contract signed in late December might not see any flocks delivered that year. Similarly, any number of factors might result in a grower receiving fewer flocks than initially anticipated or even no flocks in a given year, such as natural disasters (floods, fires, hurricanes), public health emergencies and pandemics, avian disease outbreaks and APHIS quarantines, unexpected market shocks, a change in target bird size or breed, disruptions to key inputs, and planned facility repairs or renovations. Force majeure clauses or other contract provisions might address these situations, but it is unclear which provision AMS would view as prevailing, and in any case significant confusion could result. Likewise, a dealer should never be required to continuing providing birds to a grower who neglects or mistreats a flock, but a guaranteed placement provision might expose a dealer taking steps to protect bird welfare to breach of contract claims and allegations of PSA violations. Nor does this provision address how to handle a situation in which a grower does not want to receive a flock at a given time, perhaps due to medical issues, farm repairs, improvements, or labor shortages.

Finally, AMS's concerns that contracts need to guarantee minimum placements and densities for growers to make sound financial decisions is misplaced. Chicken growers are experienced businesspeople who understand their business, and they have been able to make good decisions without this information for decades. Further, many farm operations are financed, typically through loans from sophisticated agricultural lenders. As demonstrated by decades of

expanded poultry production,[19] for years, banks have had little problem determining whether a grower's future income stream is sufficient to support a loan, even without guarantees. The market has thus demonstrated this is not an issue.

In light of these considerations, AMS should not finalize proposed § 201.100(i)(2). If AMS were to conclude this information must be provided, it would be more consistent with the rulemaking's rationale to include minimum annual placements and minimum stocking densities as tentative projections to be included in the Disclosure Document at proposed § 201.100(b)(5) (discussed next). If AMS were to keep the proposed § 201.100(i)(2) provisions in a final rule, it must revise the rule to accommodate the above concerns.

2. Disclosure of minimum placements and stocking density disclosures in proposed § 201.100(b)(5)

All of the issues identified above in discussing proposed § 201.100(i)(2) also apply to the requirement in proposed § 201.100(b)(5) that the Disclosure Document include the minimum annual placement frequency and minimum stocking density, and it is critical that AMS ensures that any final Disclosure Document requirement address those concerns as well. Moreover, given that AMS anticipates that growers will make financial decisions based on the Disclosure Document, information about placements and stocking density should be presented as tentative projections and expressly not as guarantees. The Disclosure Document should make clear that actual placements and densities may vary and will depend on any terms that might be specified in the contract as well as factors that might be outside any party's control and that growers should not rely on the projected placements.

3. Litigation summary, § 201.100(c)(1)

The proposed requirement in § 201.100(c)(1) to include ligation information should be omitted from any final rule because it is not relevant to a grower determining how much income the grower might anticipate receiving under a contract. If the purpose of the Proposed Rule is to provide growers with more information to determine how much income they might earn through a contract, it is hard to understand how information about litigation—much of which likely has nothing to do with grower contracts—is relevant to calculating what the contract says a grower might earn under different situations. In fact, the proposed litigation disclosure presents a number of issues:

- **The proposed disclosure is overly inclusive of all litigation.** The proposed disclosure would appear to require a dealer provide information about all litigation between the dealer and growers, without regard for the nature or merits of the case. The proposal would appear to require even the disclosure of a case that resulted in sanctions against the plaintiff for filing frivolous claims. Especially for larger companies, this could result in a lengthy disclosure of virtually no value that is difficult and costly to maintain and distracts from more important elements of the agreement. There is no useful reason to require all this be listed, especially when companies have multiple subsidiaries, and many lawsuits would have nothing to do with PSA issues.

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[19] United States Department of Agriculture Economic Research Service, *Poultry Sector at a Glance*, (June 13, 2022) https://www.ers.usda.gov/topics/animal-products/poultry-eggs/sector-at-a-glance/#:~:text=U.S.%20poultry%20production%20mostly%20expanded,percent%20below%20that%20of%202012.

- **The disclosure risks skewing incentives in litigation.** Requiring that dealers list all litigation could create skewed incentives not in the interest of any party to a litigation. For example, if a dealer knows that settlements will be listed on a disclosure, the dealer might be reluctant to settle cases for fear of projecting a reputation as being quick to settle and thus inviting more litigation, which would in turn make it more difficult for growers and dealers to resolve disputes in an efficient manner.
- **Keeping this information current would be extremely burdensome.** Especially for larger companies that are more likely to have multiple cases ongoing, it would be highly burdensome for companies to have to maintain and update this information on an ongoing basis, especially with cases involving multiple parties and highly active dockets.
- **Disclosure might violate court orders and settlement agreements.** There are a number of situations in which a dealer might not be permitted to disclose information about a litigation. For example, a key filing might have been made under seal, or a settlement or court order might include a confidentiality agreement preventing the parties from disclosing any related information. As written, proposed § 201.100(c)(1) would put a dealer in the position of having to choose whether to violate AMS regulations by not disclosing a case and certifying the disclosure or violating a court order or settlement agreement.
- **The six-year period is inconsistent with the rest of the Proposed Rule.** It is not clear why AMS proposes that the litigation disclosure cover six years while other aspects of the proposal, such as the financial disclosures, cover shorter time periods.
- **It is unclear how to determine if a case fits into the disclosure window.** As proposed, a dealer must provide a summary of litigation "over the prior six years." It is unclear from the proposal whether this would include cases filed in the past six years, cases that had an open docket at any point in the past six years, or something else.

4. Bankruptcy information, § 201.100(c)(2)

As with the proposed litigation disclosure, it is unclear why disclosing a dealer's bankruptcy history would be relevant to determining how much income a grower might anticipate earning under a contract. A grower's potential income is based on the contract, not the dealer's bankruptcy history. Bankruptcy history is publicly available if a grower wants the information. For larger companies with multiple subsidiaries, there may be relatively complex histories, making this information both confusing and cumbersome to maintain. It is also not clear why AMS proposed a six-year period for bankruptcy history when other provisions have shorter periods.

5. Statement regarding sale of grower facilities, § 201.100(c)(3)

Again, it is unclear how this provision relates to determining how much income a grower might anticipate earning under a contract, and including it in the Disclosure Document is unnecessary. If the parties wish to make any binding commitments about how facility sales will be handled and whether a contract may be transferred, the parties can address that in the contract itself.

6. Financial disclosures, § 201.100(d)

The proposed financial disclosures in proposed § 201.100(d) would require dealers to compile complex information, imposing significant costs on dealers but providing growers little of value because past economic information cannot be relied on to predict future economic conditions. Fundamentally, a grower's income is determined as specified in the contract and driven

primarily by the grower's care and skill. If these disclosures are required, AMS should consider several points:

- **Extraneous information not directly related to grower payments should be omitted.** As discussed earlier, financial disclosures should require only the basic information necessary for a grower to make a general assessment of potential income under the agreement. Other information is extraneous for this purpose and should be omitted given the burdens in assembling and certifying this information. For example, the Disclosure Document should not have to include contact information for a state university extension service (proposed § 201.100(d)(5)). That information is readily available through other channels, and AMS or state organizations can promote it through educational outreach.
- **Flexibility is critical**. Dealers should be provided as much flexibility as possible in how they present the required information and should be expressly permitted in the regulation to provide additional qualification or disclaimers as they determine may be appropriate.
- **Information should be limited to only the grower's local complex.** Different geographic areas face different economic conditions that have little or no bearing on grower income in different areas. For example, different regions will have different costs of living, state and local tax structures, state and local regulatory burdens, land costs, fuel costs, and labor costs, to name but a few variations. Grower incomes may vary across regions—even within the same company—to account for these differences. Presenting income across a company or for different complexes would be confusing because the income might vary to reflect higher costs in some regions and would do nothing to help a grower determine how much that grower might earn in his or her local complex. The disclosure in proposed § 201.100(d)(1) should be omitted from any final rule.
- **The quintile-based reporting system is too complex.** Reporting normalized income by quintile would make the information difficult to read and understand. If this is included in a final rule, for simplicity, the disclosure should present the average income for the complex and the upper and lower bounds of the range.
- **Five years of data is too long to be meaningful.** Changes in markets, product offerings, demand, global trade, and inflation all make it difficult to draw meaningful conclusions from five-year-old data. If AMS mandates any such disclosure, a shorter timeframe would be more appropriate.
- **The disclosure needs to include a disclaimer that past income does not guarantee any future payments.** The amount of detail called for in the proposed financial disclosures risks confusing growers into making inappropriate assumptions about future income. Just as with financial investments, mandatory backward-looking generalized income information should be accompanied by a disclaimer making clear that past performance or income does not guarantee any future income, and that actual income will be governed by the terms of the contract, the parties' performance, and possibly factors beyond anyone's control. Dealers should also be permitted to provide any additional disclaimers in the Disclosure Document that they determine may be appropriate.
- **Forward-looking projections should not be required under any circumstance.** The supplemental forward-looking income information contemplated in proposed § 201.11(d)(3) is inappropriate and should be omitted. First, it is entirely unclear how a dealer might know that past grower annual payments would or would not reflect projected grower payments, as no one can predict future economic conditions. Second, it is unclear what is meant when the proposal references past payments not reflecting

future payments "for any reason." Past grower payments will never exactly match future grower payments, and there are any number of reasons that might cause changes. For one, inflation means that there will inevitably be changes year-to-year in payments, but that should be no reason for needing to project future income. Third, it is impossible for dealers or anyone else to predict what grower payments will be in the future, and requiring dealers to make future projections puts them in an impossible position while doing a disservice to growers, who might mistakenly treat projections as guarantees. As recent years have demonstrated, natural disasters, geopolitical events, supply chain issues, and inflation can all affect future economic conditions, and they are impossible to predict. Fourth, it is unclear how far into the future any projections would need to be made. Instead of providing forward projections, all financial disclosures should include a caveat that past information is not indicative of future results and that results will depend on a variety of factors, some outside any party's control, as well as the grower's performance.

- **If projections were required, they must be qualified and exempt from any certifications.** Projections are by definition unlikely to be completely accurate, and in many cases, even reasonable projections could be off by a significant amount. It is impossible to certify the accuracy of a forward-looking projection, which is one reason they are treated with such caution in the financial world. If projections were to be required, they must be exempt from any certifications, as no officer can certify that a projection will be correct. Moreover, projections would need to be accompanied by substantial qualifiers explaining that the projections are unlikely to reflect actual payments and should not be relied on.
- **The grouping scenarios in the Proposed Rule are too simplistic.** The Proposed Rule appears to contemplate that a grower will raise the same type of bird in the same type of housing. In reality, some growers may have a mix of older and newer housing and may raise distinct types of birds. It is unclear how a dealer would be expected to treat these and other types of mixed situations in preparing the proposed financial disclosures.
- **AMS must clarify how to provide historical data for periods before the effective date of any final rule.** It is unclear how AMS expects companies to obtain and handle financial data from periods that predate the effective date of any final rule. Companies may or may not currently possess the historical data required to prepare the proposed disclosures. In the event a company does possess such data, the company did not develop and maintain it in anticipation of being used in financial disclosures. AMS would need to explain how dealers can comply with the financial disclosure and certification requirements if historical data predating a final rule is required.
- **Information about grower variable costs is inappropriate.** Dealers should not be required to collect, produce, or certify the accuracy of information about grower variable costs. Growers are responsible for understanding and controlling their costs of production, in keeping with the efficient allocation of responsibilities in poultry grower compensation frameworks. Dealers do not systematically maintain all of this information, and any information provided could be incomplete or inaccurate. Proposed § 201.100(d)(4) should be omitted. If the provision were included in a final rule, it should be accompanied by significant qualification, it should be specifically exempt from any certification, and it should not have to be included in any governance framework.

7. Governance and certification, § 201.100(f)

The Proposed Rule includes a governance framework that AMS states is intended to "ensure the accuracy and completeness of the Disclosure Document, and ensure the dealer's

compliance with its obligations under the PSA and the regulations." AMS hopes the framework will ensure corporate attention and accountability. Such a governance framework is unnecessary for the proposal, needlessly costly and complex, and inappropriate for the type of information required in the proposed disclosures. In addition, AMS has grossly underestimated the costs associated with this portion of the Proposed Rule, especially because this requirement goes beyond the scope of this proposal and requires firms to evaluate their obligations under all PSA regulatory requirements. We urge AMS to omit this requirement from the final regulations for these reasons and those discussed earlier in these comments.

If AMS were to include a governance framework in a final rule, it should simplify the requirements and provide additional clarity on what is required. AMS should particularly address the following:

- **Clarify what "reasonably designed" means.** AMS must clarify the agency's expectations for a "reasonably designed" governance framework, including providing an example of how such a framework is designed with specifics about personnel needs, review frequency, frequency of data updates, and nature of executive review. The term "reasonably designed" should be fully defined.
- **Omit the requirement for certification by an executive officer.** This requirement is unnecessary and inappropriate for a contract document. It is inappropriate to require an individual corporate official to personally certify the proposed disclosures. A grower could have recourse if deceptive statements were made in an agreement regardless of whether someone certifies the information, and including this requirement appears to be motivated by an effort to inject individual liability into what is in essence a private commercial contracting issue, which is wholly inappropriate. AMS should continue its longstanding approach of permitting companies to determine how best to comply with any regulatory requirements. If a certification is included, it should certify that the disclosures are made pursuant to a system designed to capture generally accurate information rather than to the accuracy of any particular information.
- **Exempt any forward-looking financial information required by the regulation from any certification.** This information is, by definition, projections or estimates, the accuracy of which cannot be guaranteed. Requiring a certification for forward projections could lead growers to misunderstand the nature of the projection and rely on it as guaranteed income.
- **Clarify "material fact."** In relation to the certification, AMS needs to explain and provide examples of what constitutes a "material fact" such that its untruthfulness or omission would render the Disclosure Document misleading.

8. Receipt by growers, § 201.100(g)

Proposed § 201.100(g) should be revised to require that a dealer maintain documentation that required disclosures were transmitted to a grower through a reliable means of communication, and the grower's signature should not be required as evidence of receipt by the grower within the required time period. The Proposed Rule appears to require that the dealer obtain the grower's signature as evidence that the disclosures were provided within the required timeframe. However, a dealer cannot control whether a grower signs the disclosures. For example, mail delays, illness, internet outages, a grower's delay in opening mail or email, vacation, natural disasters, or even a grower's refusal to sign could all prevent a dealer from obtaining the signature required under proposed § 201.100(g)(2) despite timely delivery of the disclosures. AMS should revise any final rule to expressly allow dealers to show they used a

reliable means of communication to deliver a disclosure in a timely manner, such as placing the disclosure in the mail, sending it by email, or delivering it by hand.

E. Comments on proposed 7 CFR § 201.214.

1. Placement disclosures, § 201.214(b)

If the placement disclosures in proposed § 201.214(b) are included in a final rule, AMS should consider several points:

- **"Health impairments" requires clarification.** It is unclear what would constitute a health impairment of the flock or breeder flock under proposed § 201.214(b)(6). Health impairments requiring disclosure should at the most be limited to a medical diagnosis made in writing by a licensed veterinarian that could reasonably affect the growth and mortality of the broiler flock.
- **Third-party breeder information should be considered.** Some companies might obtain birds or eggs from third-party breeder operations, which might consider the identity of the source farm to be proprietary information or subject to a nondisclosure agreement. AMS should address how a dealer should make the placement disclosures when required information is unavailable to the dealer or when a dealer is prohibited by law or contract from providing the information.
- **Reinforce that adjustments are not required based on the disclosed information.** Proposed § 201.214(b)(7) references the disclosure of "Adjustments, if any, that the dealer may make to the calculation of the grower's pay based on the inputs in (1) through (6) of this paragraph." We understand this to mean that dealers are not required to make adjustments based on the referenced information and that a payment system that does not make adjustments based on this information would not be in violation of the PSA. We urge AMS to reinforce this point in any final rule.

2. Settlement disclosures, § 201.214(c)

Proposed § 201.214(c) requires disclosure of much of the same information as called for in § 201.214(b), and the issues raised in the above discussion apply to proposed § 201.214(c) as well. Moreover, dealers already provide the information used to calculate a grower's payment under their contracts. Providing the additional information called for in proposed § 201.214(c) is unnecessary and would be confusing to the extent the information is not actually part of the contracted-for settlement calculation. If this disclosure were included in a final rule, AMS should address the following:

- **Include proper context for the information.** Because disclosing at settlement information not actually used to calculate payment could be confusing, dealers should be permitted to include a statement providing context around the information, including a statement that the disclosures address only a limited number of factors and that the disclosed factors are unlikely to fully or even substantially explain a grower's relative performance.
- **Clarify how to address multiple housing types.** It is unclear how a dealer should address in the comparison sheets situations involving different housing types on the same farm. AMS should clarify this and other situations that do not fit neatly into the scenarios contemplated in the Proposed Rule.

- **Clarify situations in which not all chicks are sexed.** AMS should provide clarity on how to address situations in which the sex of birds may be known for some but not all of the growers in the settlement pool.
- **Clarify feed disruption.** AMS should clarify exactly when a feed disruption occurs, such as when the feed lines have run completely empty. AMS should also address how to handle a situation in which all participants in the settlement pool experienced substantially the same feed interruption (for example, in the case of a natural disaster that affected all growers in the settlement pool).

* * *

NCC appreciates the opportunity to comment on the Proposed Rule. Please feel free to contact us with any questions. Thank you for your consideration.

Respectfully submitted,

Mike Brown
President
National Chicken Council

Enclosures

Appendix A: T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022).

Appendix A

T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022)

Live Chicken Production Trends

Dr. Thomas E. Elam

President FarmEcon LLC

thomaselam@farmecon.com

March 2022

Disclosures: This study was prepared for the National Chicken Council. FarmEcon LLC was compensated for its preparation.

Live Chicken Production Trends, 2022 Revision

Introduction

This study presents the results of a 2022 broiler industry survey designed to capture 2021 key live chicken production statistics. The survey was designed by FarmEcon LLC and data were collected from National Chicken Council (NCC) member companies. Conclusions drawn are those of FarmEcon LLC. Statistics collected from the responding companies included:

1. Number of live chicken production farmers;
2. Current contract duration;
3. Farmer tenure;
4. Newly granted contract duration;
5. Farmer age;
6. Farmer family experience in live chicken production;
7. Number of persons on waiting lists for entering live chicken production;
8. Existing farmers wishing to expand current operations;
9. 2021 farmer turnover by major reason for departure and;
10. Variability of average live chicken contract fees compared to beef and pork prices.

In addition, the study summarizes several key trends in broiler production efficiency and returns. Loan quality data for live chicken producers will be discussed.

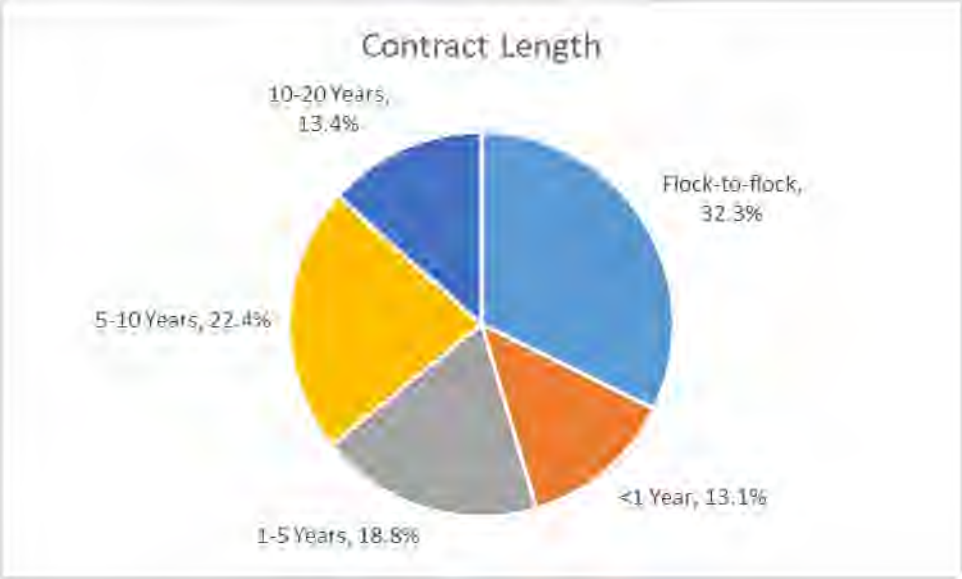
Studies on broiler farmer returns and loan quality are not revised. There are no updates available for these two studies that this study utilized in 2015. However, more recent USDA 2021 poultry farmer financial returns data were found and are cited.

Survey Results

The survey was collected during early 2022. Twenty companies representing 83% of 2020 top 32 U.S. chicken company production as reported by Watt Publishing responded[1].

1. Companies responding to the survey reported on 8,971 live chicken farmers. The reported farmers held 10,921 production contracts. The 83% response rate implies that the survey is very representative of all 32 top chicken companies.

2. Companies responding reported current contract duration, in years, as shown below.



The 32% flock-to-flock percentage is 10 points lower than the 42% reported in a 2015 NCC survey done for the prior version of this report. Other contract durations are correspondingly higher than the prior report.

Flock-to-flock contracts have no obligations for either party past the current flock being grown. These contracts have been criticized for not offering farmers long term assurance of live chicken production with their current company. However, long term contracts also can be canceled for poor performance and not meeting contract terms. In reality, a multi-year contract offers little additional assurance over a flock-to-flock contract. Regardless of stated contract duration, both parties need to agree that the arrangement is beneficial if the contract is to continue.

Companies reported that long term contracts are required, and granted, for new construction. In most cases these contracts run for 10 years or longer as required by lenders.

3. Respondents reported on the length of time that their current farmers have been with their company. Results are shown in the graph below.

More than half the farmers have been with their current company for 10 years or more. Almost three-quarters have been with the same company for 5 years or more. These results are almost identical to the prior version of this report.

4. Companies reported on contract duration for newly granted contracts. Responses fell into two broad categories. For contracts granted on newly constructed houses, whether expansion or for a new farm, contracts are granted to satisfy any lender requirements. That was reported to be generally 10 to 15 years. At the other end of the spectrum, many new contracts were granted on a flock-to-flock basis on existing farms with no lender requirements involved. Several companies also reported new multi-year contracts are granted even without a lender requirement involved.

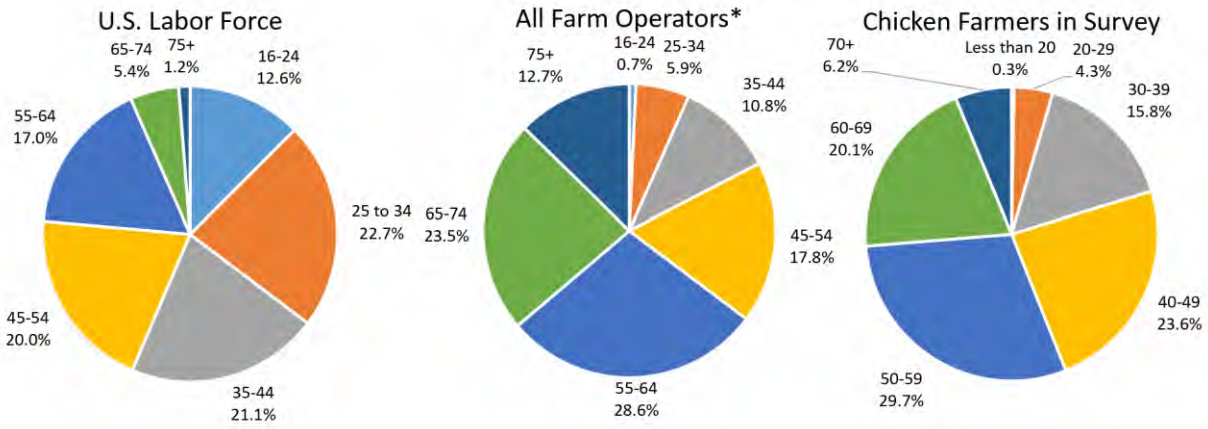
5. Companies reported on the ages of their current farmers. The results for those who track this data show that the vast majority, 80%, of farmers are 40 years old or older. Only 14 farmers were reported to be under 20 years old. This age structure together with the length of time farmers have been with a company is seen as implying that live chicken production is dominated by experienced live chicken producer owner-operators.

   The live producer age structure implies that these farmers are in the business for the long term. It also implies that current farmers are, for the most part, financially sustainable and stable. The relatively few farmers under the age of 30 implies that entry may be somewhat difficult for that age group.

   In contrast to the overall U.S. labor force[2], but in common with all farm operators, chicken farmers have relatively few participants in the under-30 age cohorts. Except for the oldest cohorts, chicken farmers and all farm operator[3] ages are much more comparable.

Ages of chicken farmers indicate that they are generally typical of other farmers but leave chicken farming at a somewhat earlier age. This can be attributed to factors such as ability to finance earlier retirement, time demands of chicken raising, or that farm operators outside chicken farming may remain part-time farm producers longer into their later years. The relative lack of younger people in farming reflects the difficulty of financing a farm at an early age versus obtaining employment in other sectors. It is often the case that entry into farming happens as a result of an aging farm operator within the family of the entering farmer being replaced by a younger family member.

Age cohorts for the overall labor force, all farm operators, and chicken farmers of the surveyed companies are shown in the graphs below.



*Operators whose principal occupation is farming, 2017 Census of Agriculture

6. Companies reported on current farmer family experience in contract chicken production. Of the current farmers 26% were reported have to have had a family background in this type of farming.

7. Companies reported that they have 1,672 applications from potential live chicken producers who would like to get into chicken production. Those applications are 19% of the current farmers reported. This statistic is an indication of the attractiveness of this type of farming for those not involved in it today.

   Also reported were 335 open applications from existing farmers for expansion of their existing operations.

   Taken together, these responses indicate active expansion and investment interest on the part of potential and current farmers. Indirectly the interest level shows that a significant number of persons outside and inside live chicken production regard it as an attractive farming option and investment opportunity.

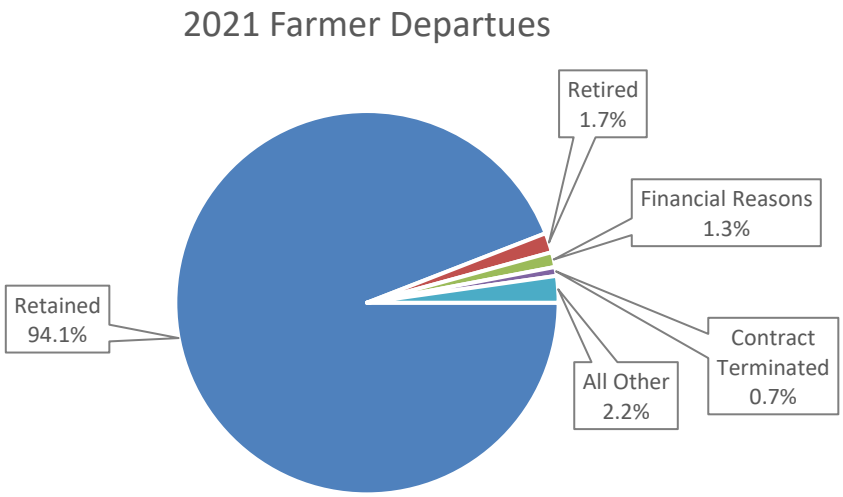
8. Companies reported on reasons for 2021 farmer departures. There are many and varied reasons that farmers might leave a chicken company. These, include among others, retirement, financial distress in the farming operation, declining health, farm

catastrophes, to take an offer from another company, and contract termination by a company.

9. Unfortunately, as in any business arrangement, not every partnership works out to the satisfaction of both parties. In the chicken farming business, we see both sides of this fact. Producers can and do leave a company for what they regard as a better opportunity with another company. Companies have the right to terminate a farmer that is not meeting their performance expectations or is not otherwise living up to the terms of the contract.

   The least likely reason, accounting for only 0.7%, for a farmer leaving broiler production was contract termination on the part of their company. There are several reasons for a contract termination, but the major ones are poor bird performance and failure to adhere to contract terms.

   Put into a perspective of the total number of contract producers and reasons for their leaving a company, contract termination was the least numerous in 2021. Results of the survey are presented in the graph below.



   In 2021 563, or 6.3%, of live chicken farmers left their company. The “All Other” category includes farmers who moved to a different company. In many cases farmers who left chicken production sold facilities that remained in production after that farmer departed chicken raising. Only if a production facility is so obsolete that it is not financially attractive to keep it in production is it normally abandoned.

   Though not directly comparable, employee turnover due to job separations in the overall economy averages 3-4% per month[4]. The 6.3% contract farmer figure is for an entire year, and includes retirements. The major difference between employee turnover and live chicken production is that the chicken farmer has a significant financial

investment at risk in the business whereas most employees do not. That farm investment makes chicken farmers, and farmers in general, less mobile than employees.

Live Chicken Production Technical Performance

The table below shows selected average live chicken performance trends since 1925[5].

	Market Age	Market Weight	Average Daily Gain	Feed to Meat Gain	Feed Per Bird	Mortality
Year	*Average Days*	*Pounds, Liveweight*	*Grams*	*Pounds of Feed per Pound of Live Broiler*	*Pounds Feed Per Broiler*	*Percent*
1925	112	2.50	10.12	4.70	11.75	18.00
1935	98	2.86	13.24	4.40	12.58	14.00
1940	85	2.89	15.42	4.00	11.56	12.00
1945	84	3.03	16.36	4.00	12.12	10.00
1950	70	3.08	19.96	3.00	9.24	8.00
1955	70	3.07	19.89	3.00	9.21	7.00
1960	63	3.35	24.12	2.50	8.38	6.00
1965	63	3.48	25.06	2.40	8.35	6.00
1970	56	3.62	29.32	2.25	8.15	5.00
1975	56	3.76	30.46	2.10	7.90	5.00
1980	53	3.93	33.63	2.05	8.06	5.00
1985	49	4.19	38.79	2.00	8.38	5.00
1990	48	4.37	41.30	2.00	8.74	5.00
1995	47	4.67	45.07	1.95	9.11	5.00
2000	47	5.03	48.54	1.95	9.81	5.00
2005	48	5.37	50.75	1.95	10.47	4.00
2006	48	5.47	51.69	1.96	10.72	5.00
2007	48	5.51	52.07	1.95	10.74	4.50
2008	48	5.58	52.73	1.93	10.77	4.30
2009	47	5.59	53.95	1.92	10.73	4.10
2010	47	5.70	55.01	1.92	10.94	4.00
2011	47	5.80	55.98	1.92	11.14	3.90
2012	47	5.85	56.46	1.90	11.12	3.70
2013	47	5.92	57.13	1.88	11.13	3.70
2014	47	6.01	58.00	1.89	11.36	4.30
2015	48	6.12	57.83	1.89	11.57	4.80
2016	47	6.16	59.45	1.86	11.46	4.50
2017	47	6.20	59.84	1.83	11.35	4.50
2018	47	6.26	60.42	1.82	11.39	5.00
2019	47	6.32	60.99	1.80	11.38	5.00
2020	47	6.41	61.86	1.79	11.47	5.00
%1925-2020	-58%	156%	511%	-62%	-2%	-72%

Over the entire 1925-2020 span there was a steady improvement in live chicken performance. In recent years the industry has held average days to market steady and allowed improved ADG performance to be expressed as higher average market weights. The result has been a bird that is 156% heavier than 1925 on about the same amount of feed and in 58% fewer days. This improvement is due to both investments by chicken companies and the financial incentives offered in the contracts between the companies and their farmer partners.

Feed-to-gain improvement has slowed since 1995. This is entirely due to raising birds to ever-heavier weights at a constant 47-48 average days of age. Note that while days to market

stopped declining, average market weights accelerated. All else equal, as chicken weights increase FCR performance tends to decline. Maintaining FCR at increasing average weights over time is actually a significant performance improvement. As will be shown below, increasing average weights at 47-48 days has also been a significant benefit for chicken farmers.

Death loss declines were rapid until about 1960 but have plateaued at 4-5% in recent times.

The next table translates chicken productivity increases into live pounds per square foot produced in farmer facilities and grower payments in current and 2012 dollars.

Year	Average Grower Payment, Cents/Lb., Current Dollars	Average Grower Payment, Cents/Lb., $2012	Live Young Chicken Production, 000 Pounds	Total Grower Payments, $2012, 000	% Change	Live Pounds Per Sq. Foot	Average Grower Payments, Per Sq. Foot, $2012
1990	4.08	6.33	25,549,696	$1,617,672	4.8%	33.12	$2.10
1991	4.11	6.19	27,170,780	$1,680,540	3.9%	33.44	$2.07
1992	4.14	6.10	28,997,878	$1,768,320	5.2%	33.77	$2.06
1993	4.22	6.08	30,474,243	$1,851,444	4.7%	34.09	$2.07
1994	4.23	5.96	32,765,941	$1,954,314	5.6%	34.77	$2.07
1995	4.32	5.97	34,352,980	$2,051,491	5.0%	34.93	$2.09
1996	4.30	5.84	36,034,815	$2,104,723	2.6%	34.75	$2.03
1997	4.46	5.96	37,207,401	$2,219,110	5.4%	34.87	$2.08
1998	4.53	5.99	38,054,849	$2,280,572	2.8%	35.26	$2.11
1999	4.68	6.09	40,444,167	$2,463,925	8.0%	36.09	$2.20
2000	4.78	6.07	41,293,525	$2,508,363	1.8%	36.23	$2.20
2001	4.87	6.07	42,335,507	$2,569,145	2.4%	36.03	$2.19
2002	4.81	5.89	43,715,247	$2,575,580	0.3%	34.64	$2.04
2003	4.90	5.88	44,317,531	$2,606,601	1.2%	37.22	$2.19
2004	5.04	5.88	46,109,201	$2,709,460	3.9%	38.56	$2.27
2005	5.24	5.92	47,578,696	$2,814,545	3.9%	39.15	$2.32
2006	5.39	5.93	48,332,516	$2,863,716	1.7%	38.97	$2.31
2007	5.43	5.82	49,089,999	$2,856,088	-0.3%	38.56	$2.24
2008	5.64	5.93	50,441,600	$2,992,748	4.8%	38.84	$2.30
2009	5.62	5.90	47,752,300	$2,816,920	-5.9%	38.19	$2.25
2010	5.67	5.85	49,152,600	$2,877,597	2.2%	38.48	$2.25
2011	5.78	5.86	50,082,400	$2,932,593	1.9%	39.40	$2.31
2012	5.85	5.81	49,655,600	$2,883,515	-1.7%	39.07	$2.27
2013	5.93	5.78	50,678,200	$2,931,633	1.7%	39.12	$2.26
2014	6.19	5.94	51,378,700	$3,053,616	4.2%	39.52	$2.35
2015	6.27	5.97	53,376,200	$3,187,929	4.4%	40.03	$2.39
2016	6.42	6.03	54,259,100	$3,271,137	2.6%	39.93	$2.41
2017	6.63	6.10	55,573,900	$3,390,586	3.7%	39.04	$2.38
2018	6.84	6.15	56,797,700	$3,494,614	3.1%	38.31	$2.36
2019	6.93	6.13	58,259,100	$3,573,514	2.3%	38.08	$2.34
2020	7.02	6.13	59,405,600	$3,644,069	2.0%	38.09	$2.34
% Increase	**72.1%**	**-3.1%**	**132.5%**	**125.3%**	**NA**	**15.0%**	**11.4%**

Farmers have benefited from this improved performance. The investments made in genetics and feeds by their companies have increased the throughput of their facilities, resulting in increased production per square foot of their chicken housing. The table above shows how that increased performance has expressed itself in increased constant dollar farmer payments per square foot of their owned chicken housing[6]. Payments per square foot in 2012 dollars did decline slightly between 2016 and 2020 as companies changed to slightly slower growing breeds.

While average current dollar farmer payments per pound of chicken have increased 72% since 1990, corrected for overall inflation, those payments have declined slightly. However, a 15% increase in average pounds of chicken production per square foot of farmer-owned housing has more than compensated for the decline in inflation-corrected payments per pound. Though declining slightly in recent years, the overall result is that inflation-corrected annual farmer payments per housing square foot have increased over 11.4% since 1990.

The gains reflect both company investments in chicken performance and farmer improvements their housing required to take advantage of that increasing chicken performance capability.

While farmer payments per pound are highly visible to both farmers and their companies, payments per square foot are not. Arguably, payment per square foot is a much better farmer payment and return on investment metric than payment per pound of chicken raised.

Contract farmers and their companies have mutually benefited from the investments that have improved bird performance. Farmers who focus on payment per pound of chicken could be looking at a more meaningful metric that includes both a payment per pound measure and the productivity trend of their housing investment.

Live Chicken Producer Income Stability

Survey data were collected for 2020-2021 monthly average chicken farmer payments per pound of live chicken production. From these data the average, standard deviation and coefficient of variation (CV) were calculated. The average over all months and all companies was 6.76 cents per pound, the standard deviation was 0.11 cents per pound, resulting in a CV of 1.6%. This overall CV is a statistical measure of the variation in monthly average payments relative to the two-year average. It has little meaning unless compared to other CV statistics for similar data.

Spreadsheet data for U.S. average cattle and hog prices were obtained from the Economic Research Service of USDA and CV was calculated for each[7].

For all slaughter cattle prices reported in the spreadsheet the average was $1.42 cents per pound, standard deviation $0.19 and CV was 13%. For hogs the average was $0.55 per pound, standard deviation $0.16 and CV 29% .

Cattle and hog prices represent the payments to producers for each pound of live animal delivered to market. In that respect they are similar to broiler farmer fees received from broiler companies. However, in another respect broiler payments are different. Cattle and hog prices are market-based. Broiler farmer fees are contract-based. Broiler farmer fees paid to individual farmers are subject to variation around the contract average based on terms and conditions that determine premiums and discounts based on broiler performance. However, overall cattle and hog average prices also do not reflect variation in individual producer prices received based on live animal quality that also result in price premiums and discounts.

Also, cattle and hog producers pay for feed and the animals they raise out of their income stream. Broiler farmers receive feed and chicks from their companies at no cost.

The conclusion is that overall average producer payments per pound of live animal produced are much less variable for broiler farmers than payments to cattle and hog producers.

Live Chicken Producer Financial Performance

Statistics on live chicken producer returns are not routinely gathered by USDA or any known university farm records systems. In 2011 USDA did conduct a special financial survey that included live chicken farmers. Results of that survey are detailed in an August 2014 article by USDA economist James MacDonald[8]. This study is reported here for historical context.

The survey showed that farmers who raise broilers under contract generally realize higher average incomes than other farm households and other U.S. households. However, the range of household incomes earned by broiler farmers is also wider than other groups.

MacDonald compared average incomes using the median, at which half earn less than and half earn more. In 2011, the median income among all U.S. households was $50,504, while the median income among farm households was $57,050. The $68,455 median for chicken farmers was significantly higher than both all farm households and all U.S. households. Sixty percent of chicken farmers earned household incomes that exceeded the U.S.-wide median.

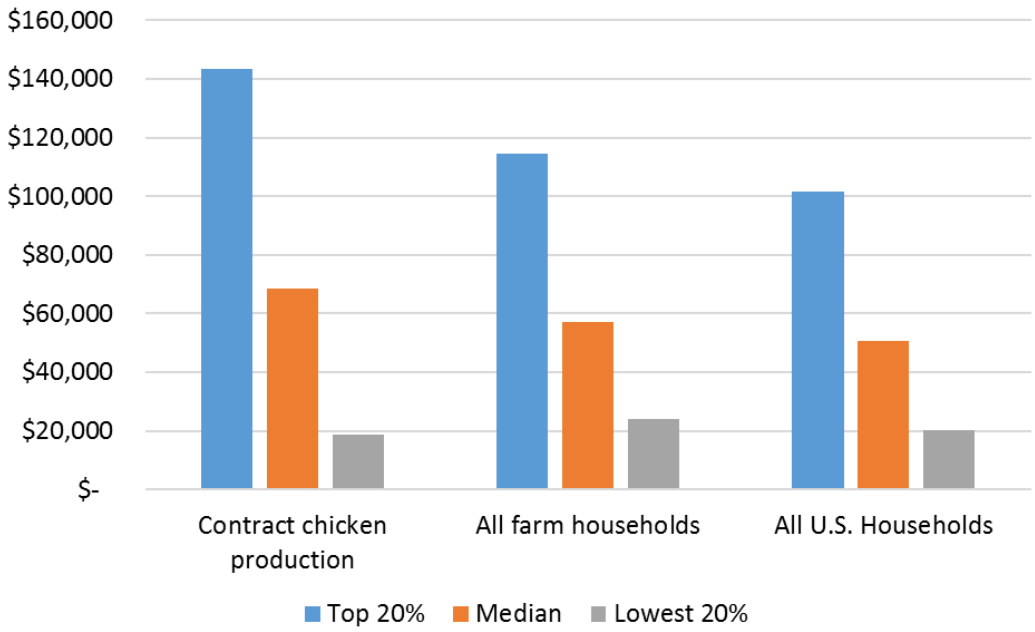
In part the higher income spread was due to a wide scale of live chicken production among chicken operations. Larger producers may also be better at raising chickens and receive higher payments per pound based on their higher-than-average performance. Similar to all businesses, those who are most successful at raising chickens will tend to earn more income than those who are less successful.

MacDonald also points out that the contracting system has substantially reduced some financial risks borne by contract farmers. Feed, medication and baby chick costs are the responsibility of the chicken company. As MacDonald points out, “These risks are not small; feed prices rose or fell by at least 5 percent in 11 of the 60 months between January of 2009 and December of 2013. Poultry companies also bear production risks that commonly affect farmers. For example,

if weather or disease affects mortality among all farmers, base payment rates remain the same."

Comparing the top 20% of live chicken farmer returns to the same statistic for other farm households and all U.S. households shows a significant advantage for top performing contract chicken producers. Median incomes are also higher for chicken farmers, while at the bottom end, the lowest 20% are slightly lower than all farms, but comparable to the U.S. average. Chicken farmer incomes have a wider range than all farms and all households, but this is almost entirely due to the significantly higher level of the top 20% of chicken farmer incomes.

The graph below shows the results for these three income categories.



As this is only one year of data the results need to be viewed with some caution. Farm incomes, especially for farms not selling on contracts, can vary widely from year to year. Still, the results do tell a story about the relative returns of live chicken production. At the top end and on average, well-run chicken farms tend to earn significantly more than both the average U.S. farm and U.S. non-farm household.

Recent USDA data also show that over the last decade poultry farms have on average financially outperformed the average farm. From 2010 to 2021 average poultry farm net farm income was $59,800 compared to $38,200 for all farms[9]. The averages cannot be directly compared to the medians reported in the MacDonald report but directionally the conclusion is the same.

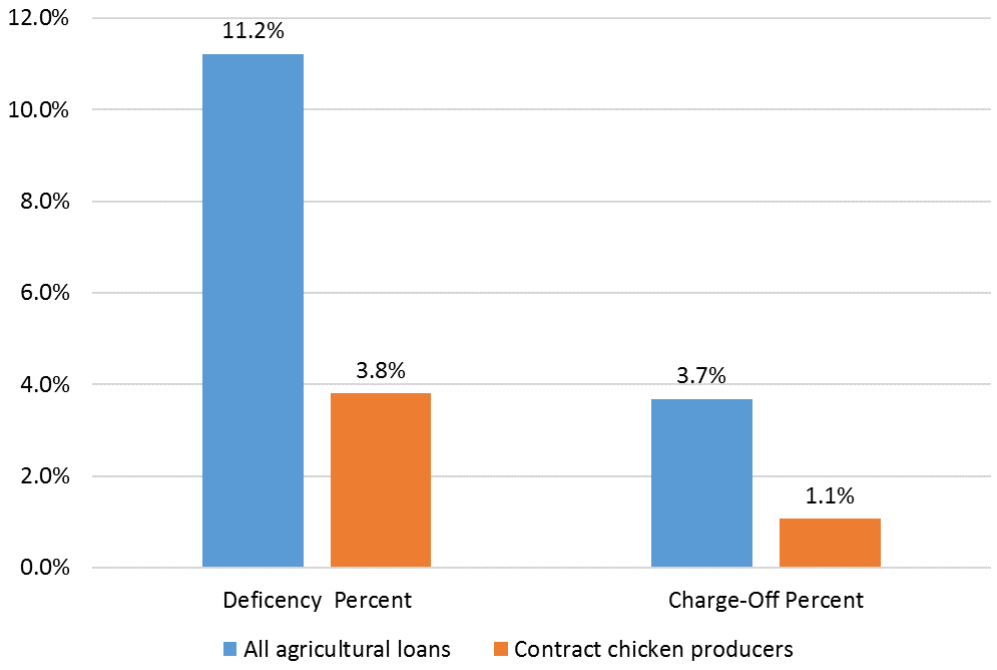
Comparative Live Chicken Production Loan Performance

Available agricultural lender statistics also strongly support the USDA survey showing that live chicken production has favorable returns compared to other farming activities.

In 2015 NCC obtained loan quality data from the Small Business Administration, a significant lender to live chicken producers. The data showed significantly lower charge off and deficiency percentages for chicken producers compared to all agricultural loans.

The deficiency rate for live chicken farmers was about one-third the rate for all agricultural loans, and the charge-off rate was less than 30% of all agricultural loans.

These loan results also support the financial advantages of contract chicken production compared to other types of farming operations. The following graph summarizes an overview of these data[10]. The vastly different chicken farmer loan results are largely due to the lower level of cost and income risks that are the result of the specific contracting arrangements between chicken farmers and their companies.



Summary and Conclusions

Data from the NCC survey and evidence from third party sources all show that live chicken production is broadly and generally being run by a group of effective and experienced farmers. Chicken farmers generally have higher incomes compared to all farms and all U.S. households, and have an age structure that is similar to all farm operators. Compared to the entire U.S.

labor force both chicken farmers and all farm operators tend to be older than non-farm employees. This is seen as a result of the substantial financial investment often required to enter farming.

The 2021 turnover rate of chicken farmers was 6.3%, the majority of which was voluntary or due to external factors beyond the control of companies and farmers.

Responding companies also reported significant waiting lists for those who would like to enter live chicken production or expand existing operations.

An analysis of farmer payment data obtained from Agri Stats showed that inflation-corrected farmer payment rates per square foot of farmer owned housing have increased over time. The increase is due to improved bird daily weight gain performance that has increased with no significant effect on feed used per bird. Chicken companies who furnish the feeds have benefited from the feed efficiency gains. Farmers who furnish live chicken housing have captured the benefits of increased growth rates.

The current contracting system has helped promote the steady improvements in live chicken performance that have benefited chicken farmers, the companies they produce for, and ultimately consumers. Both farmers and their companies benefit from those performance gains.

A USDA farm financial survey shows that broiler producers generally have significantly higher incomes than all other farming enterprises and the average U.S. household. The lowest 20% of contract farmer incomes are only slightly less than the similar statistic for all U.S. households, but lower than bottom 20% of all farm operators.

SBA farm loan data show much lower loan deficiency and charge-off rates for live chicken production than all agricultural loans. These data support the findings of the USDA survey.

Agri Stats data show that inflation-corrected farmer income per square foot of chicken housing has benefited financially from increases in chicken growth rate performance. Higher growth rates are primarily the result of breeding investments made by chicken companies and farmer investments in their own operations that help chickens realize their improving genetic potential. Average daily gains have decreased in the last few years, but have been partially offset by higher payments per pound.

Viewed in totality, live chicken production is a viable, mutually beneficial and attractive farming enterprise for the vast majority of farm families who raise chickens in partnership with the companies they work with.

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[1] Watt Publishing. *Poultry USA*. "2020 Top Poultry Companies." March, 2021. Pp 14-50.
[2] U.S. Bureau of Labor Statistics. Employment database found at http://www.bls.gov/cps/cpsaat03.htm. Accessed 2/27/2022.
[3] USDA. 2017 Agricultural Census report found at USDA/NASS Census of Agriculture Chapter 1, Table 52. Accessed 2/27/2022.

[4] U.S. Bureau of Labor Statistics. Job Openings and Labor Turnover Summary. Job Openings and Labor Turnover Summary - 2021 M12 Results (bls.gov). Accessed 2/28/2022.
[5] Source: 1925-2020 NCC: http://www.nationalchickencouncil.org/about-the-industry/statistics/u-s-broiler-performance. Accessed 12/17/2021
[6] Sources: Agri Stats bird performance data, obtained 2/1/2022. GDP deflator, 2012=100, obtained from the U.S. Bureau of Economic Analysis at https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey. Accessed 2/15/2022.
[7] USDA/ERS. Historical Livestock Prices Spreadsheet. LivestockPrices.xlsx. Accessed 3/1/2022.
[8] MacDonald, James. "Technology, Organization, and Financial Performance in U.S. Broiler Production." USDA. Economic Information Bulletin Number 126. June 2014. Found at Technology, Organization, and Financial Performance in U.S. Broiler Production (usda.gov). Accessed 2/1/2022.
[9] USDA, Agricultural Resource Management Survey. Found at USDA ERS Reports. Accessed 3/7/2022.
[10] Source: NCC. Data obtained from Government Loan Solutions, Inc. 9/11/2015

EXHIBIT 3

NCC Comments to Docket No. AMS-FTPP-21-0046 Poultry Growing Tournament System Fairness and Related Concerns (Sept. 6, 2022)

NATIONAL CHICKEN COUNCIL

1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622

September 6, 2022

Submitted electronically via regulations.gov

Bruce Summers
Administrator
Agricultural Marketing Service
United States Department of Agriculture

Docket Clerk
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Re: Docket No. AMS-FTPP-21-0046, Poultry Growing Tournament Systems: Fairness and Related Concerns

Dear Mr. Summers:

The National Chicken Council (NCC) appreciates the opportunity to provide comments on the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) advance notice of proposed rulemaking entitled, "Poultry Growing Tournament Systems: Fairness and Related Concerns" (ANPR).[1] NCC is the national, non-profit trade association that represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. NCC members would be directly affected by changes to poultry grower contracting, including those contemplated in the ANPR.

As explained in more detail in these comments, NCC strongly opposes further rulemaking by AMS regarding the current poultry grower contracting system. In addition, we incorporate by reference our comments filed on August 23, 2022, to docket No. AMS-FTPP-21-0044 regarding AMS's Transparency in Poultry Grower Contracting and Tournaments Proposed Rule.[2] NCC is deeply concerned that changes to, or elimination of, the tournament system would have a

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[1] 87 Fed. Reg. 34814 (June 8, 2022), https://www.govinfo.gov/content/pkg/FR-2022-06-08/pdf/2022-11998.pdf.

[2] NCC Comments to Docket No. AMS-FTPP-21-0044, Comment ID AMS-FTPP-21-0044-0487 (Aug. 23, 2022), https://www.regulations.gov/comment/AMS-FTPP-21-0044-0487.

devastating financial impact on the U.S. chicken industry by raising costs, contributing to increased food prices for consumers, and ultimately destabilizing a successful compensation system. NCC urges AMS to refrain from further steps that would undermine a successful compensation system.

I. The Current Poultry Grower Contracting System Is a Well-Designed, Efficient Structure That Benefits Growers, Dealers, and Consumers

NCC supports the current poultry grower compensation system and champions it as a structure that fairly rewards family farmers for efficient use of resources and innovation in raising high-quality birds. The current system's fair, honest contracts provide a target pay that high-performing growers can supplement with the efficient use of resources. This system promotes superior results that lower chicken-raising costs, encourage efficient use of resources, and benefit growers, live poultry dealers ("dealers"), and consumers.

To briefly describe the performance structure, dealers deliver broiler chicks to growers on the day the chicks hatch. Growers raise the chicks into broilers using feed, veterinary care, and other consultants like animal welfare experts that are provided by the dealer. Growers are responsible for providing quality housing, farm maintenance, on-farm inputs, and day-to-day care of the broilers.

In a typical grow-out contract, growers and dealers agree on a pre-determined target price per pound of weight gain based on an average. The specifics vary, but growers are usually either paid the target plus a bonus for high performance, or grower payments are adjusted slightly upward or downward from the target based on relative performance. Overall, regardless of the approach taken, growers earn a predictable payment plus the opportunity to earn a bonus for strong performance. This approach rewards skilled growers who have honed their management practices to most efficiently raise healthy birds.

The tournament system's incentive-based pay structure rewards grower efficiency and innovation and promotes bird welfare.

The current poultry grower compensation system operates like any arrangement between a business and a service provider, where a service provider competes with others to provide the best services as efficiently as possible to increase the provider's net compensation and where businesses compete to secure the best service providers at profitable rates. Growers are provided the same quality resources—broilers, feed, access to veterinary care and consulting—and use their farming skills to produce high-quality birds at the lowest cost. This rewards-based system allows dealers to incentivize efficient use of resources, innovation in management practices, and grower investments in housing and care.

Growers not only take seriously their responsibility to ethically raise their birds, but, through the current compensation system, they also have every business incentive to ensure their birds are well-cared for. Properly cared-for birds experience optimal growth rates and have lower mortality, both of which increase a grower's pay. This contract structure allows the well-being of birds to be a dealer's and grower's top priority because incentives are given to farmers who raise the healthiest, highest-quality birds. Similarly, dealers have every incentive to make sure their growers succeed and produce healthy, quality birds. If a dealer sees a flock struggling or identifies opportunities to increase efficiency, the dealer will provide the grower with assistance through technical experts that are familiar with the breed, business, and growing conditions to help the grower maximize his or her potential.

This process results in a highly efficient market and contributes to the global cost-competitiveness of U.S. chicken meat. Chicken meat is a wholesome, nutritious lean protein that has never been more affordable in the U.S., both on a real-dollar basis and when viewed against a typical household's overall buying power. This is despite the immense inflationary pressures facing consumers and businesses from all directions.

The tournament system efficiently allocates risk to the parties best equipped to handle it.

The current poultry grower contracting system has evolved to efficiently allocate economic risk to the parties best prepared to burden it. In fact, data show that chicken companies remove approximately 97 percent of the economic risk from growers as compared to independent growers.[3] Dealers supply growers with a variety of necessary inputs, including broiler chicks, feed, medication and veterinary care, technical advice, and other resources. This removes much of the economic risk from factors like shifting feed prices and market uncertainty from contract growers to dealers, whereas independent growers would shoulder the entirety of that risk themselves. If feed prices skyrocket during a contract term, or weather or disease affect mortality rates among all growers, the contracted-for grower base payments would not change.

Many of the capital-intensive inputs listed above benefit from large-scale purchasing. For example, broiler chicks themselves are expensive inputs, given the advanced genetics and breeding management required to produce them. Dealers operate at scale and are best equipped to manage the complicated chick supply chain, including hatcheries and grandparent flocks of sufficient size and scale to supply all their farms. It would be impossible for an individual farmer to source chicks with anywhere near the same consistency and efficiency as dealers. The contract structure also protects buyers from needing to find a market for the birds once fully raised. The contract terms remain in effect for the duration of the agreement, regardless of whether demand for chicken meat plummets and affects a dealer's profits. A grower will always get paid for the birds he or she raises and does not have to face the risk of investing heavily in a flock only to have the market crater when it comes time to harvest those birds.

Another major input dealers supply that presents significant risks is feed. Feed is typically the greatest input cost in raising chickens. Dealers secure or produce feed at significant scale and volume, and they do so with their specific bird breeds or customer specifications in mind. In particular, a major ingredient in chicken feed is corn, which regularly experiences significant price fluctuations, depicted in Figure 1 below. These price fluctuations result from government policies like Renewable Fuel Standard mandates, competing end-users, geopolitical events, and droughts and other major weather events. These price fluctuations could be catastrophic for individual farmers if they had to secure feed on the open market. But under the current system, dealers have the scale and resources, including access to sophisticated hedging strategies, to secure feed at favorable prices and they are better positioned to absorb unexpected increased feed costs. Grow-out contracts are agnostic to feed prices, and the grower is insulated from these potentially devastating input risks.

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[3] C.R. Knoeber & W.N. Thurman, *"Don't Count Your Chickens…": Risk and Risk Shifting in the Broiler Industry*, 77 Am. J. Agricultural Econ. 486, 496 (1995).

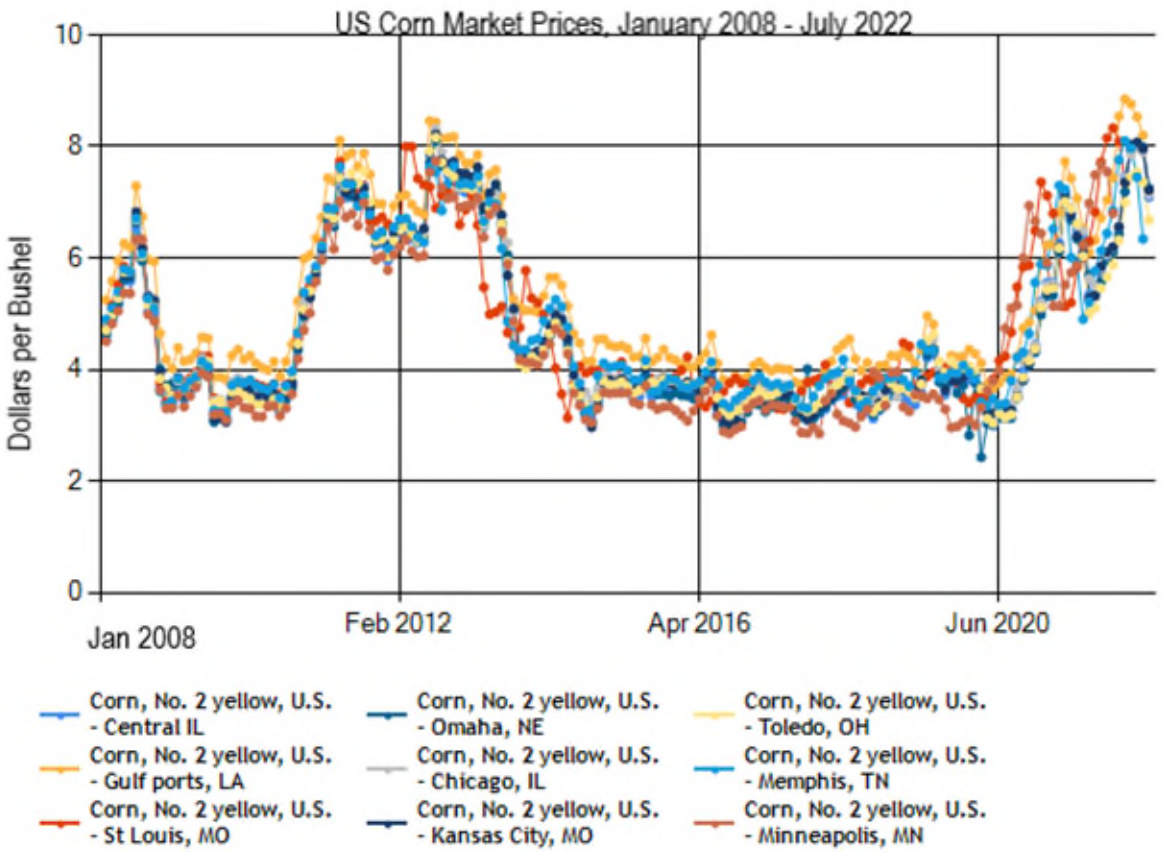

Figure 1, Corn Prices in U.S. Markets, January 2008 – July 2022.[4]

Similarly, dealers are best equipped to secure medication and veterinary care for the chickens. Rather than requiring each grower to retain a veterinarian, schedule veterinary visits, and obtain medication, dealers coordinate veterinary care to ensure birds are well cared for. Alleviating growers from arranging veterinary care also ensures that a grower's economic incentive is aligned with protecting bird health. Whereas an independent grower might have an economic incentive to pay for veterinary services only when it is absolutely clear that care is necessary, contract growers have every incentive to reach for veterinary services whenever they might be needed, better protecting bird health overall. Additionally, because a dealer's veterinarians cover many growers, they are able to work at a more efficient scale and are extremely familiar with the type of birds they are caring for.

This arrangement removes the overwhelming majority of the economic risk that growers would otherwise face, allowing contract growers to dedicate consistent attention and resources to providing high quality care, land, and housing for their birds. This partnership dynamic promotes the economic vitality and independence of family farms by promoting stable and predictable income. As described in more detail in Section II, the benefits of this partnership

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[4] *Feed Grains Database,* USDA Economic Research Service (accessed September 1, 2022), https://www.ers.usda.gov/data-products/feed-grains-database/.

structure were highlighted during the industry's successes during the COVID-19 pandemic, where the industry maintained steady profits for growers even in serious economic uncertainty and supply chain disruptions.

The American poultry industry is the most competitive in the world in significant part because the poultry grower compensation system encourages innovation and investment in the best equipment and practices. NCC is proud to represent an industry that consistently and continuously produces affordable protein, even in times of soaring across-the-board inflation and economic distress that increase prices for consumers.

II. Data Show the Current Poultry Grower Contracting System Is Profitable and Works Well for Growers

NCC commissioned an independent study, published earlier this year by Dr. Tom Elam, that captures live chicken production statistics from 2021 and summarizes key trends in broiler production efficiency, returns, and loan quality data (the "Elam Study", attached as Appendix A).[5] The study incorporates the most recent publicly-available government data and analyzes the results of a recent survey of chicken growing contracts. The survey results indicate that current poultry grower contracting relationships are mutually beneficial, successful, and profitable for both growers and dealers.

Despite having options to work with different dealers, most growers have been with their current dealer for over 5 years.

Most growers are in a position to choose between partnering with two or more processors and can readily cut ties with a bad business partner. Over 50 percent of growers have been with their current dealer for ten years or more, a statistic unchanged from 2015, with an additional 20 percent (for a total of 70 percent) having been with their current dealer for over five years.[6] A majority of the contracts considered in the study were for five years or less, and one-third were for flock-to-flock arrangements. This shows that most growers, when presented with the opportunity to stay with their dealer or to test the market, find it better to stay with their dealer and renew their agreement.

In addition, only 6.3 percent of the study respondents' farmers left their company in 2021, a statistic that includes retiring growers.[7] A grower may part ways with his or her dealer for a variety of reasons, including retirement, financial distress, and declining health. Of the 6.3 percent of grower departures, only 0.7 percent was from growers leaving the industry due to contract termination by the dealer.[8] These data show that growers and dealers both willingly

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[5] T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022), https://www.nationalchickencouncil.org/wp-content/uploads/2022/03/Live-Chicken-Production-FARMECON-LLC-2022-revision-FINAL.pdf [hereinafter "Elam Study"].

[6] *Id.* at 3.

[7] *Id.* at 5.

[8] *Id.* A dealer may terminate a contract for various reasons, but most often the reason is tied to poor bird performance or failure to adhere to contract standards.

continue doing business after their initial contracts end and that exceedingly few growers see their contracts terminated, further showing the current partnership contracting system is mutually beneficial.

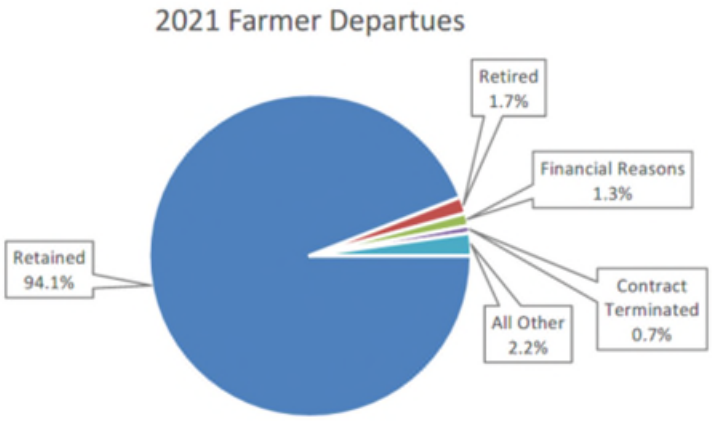

Figure 2, Reasons for Farmer Departures, 2021[9]

The features of the tournament system allow chicken growers to earn a profitable wage.

The Elam Study found that USDA data showed, in 2011, the $68,455 median income for chicken farmers was significantly higher than the median income of both U.S. farm households and U.S. households (not restricted to farm households). Sixty percent of U.S. chicken farmer household incomes exceeded the U.S.-wide median.[10] In addition, the top 20 percent of contract chicken farmers earn on average $142,000, significantly higher than the top 20 percent of all farm households ($118,000) and the top 20 percent of all U.S. households ($101,000), according to the same data.[11] Although USDA has not since updated the study reporting this data, there is every reason to believe that these trends have continued. For example, a different USDA dataset showed that, from 2010-2021, average poultry farm net farm income was $59,800, compared to $38,200 for all farms.[12]

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9 *Id.*

10 *Id.* at 9.

11 *Id.* at 10.

12 *Id.* This study used different data and is not directly comparable to the figures in the study reporting the 2011 income, although the same trend bears out—chicken farming generates more income than the average farming operation.

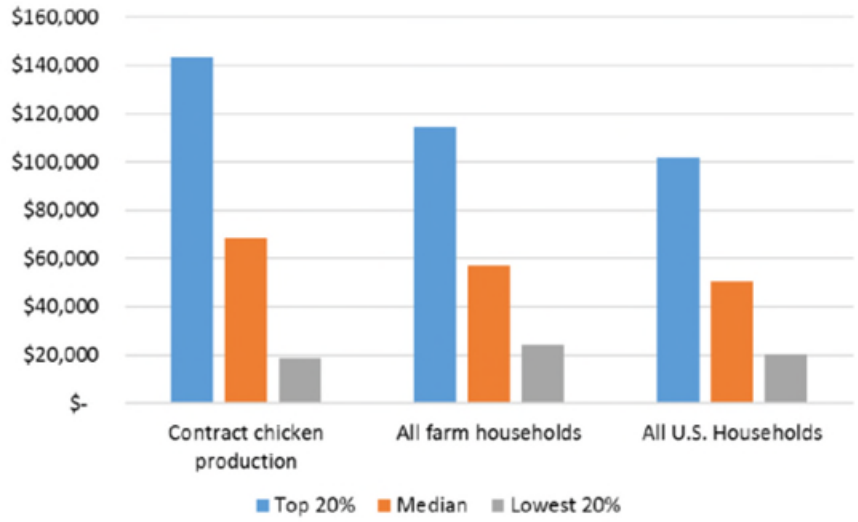

Figure 3, Income Variations Between Contract Chicken Production, All Farm Households, and All U.S. Households, 2011.[13]

The tournament system's features benefit the health and well-being of chickens.

In 2021, the average on-farm livability of a flock of U.S. broiler chickens was almost 95 percent, compared to only 82 percent in 1925.[14] This improvement in production practices is driven in large part by directly incentivizing growers to properly care for their birds.

Interest in entering the broiler growing industry remains high, showing that the industry can not only retain its current farmers but that there is room to grow.

The Elam Study's findings show interest in entering the broiler growing industry remains high. Companies responding to the survey reported significant waiting lists for entrepreneurs seeking to enter live chicken production or current farmers looking for opportunities to expand their operations. There were 1,672 applications from potential growers and 335 expansion requests from existing farmers.[15] These applications indicate a steady interest in entering contract chicken production and excitement about entering an industry with a reputation for profitable arrangements.

Default rates on loans for poultry growers and dealers are low.

As depicted in Figure 4, the Elam Study found that the deficiency percent and charge-off percent for poultry grower loans amount to merely one-third of the average agricultural loan,

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[13] *Id.* (referencing 2011 data from a USDA financial survey as analyzed by J. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA Economic Information Bulletin Number 126 (June 2014)).

[14] *Id.* at 6.

[15] *Id.* at 4.

based on Small Business Administration loan quality data.[16] The data overwhelmingly show that growers and their lenders can effectively and accurately evaluate expected income from poultry growing arrangements. Moreover, these data show growers can earn steady incomes from their growing arrangements that allow them to adequately service their debt obligations, directly dispelling any allegations that growers are somehow saddled with unsustainable debt loads.

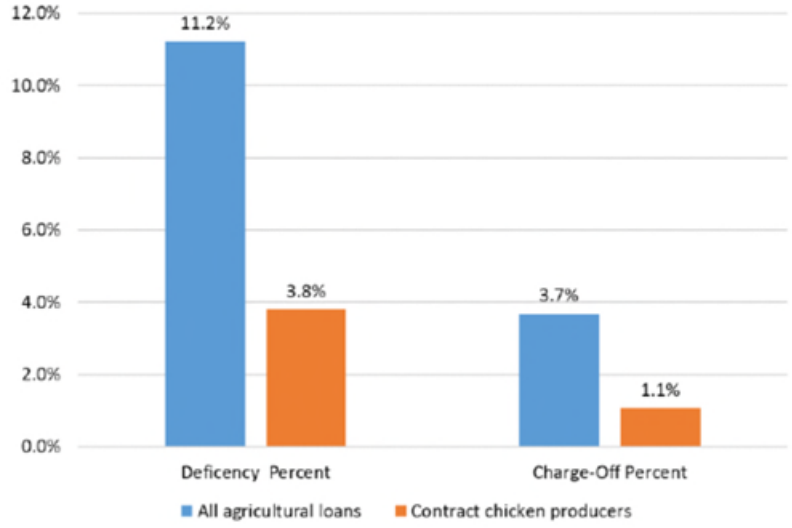

Figure 4, Default Rates for Contract Chicken Producers and All Agricultural Loans, 2015[17]

III. AMS's Changes to Poultry Grower Contracting Contemplated in the ANPR Suggest Fundamental Changes That Would Hobble Poultry Producers and Dismantle the Current Successful Compensation System

NCC is gravely concerned that the policy proposals telegraphed in the ANPR would impose substantial costs on the broiler industry and would undermine the functioning of the very successful grower compensation system. At a time when input costs are soaring and inflation continues to be a top concern for American households, AMS should avoid imposing regulatory burdens that would increase costs for producers and add costs to consumers, and under no circumstances should AMS destroy a highly successful economic structure. We highlight the following overall concerns and general comments regarding AMS's requests for comments in the ANPR:

- AMS poses questions in the ANPR that presuppose the current poultry grower contracting system is unfair or problematic. AMS appears to have made up its mind without even considering comments, and NCC urges AMS to take an unbiased approach to its rulemaking, especially considering the impression presented in the ANPR is far from accurate. Tellingly, no court has ruled that the current grower compensation system violates Section 202(a) of the Packers and Stockyards Act, nor has AMS taken

16 *Id.* at 11.

17 *Id.* at 11.

enforcement action on this basis despite the tournament system being in use for decades.

- Several of AMS's questions for comment in the ANPR appear to reflect ideas from earlier 2010 and 2015 rulemakings (75 Fed. Reg. 35338 (June 22, 2010); 81 Fed. Reg. 92723 (Dec. 20, 2016)) that were clearly rejected by Congress.[18] As multiple economic impact studies submitted to those dockets reflect, those proposals would have imposed costs on the industry in excess of one billion dollars (numbers that, due to inflation, would be significantly higher in 2022). Those proposals were misguided and costly when introduced and remain so today. To the extent AMS seeks to incorporate ideas from those previous rulemakings into future regulatory action, NCC urges the agency to account for these independent economic analyses and inflation when evaluating the costs on the industry and consumers.

- Existing market practices address or prevent many of the purported concerns AMS raises. Dealers have every economic and business incentive to promote the optimal growth of birds and maintain productive relationships with their growers. Because chicken processing plants are expensive and only provide sufficient return on investment if they operate at full capacity, dealers are further incentivized to maintain good reputations as a good business partner in order to attract new growers to their operation and maintain a consistent processing schedule. Processors that gain a reputation as bad business partners, including by attempts to manipulate a grower's performance or otherwise drive away growers, would quickly see their plants under-supplied and their grower pool taken by competitors. Lenders serve as an additional check on dealer business practices. Because many growers are financed by experienced lenders, lenders are intimately involved in scrutinizing the revenue expected under a growing arrangement, and they have a sophisticated understanding of the industry. Growers presented with unsustainable contracts would not be able to secure financing, which in turn would mean dealers would not have anyone to raise their birds. This provides a natural market force to reinforce the existing economic incentives toward fair and sustainable contracts.

- AMS appears to be to be overly concerned with contract termination. As explained in detail in Section I, dealers have every inventive to help growers raise high quality birds and meet their expectations under the contract. If there is a concern about growers meeting their contracted-for standards, dealers work with the growers and technical experts to address the issue and identify areas of improvement. In reality, and as explained above, less than one percent of contracts are terminated each year. These terminations are most often for animal welfare violations and failure to raise the birds properly.

- AMS should avoid any changes that eliminate the current system's ability to reward the top-performing growers. Eliminating performance-based pay would eliminate any

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[18] *See* Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 731 (2014); Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. § 744 (2014); Consolidated and Further Continuing Appropriations Act, 2013, H.R. 933, 113th Cong. §§ 742–43 (2013); Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. § 721 (2011).

incentive for a grower to put in the hard work and make the necessary investments to raise high-quality flocks. This would harm efficiency, jeopardize bird welfare, make it harder for top performers to stay in the poultry growing business, and ultimately affect consumer prices. The current compensation system structure is an efficient and an effective means of rewarding the best growers for performing above average and incentivizing less-efficient growers to improve their performance.

IV. AMS Should Address All Amendments to PSA Regulations in One Rulemaking. Otherwise, All Changes Required of Industry Should Have a Single Implementation Date

We urge the agency to propose and implement all planned amendments to PSA regulations in a single rulemaking, or, if this is not possible, provide a single implementation date. NCC is concerned that AMS is taking a piecemeal approach to promulgating regulations for industries regulated by the PSA. This ANPR and the proposed rule issued on the same day as the ANPR signal AMS intends to propose a line of planned changes affecting the poultry industry. Imposing constant regulatory changes on industry would only foster confusion, increase unnecessary costs, and impress uncertainty in an already uncertain economic environment. Implementing changes in a single rulemaking would allow industry to see the true cost of the proposed changes and allow AMS to be transparent with industry about the direction it plans to take. Even if AMS chooses to implement regulations in a piecemeal fashion, it should implement a uniform effective date for all changes to PSA regulations currently identified in the Unified Agenda, including “Clarification of Scope of the Packers and Stockyards Act (AMS-FTPP-21-0046)” (RIN 0581-AE04) and “Unfair Practices in Violation of the Packers and Stockyards Act (AMS-FTPP-21-0045)” (RIN 0581-AE05).

* * *

NCC appreciates the opportunity to comment on the ANPR. Please feel free to contact us with any questions. Thank you for your consideration.

Respectfully submitted,

Mike Brown
President
National Chicken Council

Enclosures

Appendix A: T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022).

EXHIBIT 4

NCC Comments to Docket No. AMS-FTPP-21-0045 Inclusive Competition and Market Integrity Under the PSA Proposed Rule (Jan. 17, 2023)

NATIONAL CHICKEN COUNCIL

1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622

January 17, 2023

Submitted electronically via Regulations.gov

Bruce Summers
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Re: Comments on Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 (Oct. 3, 2022), Docket No. AMS-FTPP-21-0045

Dear Mr. Summers:

The National Chicken Council (NCC) appreciates the opportunity to comment on the proposed rule, "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act" published in the Federal Register on October 3, 2022, (the "Proposed Rule") by the U.S. Department of Agriculture (USDA) Agricultural Marketing Service ("AMS" or the "agency"). NCC represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. Our members would be directly affected by the proposed regulations.

The Proposed Rule would fundamentally alter and constrain the poultry production market to the detriment of growers, consumers, and processors alike. The Proposed Rule suffers numerous legal infirmities and would have devastating effects on the poultry contracting process, resulting in increased costs to our members making it more difficult to fairly reward their contract farmers. For the numerous reasons discussed in these comments, we urge AMS to withdraw the Proposed Rule. To the extent AMS believes a rulemaking remains necessary, we urge AMS to promulgate a single rulemaking addressing all proposed changes to livestock and poultry contracting in one consolidated process.

Executive Summary

NCC urges AMS to withdraw the Proposed Rule because it is legally unsound, unworkable for industry, and poses costs that will inflict irreparable damage to the US economy. The Proposed Rule exceeds AMS's statutory mandate by proposing a rule by which violations would seemingly not require a showing of injury to competition, an essential component of all violations of Section 202 of the Packers and Stockyards Act (PSA). The Proposed Rule further fails to pass constitutional muster because of the litany of vague and undefined terms used throughout that fail to clearly define what conduct is prohibited. The Proposed Rule likewise falls short of Administrative Procedure Act (APA) requirements because it is based on an inadequate administrative record. Moreover, each provision of the Proposed Rule suffers fatal flaws making the proposal fundamentally unworkable. We highlight specific concerns below,

noting in particular the failure to define and protect reasonable business conduct and the broad and subjective definition of "market vulnerable individual." Finally, AMS drastically underestimates the cost of the Proposed Rule overlooking the heavy costs of recordkeeping, contract revisions, and associated labor and technology, much less the substantial litigation costs that would be necessary to define the contours of the Proposed rule. For the many reasons discussed below, AMS should withdraw the Proposed Rule. If AMS continues to believe the proposal is necessary, it should conduct a single rulemaking addressing all proposed changes to livestock and poultry contracting.

I. The Proposed Rule Is Legally Deficient

The Proposed Rule is legally deficient because it would prohibit conduct without regard to injury or likely injury to competition, is unconstitutionally vague, exceeds AMS's statutory mandate, and is not supported by the administrative record.

A. The Proposed Rule would prohibit conduct without regard to injury to competition

Well established caselaw—universal among the many circuit courts of appeal to have considered the issue—holds that establishing a violation of Section 202 of the PSA requires showing injury or likely injury to competition. As recently as two years ago, AMS tacitly recognized this as well.[1] AMS suggests throughout the preamble, however, that it could enforce the Proposed Rule without showing competitive injury.[2] Meanwhile, the plain text of the Proposed Rule is silent on the requirement. As a matter of law, all violations of Sections 202(a) and (b) of the PSA require a showing of injury, or the likelihood of injury, to competition. The Proposed Rule ignores this requirement and attempts to reach much more broadly. As such, it would exceed AMS's statutory authority.

1. The agency lacks statutory authority to promulgate any regulation that permits a finding of a violation of Sections 202(a) or (b) of the PSA without a showing of injury to competition.

When Congress passed the PSA, it specifically intended to prohibit practices that harmed the competitive process. The language that it used in the statute was understood at the time of

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[1] Most recently, AMS recognized "a question" of competitive injury in its 2020 rulemaking addressing criteria for identifying violations of the PSA. 85 *Fed. Reg.* 79779, 79790 (Dec. 11, 2020) ("Whether competitive injury is required to establish a violation of the Act is a broader question applicable to the full provisions of sections 202(a) and 202(b). . . .").

[2] For example, AMS references protecting individual producers without addressing the corresponding need to show a broader injury or likelihood of injury to competition:

> The proposed prohibitions would protect producers at both individual and market-wide levels from undue prejudices and disadvantages and unjust discrimination—both of which AMS has determined violate the PSA. The Secretary is empowered under the PSA to address harms in their incipiency.

87 *Fed. Reg.* 60017. AMS cites *Bowman v. USDA,* to support the above proposition, quoting "the Act is designed to 'prevent potential injury by stopping *unlawful* practices in their incipiency. Proof of a particular injury is not required." 363 F.2d 81, 85 (5th Cir. 1966) (emphasis added). AMS ignores however that the concerns it identifies do not in fact violate the PSA without showing a likelihood of competitive injury. If an action, including one it its incipiency, does not present a likelihood of injury to competition, it is not unlawful under the PSA.

enactment to address those practices that were collusive or monopolistic (or monopsonistic) and had a substantial likelihood of reducing output and ultimately raising prices to consumers. Congress incorporated terminology from other regulatory statutes—most notably, the Interstate Commerce Act (ICA) and the Federal Trade Commission Act (FTCA)—that were plainly designed to protect the competitive process for the benefit of the consuming public. The competitive injury requirement, therefore, is not some judicial gloss on Section 202(a)-(b) but an integral part of the statutory scheme. By importing language from other enactments with well-established legal meaning, Congress necessarily "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use convey[ed]."[3] Accordingly, it is the statutory language itself that imposes the requirement of competitive injury. Indeed, there is no other reasonable reading of the statute. The agency has no authority to promulgate any regulation that is broader than, or conflicts with, the underlying statutory provision on which it is based.[4] Because Sections 202(a) and (b) of the PSA mandate a showing of competitive injury, AMS has no power to read out that statutory element through its rulemaking authority.

The PSA is at its foundation an antitrust law. There is no dispute that the purpose of Section 202 of the PSA is the elimination of monopolistic or other anticompetitive practices—that is, to protect competition for the benefit of consumers. Only a year after the Act's passage, the Supreme Court in *Stafford v. Wallace* recognized that the "chief evil" that Section 202 sought to address was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys*."[5] "Another evil," according to the Court, was "exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, *all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other*."[6]

The common thread linking the statutory purposes identified by the Supreme Court is the elimination of anticompetitive practices. First, as the *Stafford* Court noted, Congress sought to prohibit the abuse "unduly and arbitrarily" of monopsony power by packers that leads to a monopolistic restriction of output with the effect of "arbitrarily" increasing the price of products purchased by consumers. Second, Congress intended to prevent "exorbitant charges" and other anticompetitive practices resulting from collusion among market participants. As the Court noted, because of that collusion, "[e]xpenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and *increase the price to be paid by the consumer*."[7] In other words, every aim of Section 202 identified in *Stafford* manifests an intent to protect the competitive process for the benefit of consumers.

Nothing in *Stafford* or in the language of the statute suggests that Congress intended the Act to protect individual market participants from the stringency of competition. Rather, market

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3 *Morissette v. United States,* 342 U.S. 246, 263 (1952).

4 *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010) (regulation promulgated under a statute "'does not extend beyond conduct encompassed by [the statute's] prohibition'") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)); *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1975) ("scope [of a rule] cannot exceed the power granted the [agency] by Congress under [the relevant statute]").*

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

6 *Id.* (emphasis added).

7 *Stafford*, 258 U.S. at 515.

participants are protected from conduct that itself would have the effect of harming competition and consumer interests. In identifying the aims of Section 202, *Stafford* explicitly connects any protection of producers to the protection of consumers. The Court explained that Congress sought to remove "undue burden[s] on . . . commerce"[8] and "unjust obstruction[s] to . . . commerce"[9] flowing from any "unjust or deceptive practice or combination," confirming that Congress enacted the PSA to maximize market output for the benefit of consumers.

Courts have long recognized that the PSA is rooted in antitrust law.[10] Antitrust law exists to protect the competitive process so that consumers may obtain the highest quality goods and services at the lowest possible cost.[11] In the absence of some likely consumer harm, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[12] In short, the Sherman Act and other antitrust statutes have not been construed to protect producers from the rigors of competition or to strike against aggressively competitive practices. Instead, these laws aim to enhance consumer welfare by ensuring that markets operate efficiently and that products are produced and priced competitively. *Stafford* makes clear that the goals of the PSA are identical.[13]

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8 *Id.*

9 *Id.*

10 *De Jong Packing Co. v. United States Dep't of Agric*., 618 F.2d 1329, 1335 n.7 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"); *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.").

11 *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 225 (1993) (the antitrust laws protect "*competition*, not *competitors*") (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producer thinks the competition 'fair.'"); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville."); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.").

12 *Brooke Group*, 509 U.S. at 225.

13 The PSA may be broader than some antitrust provisions in that it prohibits acts that are *likely* to have a detrimental effect on competition rather than only those having an *actual* anticompetitive effect. *See, e.g.*, *De Jong*, 618 F.2d at 1335 n.7 ("the courts that have considered § 202 have consistently looked to decisions under the Sherman Act for guidance, although recognizing that § 202 in some cases proscribes practices which the Sherman Act would permit"); *Armour & Co*., 412 F.2d at 722 ("While Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation found in the Sherman Act, Clayton Act, FTCA and ICA, there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers."). The point remains, however, that Section 202 does not permit either the agency or a private plaintiff to dispense with some showing of competitive injury—actual or likely—to prove a violation.

2. Every appellate court to have considered the issue has held Section 202 of the PSA requires a showing of competitive injury.

In light of *Stafford*, every appellate court to have construed Section 202 of the PSA has held that no violation of subsections (a) or (b) occurs without a showing of competitive injury. Eight different circuits have addressed the issue, and they have uniformly and resoundingly affirmed this understanding.[14] In several of these cases, the agency argued its position directly to the court in question[15]; in others, it filed *amicus* briefs urging the court to adopt its preferred construction.[16]

The Sixth Circuit thoroughly summed up the judicial landscape in its 2010 *Terry* decision. The court concluded that, while the question of "whether a plaintiff asserting unfair discriminatory practices or undue preferences under §§ 202(a) and (b) of the PSA must allege an adverse effect on competition to state a claim" was new to the Sixth Circuit, other courts had addressed the question:

> This issue is not novel to other courts; it has been addressed by seven of our sister circuits, with consonant results. All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b). For the reasons that follow, we join this legion.[17]

In surveying court precedent, the Sixth Circuit noted the "prevailing tide" of circuit court decisions holding "that subsections (a) and (b) of § 192 [PSA § 202] require an anticompetitive effect," after which it concluded:

> The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' en banc decision in *Wheeler v. Pilgrim's Pride Corp.,* 591 F.3d 355 (5th Cir.2009) (en banc), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler,* 591 F.3d at 357. All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.[18]

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[14] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276–79 (6th Cir. 2010); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4–5 (4th Cir., Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong*, 618 F.2d at 1336–37; *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369–70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d 712.

[15] *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

[16] *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

[17] *Terry*, 604 F.3d at 276.

[18] *Id.* at 277 (lengthy string citation of supporting cases omitted).

Tellingly, USDA participated in the *Terry* appeal as an amicus curiae and advanced the position that a showing of injury is not required for a Section 202(a) or (b) violation. The court expressly recognized USDA's involvement, noted USDA's argument that the court should read Section 202(a) and (b) to not require a showing of injury to competition, and pointedly concluded, "We decline to do so."[19]

The agency offers no analysis undermining any of these court decisions, nor could it. The agency has participated in some capacity, either as a party or an *amicus*, in six of the ten appellate cases holding that competitive injury is an element of a Section 202 violation. In light of this record of litigation futility, AMS is not free to ignore the prevailing judicial authority or seek to undo it through the rulemaking process.

3. When the PSA was enacted, the language of Sections 202(a) and (b) was understood to proscribe conduct that harmed competition.

AMS blindly ignores the competitive injury requirement in Section 202, instead implying the language of the section is malleable and open to interpretation. Rather than base this argument on any legal authority, AMS dredges up contemporaneous dictionary definitions of the terms and then seeks to impress them on the statute's language.[20] The agency cites no authority for this proposed form of statutory construction, which borders on frivolous. In exercising its rulemaking authority, AMS must follow the canons of statutory interpretation. It is neither "free to pour a vintage that [it] think[s] better suits present-day tastes"[21] nor otherwise permitted to construe a statute in a linguistic vacuum. The APA does not sanction such "make-it-up-as-the-agency goes-along" exercises of regulatory power.

The relevant provisions of the Act prohibit "unfair," "unjustly discriminatory," and "deceptive" practices and devices, as well as "undue" or "unreasonable" preferences and advantages and "undue" or "unreasonable" prejudices and disadvantages. All of these terms had established statutory and common-law antecedents that were well-known to members of Congress when the statute was enacted. Read in legal context, these terms concern only business conduct that has an actual or likely adverse effect on competition.[22] Therefore, the interpretation given by the courts to Sections 202(a) and (b) is not merely the best reading but rather is the only permissible reading of the statute.

The language of Sections 202(a) and (b) is lifted almost verbatim from provisions of the ICA and the FTCA.[23] By the time of the PSA's passage in 1921, these statutes had been addressed a number of times by the Supreme Court. There was no question at the time that the aims of those laws were to preserve or restore competition and prevent monopolistic practices either generally, in the case of the FTCA, or in specific economic sectors, in the case of the ICA.[24]

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19 *Id.* at 278.

20 87 *Fed. Reg.* 60015–16.

21 *United States v. Sisson*, 399 U.S. 267, 297 (1970).

22 *Wheeler*, 591 F.3d at 364 (Jones, J., concurring). The term "unreasonable," for example, had a clear antitrust meaning by the time of the passage of the PSA. The Supreme Court had used that terminology to distinguish between those business practices that unlawfully restrained competition from those that were permissible under the Sherman Act. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

23 81 *Fed. Reg.* at 92570.

24 *See generally Wheeler*, 591 F.3d at 365–70 (Jones, J. concurring) (collecting cases).

The language used in those enactments was understood to effectuate those Congressional goals.

Words used in a statute that "have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."[25] When Congress transports phrases from one statute to another, there is a strong presumption that adoption of such terminology "carries with it the previous judicial interpretations of the wording."[26] Moreover, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."[27] "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[28] Here, nothing in Sections 202(a) and (b) of the PSA suggests that Congress intended the words used in those provisions to have a meaning different from the meaning given them in other statutes.[29] Rather, Congress used terms of art to describe the unlawful practices prohibited by Sections 202(a) and (b). The "plain language" rule requires that those terms of art be given their commonly understood meaning at the time of the PSA's passage. Accordingly, the statutory language itself requires that either the agency or a private plaintiff prove a competitive injury to show a violation of Sections 202(a) and (b).

4. The structure of Section 202 of the PSA mandates a competitive injury requirement.

The existence of a competitive injury requirement is also manifest from the structure of the statute. Sections 202(a) and (b) do not ban all forms of economic discrimination, preference, or advantage. Rather, they prohibit only those that are "unjust," "undue," "unfair" or "unreasonable." Therefore, there must be some forms of discrimination, preference or advantage that are legitimate and some that are not. Both the courts and the agency must have an objective standard by which to distinguish lawful conduct from unlawful conduct. The explicit requirement of competitive injury in other subsections of Sections 202 demonstrate precisely what Congress intended that objective standard to be. When examined in context, the only reasonable conclusion that can be drawn is that Sections 202(a) and (b) are intended to be catch-all provisions that sweep up anticompetitive practices not otherwise prohibited by the more narrowly drawn subsections of the statute.[30] Otherwise, Sections 202(a) and (b) would prohibit activities specifically exempted from the other Section 202 subsections, depriving those sections of any meaning and rendering them null, contrary to the canons of interpretation.

Without the competitive injury requirement, there is no objective standard by which courts, or the agency, can separate prohibited practices from lawful ones. Cut loose from their moorings

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[25] *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources*, 532 U.S. 598, 615 (2001) (emphasis in original).

[26] *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944).

[27] *Morissette*, 342 U.S. at 263.

[28] *Moskal v. United States,* 498 U.S. 103, 121 (1990) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.R. 527, 537 (1947)).

[29] Although resort to the legislative history of the PSA is unnecessary for a proper construction of Sections 202(a) and (b), that legislative history also confirms that Congress understood the terms used in the statute to address anticompetitive conduct. *See* H.R. Rep. No. 67-77, at 2–10 (1921) (detailed discussion of Supreme Court cases construing the language of the ICA and the FTCA).

[30] *Wheeler*, 591 F.3d at 371 (Jones, J., concurring).

in competition law, the terms "discrimination," "preference" and "advantage" would have broad meanings that extend well beyond the economic realm. Yet, even AMS has not suggested that the PSA applies to noncommercial practices. The agency's own understanding of the statute, therefore, confirms that Congress intended the PSA to be economic legislation governing commercial relationships. Once that fact is recognized, it follows that the terms "unfair," "unjust," "undue" and "unreasonable" must also have economic content. The only way to give those terms such content is to apply a clear set of objective economic principles that allow a court or agency to ferret out those practices that are harmful—that is, "unfair," "unjust," "undue," or "unreasonable" —from those that are efficient and beneficial to competition overall based on the legal definitions of these terms when the PSA was adopted. The competitive injury requirement, in turn, is the only way to do so consistent with the structure and purposes of Section 202.

Any other interpretation would make it virtually impossible for a business subject to the PSA to order its affairs rationally to comply with Section 202(a) or (b). What is "unfair," "unjust," "undue," or "unreasonable" would depend solely on what an agency adjudicator or, in civil litigation, a judge or jury decided that it meant in any particular case. To exercise that function, the agency or court would have to make value judgments, choosing one set of priorities over another without any guidance from the statutory text or any other source about which value or set of values is to be preferred in any particular case. Such an approach raises significant constitutional issues, but in any event, there is no need to address those matters because nothing in the statutory text suggests Congress intended to empower the agency or the courts to make such standardless value judgments.[31]

In sum, the plain language of Section 202 of the PSA, its aims, and its structure reveal that Congress intended that the practices banned by subsections (a) and (b) be those that harm competition in some fashion. That conclusion has been unanimously confirmed by every appellate court to address the issue. Therefore, the competitive injury requirement is not merely some gloss on an allegedly ambiguous provision but an integral and permanent statutory command.

5. Any effort to omit the PSA's competitive injury requirement exceeds AMS's statutory mandate and raises a major question requiring Congressional direction.

Congress has not authorized AMS to forego the competitive injury requirement of Section 202. The Proposed Rule ultimately stems from rulemaking driven by the 2008 Farm Bill.[32] The 2008 Farm Bill granted no authority to AMS to promulgate a rule that excuses the competitive injury requirement of Section 202(a) or (b). Section 11006 of the 2008 Farm Bill stated in pertinent part that the "Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.*) to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of such Act."[33] The Farm Bill, therefore, authorized only a rule setting forth *criteria* that the agency would use in determining whether a violation of Section 202(b) of the

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31 *Id.* at 365 (Jones, J., concurring) (PSA "certainly did not delegate any such free value-choosing role to the courts") (quoting R. Bork, *The Antitrust Paradox* 53 (1993 ed.)).

32 Pub. L. 100-246.

33 *Id.* § 11006(1).

PSA has occurred. It did not authorize AMS to alter, abrogate, or ignore the fundamental elements of the statute.

Not only did the plain language of the 2008 Farm Bill make that clear, but the legislative record unmistakably demonstrates that Congress authorized no radical alteration of Sections 202(a) or (b). The original draft of the 2008 Farm Bill proposed by Senator Harkin contained an express provision eliminating the competitive injury requirement under Sections 202(a) and (b). Congress removed that language from the final enactment. Accordingly, the 2008 Farm Bill did not authorize AMS to forego the competitive injury element of Section 202 violations.

When AMS's predecessor agency charged with PSA implementation, the Grain Inspection, Packer and Stockyards Administration (GIPSA), nonetheless tried to read into the 2008 Farm Bill a mandate to circumvent the injury to competition requirement, Congress reacted swiftly and clearly by preventing GIPSA from finalizing an overly broad rulemaking for several years.[34] Moreover, the 2014 and 2018 Farm Bills did not renew the call for criteria, nor did they make any reference to GIPSA's 2010 rulemaking that had started—and then had been halted by Congress—in response to the 2008 Farm Bill. And they certainly did not indicate Congress supported attempts to read the injury to competition requirement out of the PSA. Had Congress intended for the agency to reinterpret Sections 202(a) and (b), Congress readily could have clarified as much in the 2014 or 2018 Farm Bill, especially in light of the considerable controversy caused by GIPSA's 2010 proposed rule. Instead, the 2014 and 2018 Farm Bills were silent on the topic, suggesting, if anything, that Congress felt it was time to move on from the issue raised in that rulemaking. When GIPSA ultimately promulgated an appropriately tailored rulemaking, resulting in 9 C.F.R. § 201.211, Congress did not object.

Given this clear direction from Congress, AMS's attempt to read the injury to competition requirement out of the PSA and to effectively expand the PSA into a general antidiscrimination law raises a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the current application of Sections 202(a) and (b). As recently stated by the Supreme Court in *West Virginia v. EPA*, in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers.[35] The PSA is a hundred-year-old law, and at no point in its history has it been applied to broadly address the type of conduct encompassed in the Proposed Rule or to prohibit conduct that does not result in an injury or the likelihood of injury to competition. Congress knows what the PSA does and does not do, and only Congress may expand the law's reach to cover new conduct. Through the present series of rulemakings, of

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[34] *See* Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 731 (2014); Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. § 744 (2014); Consolidated and Further Continuing Appropriations Act, 2013, H.R. 933, 113th Cong. §§ 742–43 (2013); Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. § 721 (2011).

[35] 142 S. Ct. 2587, 2613–14 (2022) (explaining that in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers); *see also Nat'l Fed'n of Ind. Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam) (rejecting the Occupational Safety and Health Administration's claims of regulatory authority regarding emergency temporary standards imposing COVID-19 vaccination and testing requirements on a large portion of the national workforce); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam) (rejecting the Centers for Disease Control and Prevention's claims of regulatory authority regarding a nationwide eviction moratorium).

which this Proposed Rule is a part, AMS seeks to completely upend animal production contracting in the livestock and poultry industry. These sectors account for more than one trillion dollars of annual economic impact and touch all fifty states, and they would be drastically affected by a change in the injury to competition requirement. Any attempt to rewrite by regulation the PSA's injury to competition requirement is the very definition of an issue of "economic and political significance." AMS cannot take it upon itself to dramatically expand the scope of such a longstanding statute.

B. The Proposed Rule is unconstitutionally vague

A regulation having the force of law must give persons and entities subject to it fair notice of what is prohibited so that they may comply with it. Several portions of the Proposed Rule fail this basic constitutional test. Under the due process clause of the Fifth Amendment, a rule of law must define a legal violation "with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement."[36] Any legal rule failing to meet that standard is "void for vagueness." While the vagueness doctrine is most often employed in criminal cases, it has also been applied in cases in which a party faced civil sanctions as well.[37]

The Supreme Court has applied the void-for-vagueness doctrine to strike down economic regulations that are remarkably similar to the Proposed Rule. In *Cline v. Frink Dairy Co.*,[38] the Court held unconstitutional under the Fourteenth Amendment Due Process Clause a Colorado antitrust statute prohibiting certain business combinations except those that were necessary to obtain a "reasonable profit." Similarly, in *United States v. L. Cohen Grocery Co.*,[39] the Court held unconstitutional Section 4 of the Lever Act, which made unlawful any "unjust or unreasonable rate or charge" for "necessities." And in *International Harvester Co. v. Kentucky*,[40] the Court concluded that a Kentucky antitrust statute proscribing the fixing of prices at levels "greater or less than the real value of the article" was unconstitutionally vague. The fatal flaw in each law was the indeterminate liability standard imposed. None of the statutes proscribed any specific conduct but rather made illegality turn on "elements . . . [that] are uncertain both in nature and degree of effect to the acutest commercial mind."[41]

The Proposed Rule includes many vaguely or even undefined terms, but failure to comply with those terms would result in a regulatory violation. For example, "market vulnerable individual" would be defined so broadly as to include potentially anyone. It is unclear how to determine whether a contract is "generally or ordinarily offered," when "differential contract performance or enforcement" would be considered to have occurred, or what it means to "inhibit market access," "take an adverse action," or use a "pretext." The Proposed Rule would prohibit conduct that is deemed to be a "prejudice or disadvantage" or "retaliation,"[42] but the proposal provides only examples, not definitive lists or definitions, making it impossible for a company to know whether any given conduct would be allowed under the regulation. Because these

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36 *Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010).

37 *Gentile v. State Bar*, 501 U.S. 1030, 1048–50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).

38 274 U.S. 445, 453–65 (1927).

39 255 U.S. 81 (1921).

40 234 U.S. 216 (1914).

41 *Id.* at 223.

42 Proposed §§ 201.304(a)(2), 201.304(b)(3).

provisions purport to identify conduct that would be violative or specific records that would need to be kept to demonstrate compliance, they must be spelled out in a definite manner so that regulated entities can understand how to comply with the Proposed Rule. The proposal would likewise prohibit "pretexts" without elaborating on what is a pretext and what is a legitimate explanation, or even how "legitimacy" might be determined.[43] The proposal would impose a strict recordkeeping requirement without specifying what records must be kept or, again, what conduct would even trigger the recordkeeping requirements.[44]

These criteria provide virtually no guidance on when conduct would be unlawful. Rather, an act could be determined to be unlawful under the Proposed Rule only *after* some event has occurred. A poultry dealer or other entity subject to Sections 202(a) and (b) acting in utmost good faith and ordering its affairs in the most rational fashion in an effort to comply with the Proposed Rule could not reasonably anticipate, much less determine with any reasonable degree of certainty, what business practices would ultimately be held illegal under these and other provisions. The Proposed Rule, therefore, cannot withstand constitutional scrutiny. It must be withdrawn.

C. An insufficient administrative record fails to support the Proposed Rule

The Proposed Rule is a solution in search of a problem, as evidenced by an insufficient administrative record. Perpetuating a fatal flaw that has plagued rulemaking on this topic for thirteen years, AMS fails to identify any actual harmful conduct requiring this regulation. Yet it would impose substantial cost and administrative burden on the entire poultry production industry with no tangible benefit.

The preamble to the Proposed Rule is littered with vague allusions to potentially violative conduct and generalized complaints lacking sufficient detail for meaningful evaluation. AMS has certainly shown no systemic or endemic problem in poultry contracting requiring such an extreme intervention to correct. The agency's rationale repeatedly falls back on broad conclusory statements or incomplete market analysis. For example, in describing the perceived need for market vulnerable individual provisions, AMS can state only that certain groups "arguably" are exposed to risk of abuse and that "undoubtedly" the type of discrimination contemplated in the Proposed Rule exists "in some form today," without citing a single actual example of this occurring.[45] More broadly, the entire rulemaking seems to simply presume there are widespread "market abuses observed in the sector today" without actually identifying any instances in which this particular set of regulations would be needed.[46]

The preamble is heavy on economic theory and light on actual facts to support the rulemaking. Stripped to its essence, the factual administrative record to support this rulemaking consists of references to unspecified allegations of unfair treatment by producers, a highly selected set of court cases, and similar past rulemakings that never came to fruition. None of these are sufficient to establish the need for such an untenable set of regulations. The preamble is rife with vague references of "concerns" that have been "reported to USDA" but never acted on.[47] AMS provides no details about these purported complaints, including what specifically they

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43 Proposed § 201.306(b)–(d).
44 Proposed § 201.304(c)(2).
45 87 *Fed. Reg.* at 60013.
46 *Id.*
47 *Id.*

alleged happened, when they were lodged, whether they were substantiated, how AMS investigated or responded to them, what conclusions AMS reached, or even how many AMS has received. The long history of rulemaking on this topic has been peppered with allusions to thinly described complaints, but never has AMS provided any real detail. If the unspecified "concerns . . . reported to USDA" reflected PSA violations, why did USDA not investigate them and take enforcement action under the statute? Tellingly, AMS's response to this question in the preamble is essentially that AMS did not think it had statutory authority to do so. At the least, USDA might have developed a factual record to inform policy decisions. Instead, it appears USDA was content to simply assume these vague allegations were true. Moreover, many of these vague allegations seem to have come from a 2010 listening session,[48] and some even earlier.[49] They are long out of date and have never been verified or subjected to the searching scrutiny warranted to support federal rulemaking. Unsubstantiated complaints lodged in 2010 and 2004 cannot meaningfully support a 2022 rulemaking under vastly different economic conditions.

The only concrete examples of alleged PSA violations in the entire proposal come in the form of selected court cases. However, many of these cases do not actually stand for the proposition for which they are cited, and they appear to have been opportunistically selected and used.

For example, AMS cites *Swift & Co.* v. *United States*[50] for the proposition that "price discrimination in favor of a larger grocery store chain, and higher prices to its competitors, are another type of unjust discrimination that the Act has prevented."[51] However, AMS neglects to mention that in *Swift*, a prerequisite of the holding was a finding that there was substantial evidence of injury to competition.[52] Similarly, AMS's reliance on *Denver Union Stock Yard Co.* is misplaced because in that case, the Supreme Court specifically addressed the discrimination at issue in the context of marketplace harm, explaining that "[a]s written [the PSA] is aimed at all monopoly practices."[53] AMS cites to the *Terry* decision described above to support AMS's position that discriminatory or retaliatory acts by packers or integrators intended to prevent transfer of rents negatively affects efficiency, but in *Terry*, the Sixth Circuit actually held there was *no* PSA violation because the plaintiff could not point to a competitive injury.[54] AMS similarly misconstrues the *James* case. AMS describes the *James* case as standing for the proposition that "fifty-four poultry growers sued the integrator for retaliatory actions and were awarded $10 million in damages as a result."[55] But in fact, in *James*, the Supreme Court of Oklahoma reviewed evidentiary proceedings from the trial that AMS referenced, *overturned the verdict*, and granted defendants a new trial citing concerns with the conduct of the trial.[56] Similarly, AMS cites *Philson v. Cold Creek Farms, Inc.* for the proposition that skipping placements and terminating contracts with turkey growers allegedly in retaliation for growers voicing complaints about the integrator.[57] Yet *Philson* was a ruling on the defendants' motion for summary judgment and thus focused on the sufficiency of the factual record. Importantly, in

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48 *Id.*

49 *Id.* at 60013 n.32.

50 317 F.2d 53, 55–56 (7th Cir. 1963).

51 87 *Fed. Reg.* at 60016.

52 317 F.2d at 55.

53 *Denver Union Stock Yard Co.* v. *Producers Livestock Mktg.,* 356 U.S. 282, 289–90 (1958).

54 *Terry* v. *Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010).

55 87 *Fed. Reg.* at 60026.

56 *James* v. *Tyson Foods, Inc.*, 292 P.3d 10, 18–19 (Okla., 2012).

57 87 *Fed. Reg.* at 60028.

denying defendants' motion to dismiss with respect to alleged PSA violations, the court noted *Stafford's* emphasis that the PSA was fundamentally focused on preventing monopolistic practices and concluded that "[c]onsequently, only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act."[58] The *Philson* court expressly rooted its denial of the defendants' motion in findings that triable issues of fact remained as to whether the complained-of conduct caused injury to competition.[59]

But even if one were to overlook the actual holdings of these cases and take AMS's explanations at face value, these cases suggest that actual serious PSA violations are rare—AMS cites only a handful of cases over more than half a century—and that when they do occur, the PSA provides USDA or harmed individuals with ample statutory authority to pursue them. If anything, these cases show that the current regulatory approach is working. They certainly do not support additional, burdensome rulemaking. Likewise, poultry growing contracts are also subject to state contract and tort law, and one would expect extensive state-law litigation if integrators were engaging in abusive contracting practices. That has not happened, again reinforcing that the purported evils AMS is trying to address simply do not exist.

Finally, AMS recounts some of USDA's past PSA rulemaking efforts, seeming to imply that because USDA decided to initiate rulemaking in the past, there must a problem that requires solving. But a federal agency cannot simply conjure a problem into existence by saying it tried to address that problem in the past, nor does the fact that rulemaking occurred legitimize that administrative record. As discussed above, Congress specifically objected to many aspects of those past rulemakings, and the rules were withdrawn.

In short, nothing in the record indicates there is pervasive, or even occasional, discrimination, retaliation, or deception of the type raised in the Proposed Rule, much less that a burdensome series of contracting restrictions, compliance hoops to jump through, and recordkeeping obligations is justified to address it. This flawed administrative record renders the Proposed Rule arbitrary and capricious under the APA.[60]

II. The Proposed Rule Is Fundamentally Flawed and Unworkable

The Proposed Rule would do much harm and little if any good for anyone involved. It suffers from several critical overarching flaws, as well as flaws specific to each provision.

A. The Proposed Rule fails to expressly protect and define reasonable business conduct

First, the regulatory text of the Proposed Rule fails to address legitimate or reasonable business decisions. The reality of business dealings means that in many cases two parties will be treated differently simply because of economic conditions or business realities. One grower might be offered a contract whereas another was not simply because of processing plant capacity. One might be offered an opportunity to raise birds to different specifications because that grower has established a track record of successfully innovating her husbandry practices. A grower might

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58 *Philson* v. *Cold Creek Farms, Inc.,* 947 F. Supp. 197, 200–02 (E.D.N.C. 1996).

59 *E.g.*, *id.* at 201–02 ("In addition, a genuine issue of material fact remains as to whether [Defendant's] method of computing 'head sold' was injurious to competition and unfair, discriminatory or deceptive.").

60 5 U.S.C. § 706(2)(A).

have a contract terminated because the grower mistreated birds. Although all of these are reasonable and appropriate business justifications for differential treatment, on the surface, they could also appear to violate the Proposed Rule. It is essential that regulated entities be able to make these and other reasonable business decisions with confidence they will not later face liability under the Proposed Rule.

Although AMS recognizes in the preamble its intent to "leav[e] room for differential treatment based on legitimate business purposes,"[61] that protection is not clearly enshrined in the regulatory text itself. Specifically, the Proposed Rule fails to recognize that differential treatment based on a reasonable business decision does not violate proposed Sections 201.304 or 201.306, regardless of any other factors. Although AMS references "legitimate" business decisions, a more appropriate approach would be to create a safe harbor for "reasonable" business decisions. Courts and agencies are well versed in applying reasonableness standards, whereas "legitimacy" implies value judgments that are far more difficult and, in any event, inappropriate for evaluating business decisions. Focusing on "reasonable business decisions" would also better harmonize the Proposed Rule with existing 9 C.F.R. § 201.211, creating better consistency across AMS's PSA regulations.

Moreover, AMS fails to identify how a company would be expected to demonstrate that an action was based on a reasonable business decision. Without clear direction, regulated entities would be forever exposed to the risk of AMS deciding after the fact that the company lacked sufficient documentation to demonstrate its decision was appropriate.

Equally as important, the emphasis must be on demonstrating the existence of a reasonable business decision, as opposed to lack of existence of any other explanation. Business decisions must be presumed to be reasonable unless proven otherwise. Business relationships, especially long-term ones, can be complicated.

Examples of complicated fact patterns abound. Consider, for instance, a poor performing grower who is unsatisfied with his pay and initiates a dispute with an integrator and who then grossly mismanages a flock and creates serious bird welfare issues. The integrator might reasonably decide to terminate the contract with that grower based on mistreatment of the birds, regardless of any other considerations, and it should be enough for the integrator to demonstrate that basis for the adverse action.

Or consider a grower who is signed to a one-year contract to make up growout capacity after part of a large multi-house farm is destroyed by a fire. After the year-long contract is up, the larger farm is once again operational, the additional grow-out capacity is no longer needed, and the integrator elects not to renew the grower's contract. If the temporary grower is a market vulnerable individual, how would the integrator demonstrate the non-renewal was for appropriate reasons? Or consider the same example, but several temporary growers were brought on board for the year, some of whom were market vulnerable individuals and some of whom were not, and due to demand increase, the integrator decides to convert some of these temporary growers to longer-term growers by renewing their contracts. How is the integrator to evaluate the growers and justify its decisions? Would it have to prioritize renewing contracts with the market vulnerable individuals?

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[61] 87 *Fed. Reg.* at 60016.

The Proposed Rule fails to provide any guidance on how a regulated entity could document its business decisions in these and many other complicated scenarios.

B. Issues with proposed Section 201.302 – Market Vulnerable Individual

AMS proposes an extremely broad and subjective definition of "market vulnerable individual." Under the proposed definition, nearly anyone could be a market vulnerable individual in one way or another. Individuals are multifaceted and could be considered members of dozens, if not hundreds, of groups. So long as a person might be identified with even one "group" whose members are at a "heightened risk" of "adverse treatment," the person qualifies as a market vulnerable individual. This extremely broad definition would in effect require a company to assume every grower is a market vulnerable individual. This in turn would create tremendous administrative burden and stifle the free market contracting that has helped make chicken production so efficient for consumers and so rewarding for growers.

The proposal overlooks the extremely complex nature of individual identities. In reality, nearly everybody could identify an aspect of his or her personhood that could be associated with a group whose members are at heightened risk of adverse treatment. The proposed definition goes well beyond concepts of protected classes familiar under Equal Protection Clause law and instead encompass every facet of a person's appearance, mannerisms, attitudes, actions, beliefs, affiliations, lineage, and so on. Any individual is almost certainly a member of a group that puts the individual at heightened risk of adverse treatment as well as a group that makes favorable treatment more likely. The traits that make one a market vulnerable individual might vary by community or might change over time. An individual's associations with different groups might change over time as well; if a person was once part of a group but no longer is, would that person still be considered a market vulnerable individual? It is impossible to fully disentangle the complex nature of individuals, but AMS's proposal would reduce all business decisions to an exercise of identifying every way in which an individual might face a disadvantage and then requiring the integrator to prove that no such disadvantage occurred, in every single interaction with every single grower.[62]

In fact, read plainly, the proposal would lead to absurd results, with market vulnerable individual protection extending to many people who ought not receive protection. For example, individuals convicted of animal cruelty offenses would almost certainly be part of a group (known animal abusers) who are heightened risk of adverse treatment in animal production contracting (no integrator would want to entrust its birds to a known animal abuser), yet AMS's proposal would appear to protect them as market vulnerable individuals. Ironically, as proposed, if an integrator perceives a grower to be an animal abuser (a group whose members are at heightened risk of adverse treatment in poultry contracting), and that grower in fact abuses chickens, it might be impossible for the integrator to terminate the grower's contract due to the abuse because the contract termination would be an adverse action against someone the integrator perceives to be a market vulnerable individual on account of that person being a market vulnerable individual.

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[62] Notably, the Proposed Rule also appears to overlook definitions used in other USDA programs that appear to have similar goals, providing no analysis of how its proposed definition would differ or be similar to those or whether it considered basing its approach on other programs' definitions instead. *See, e.g.*, 7 U.S.C. 2003(e)(1) (defining "socially disadvantaged groups" of farmers or ranchers for USDA target participation rates in certain regulatory programs as groups "whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities").

Many other unsavory traits could also trigger market vulnerable individual protection, with the ironic and unfortunate result that AMS's proposal could actually make it more difficult to refuse dealings with or to take adverse action against such people. Surely AMS does not intend such absurd outcomes, but the overly broad and nebulous concept of a market vulnerable individual all but invites such problems and the accompanying legal expenses to resolve them.

The Proposed Rule could lead to situations that are less absurd but just as difficult. Consider an integrator is approached by someone who wants to raise chickens but who does not speak English. This person presumably would be a market vulnerable individual. But none of the integrator's farm service technicians speak the prospective grower's language, and it would be impossible for them to effectively communicate with the grower and ensure the grower is able to raise birds to the integrator's standards. If the integrator declines to sign a contract with this prospective grower for this reason, the proposal would appear to treat that as an adverse action based on the individual's perceived status as a market vulnerable individual, yet doing business would seem to be impossible in this situation.

Moreover, under the proposal, it is entirely unclear how to determine whether a regulated entity "perceives someone to be a market vulnerable individual. For example, which employee's perception is relevant—the employee who interacts with the grower, the employee who approves the contract, the employee who makes placement decisions, or any of the many other employees likely involved in managing the grow-out process? What if one employee perceives the grower to be a market vulnerable individual, but another does not? What if three employees are jointly involved in a decision with respect to a grower, and one perceives the grower to be a market vulnerable individual while the other two do not? What if an employee incorrectly perceives an individual to be a market vulnerable individual, or perceives someone to be a market vulnerable individual for an incorrect reason? What if an employee's perception changes over time or is corrected someone else? What if a grower indicates he is not a market vulnerable individual?

The proposal also leaves it unclear how to determine what constitutes a "group," how to assess that group's "risk" of adverse treatment, and what amount of risk differential constitutes a "heightened risk," again reinforcing that virtually anyone could be a market vulnerable individual for a myriad of reasons.

The result of this proposed definition would be an avalanche of paperwork. Integrators would be forced to defensively document every interaction and business decision for every actual or prospective grower to demonstrate that individual was not treated adversely due to his or her status as a market vulnerable individual. The administrative cost and hassle would be immense and would impose substantial costs on integrators and growers. With significantly greater stakes for making a "wrong" decision, integrators would face a significant disincentive to bringing on new growers or taking any actions that could create their exposure with regards to market vulnerable individuals.

C. Issues with proposed Section 201.304(a) – Prohibited Bases

Proposed Section 201.304(a) suffers from numerous issues in addition to those mentioned above.

As discussed above, many critical terms used in this provision are vague (*e.g.*, "inhibit market access," "adverse action," "market vulnerable individual"). Without clear and concrete definitions, it is impossible to determine what conduct would violate this section and thus how to

comply. The non-exhaustive list of conduct that constitutes prejudices or disadvantages makes it impossible to know in advance what is prohibited. It is likewise unclear when conduct is said to "inhibit" market access or how much "inhibition" must occur for there to be a violation. For example, someone new to farming might be considered a market vulnerable individual under the proposal because new farmers are riskier business partners than established partners. If an integrator asks someone new to farming to take modest additional steps to demonstrate her fitness as a farmer, but does not make the same request of a longtime farmer, has the integrator "inhibited mark access" of a market vulnerable individual? These vague terms expose companies to arbitrary after-the-fact review and enforcement. All of the scenarios described in the sections above illustrate the very real challenges and costs regulated entities would face in trying to determine what conduct is appropriate.

It is also unclear how one would determine whether contract terms are "less favorable," especially when there are multiple terms involved. One farmer might prefer a short-term contract whereas another might prefer a longer-term contract. These preferences might also vary by geography. Similarly, it is unclear how to evaluate contracts where multiple terms differ. If a contract offered a higher guaranteed base rate but lower potential overall compensation because of lower bonus pay opportunities, would that be a more or less favorable term? It might depend on the individual farmer's preferences.

It is also unclear how contracts entered into at different times, in different regions, or in different economic conditions would be compared. Regional economic issues, such as land prices, natural disaster risk, or fuel prices might require different contracting approaches even if the growers ultimately earn the same net profit, but it is unclear whether arrangements like this would be allowed under the Proposed Rule. If integrators were forced to harmonize all contracts across regions or time, it could result in windfalls for some growers or arbitrary cuts for others.

Likewise, it is nearly impossible to determine when differential contract performance or enforcement might violate the Proposed Rule. Integrators manage hundreds or thousands of grow-out contracts, and by necessity, that process requires business judgment. An integrator might reasonably excuse a one-time issue with a longtime grower who has a proven track record, whereas that same issue might need require contract action with a new grower. The same goes with deciding whether to enter, terminate, or renew a contract.

These provisions would significantly deter entering into new contracts or new grower relationships, both because the act of entering into a new contract or relationship would trigger comparisons with all other contracts, and because it would be difficult to exit a contractual relationship with a poor performing or inattentive grower. A rational integrator would be wary under the Proposed Rule about making any changes to contracts, no matter how reasonable or how beneficial it would be for a grower, out of fear that the change could force the integrator to automatically update all other contracts to avoid allegations of disparate treatment, even if the change was based on a completely rationale, case-specific issue. Likewise, the Proposed Rule imposes substantial difficulties and risk in ending a business relationship, which could create a significant disincentive to entering into new grower relationships, especially if the prospective grower is new to farming or unknown to the integrator. The proposal could have the perverse effect of making it more difficult for individuals not established in farming, many of whom may be market vulnerable individuals in one way or another, to enter the chicken farming market in the first place.

Finally, AMS does not address how to demonstrate compliance. As described above, the proposal's vague terms and far reach would cloak nearly all grower-integrator dealings in legal jeopardy, and AMS provides no direction on how integrators could ensure they comply with these provisions.

D. Issues with proposed Section 201.304(b) – Retaliation

In addition to those issues mentioned above, we have a number of concerns with proposed Section 201.304(b).

The list of activities that constitute retaliation is not exhaustive, so there is no way to know what activities are actually prohibited. It is impossible for a regulated entity to read the regulation and understand specifically what actions it must avoid taking to comply. AMS fails to provide any rules for determining whether conduct constitutes retaliation, forcing regulated entities to guess and creating great risk of arbitrary enforcement of what is essentially a "you know it when you see it" standard.

Moreover, it is unclear how it would be established whether a live poultry dealer, and the specific employees involved in grower contracting, knew that a grower had engaged in one of the protected activities. Most of those activities are activities that a live poultry dealer would not necessarily be aware of, or that only some employees might know about. As with the above discussion about "perception" and market vulnerable individuals, the Proposed Rule provides no direction on how to determine what the company knows.

Further, the provision seems to create a presumption that all protected actions by growers are legitimate. This risks exposing live poultry dealers to strategically planned actions to trigger retaliation protections, especially by poor performing growers facing potential contract termination. This poses especially significant risks in the event a grower commits animal welfare violations.

The information sharing contemplated in proposed Sections 201.304(b)(2)(iv) and (v) provides no exception for confidential or proprietary information. The unauthorized release of confidential business information can inflict substantial and irreparable harm on businesses. Confidential and proprietary information must be governed by any contractual protections controlling its dissemination, and it cannot be considered retaliation if a company exercises its contractual rights to protect any confidential information. AMS makes no allowance for this.

It is also unclear how AMS views details related to co-op activity. For example, regardless of whether growers were to form co-ops, live poultry dealers would still need to be able to select which specific growers to contract with, to choose where to place birds, and to evaluate and approve housing and other grow-out specifications. The Proposed Rule is silent on whether exercising these basic logistical and business prerogatives could be considered retaliation.

E. Issues with proposed Section 201.304(c) – Recordkeeping

The recordkeeping provision in proposed Section 201.304(c) raises several issues in addition to those discussed above.

The proposal fails to identify specific records that would need to be kept, or what records would need to be generated to show compliance with proposed Section 201.304(a) and (b). As proposed, companies will not know which records are actually subject to the regulation's

recordkeeping provision until after the fact. There is simply no way for a regulated entity to know what records AMS might consider, years after the fact, to have been "relevant to its compliance" with proposed Section 201.304. This exposes companies to arbitrary enforcement, including arbitrary allegations of record destruction.

The proposed recordkeeping provision is as broad as it is vague. Potentially every document related to grower interactions—every email, every record from a farm visit, every correspondence with farm technical support staff, and every note taken during a call or meeting could in theory be "relevant to … compliance" with proposed Section 201.304, triggering the proposed five-year record-retention period. This would create an overwhelming administrative burden on regulated entities and would impose exorbitant compliance costs. AMS fails to explain why such a broad recordkeeping provision is necessary or provide specificity about what records must be kept to demonstrate compliance.

Moreover, it is inappropriate to include Board of Director materials and other corporate governance materials as routine PSA compliance records, as suggested in the Proposed Rule. These materials are not routine compliance records and would not speak to whether any particular act violated the Proposed Rule. Instead, this appears to be a transparent attempt to create executive- or Board-level liability for everyday regulatory compliance matters.

Finally, the record retention period is excessively long. Most other PSA recordkeeping provisions require retention for two years. Five years is needlessly long and imposes substantial administrative costs and complexity. There is simply no reason to require such voluminous records maintenance.

F. Issues with proposed Section 201.306 – Deceptive Practices

In addition to those discussed above, proposed Section 201.306 raises several significant issues.

As discussed earlier, AMS does not define what a "pretext" is in this context, nor how a company would demonstrate that an explanation is not pretextual. Without knowing what would make a statement pretextual, companies may become reluctant to provide detailed explanations to growers, stifling rather than promoting clear communication. And without a clear definition, companies would have no idea how to ensure they comply or demonstrate they are in compliance after the fact. The Proposed Rule seems to invite second-guessing of a regulated entity's motives. Without knowing how to demonstrate compliance, regulated entities are at great risk of not having the necessary records to refute allegations.

In many cases, there are multiple reasons for a contract action. The proposal does not address a situation where multiple reasonable business reasons support an action and could be read as requiring that every single reason be included in an explanation to avoid an omission of material fact in violation of the Proposed Rule, even if one factor drove the decision or any one factor would have formed a sufficient basis for the action.

The proposed provisions also risk making it more difficult and more costly to terminate relationships with poorly performing growers or a grower who neglects or abuses birds. Facing the fear of making a misstep in communicating a grower's termination, regulated entities may be incentivized to keep poor-performing growers on contract to avoid costly lawsuits about pretextual explanations and whether a particular fact was material. This would drain efficiency out of the system, to the detriment of consumers.

Fundamentally, the proposed provisions will impair efficient contracting by deterring legitimate adverse actions. If each adverse action creates the risk of litigation and large liabilities, regulated entities will face disincentives to terminating dealings with poor-performing growers or engaging in discussions with new growers. This is doubly harmful for individuals wishing to enter chicken farming, as it means poor-performing growers will occupy more of the grow-out supply, and they will face a harder time getting started. This will only harm rural communities long-term as younger farmers see fewer financial opportunities in their communities.

III. The Proposed Rule Would Impose Significant Costs on Society

AMS appears to have given no thought to its economic impact analysis, drastically underestimating the costs of the Proposed Rule at every possible opportunity. To prepare for the Proposed Rule, regulated entities would need to re-assess contracts and develop communications with their growers, evaluate and implement extensive recordkeeping programs and record-retention systems, develop and implement new compliance policies, and implement an administratively complicated oversight and compliance system. These programs would require highly paid professionals and substantial attorney time. Moreover, the proposal would make contracting more difficult, and it could deter companies from entering into new grower relationships, reducing overall economic efficiency in the poultry production market, driving up consumer costs, harming processors, and harming growers. The proposal would also drive costly, frivolous litigation. In fact, owing to its vagueness, the Proposed Rule almost seems premised on the need for years of litigation to define and refine the ambiguous terms AMS has proposed. The litigation costs necessary to define the requirements in the proposal alone would amount to many millions of dollars per year, on top of the likely frivolous litigation that will be brought based on a misunderstanding of, or perhaps to take advantage of, the proposal's vagueness.

AMS predicts the Proposed Rule would impose costs of only $504 per live poultry dealer in the first year, and costs of about half that amount in subsequent years. This simply defies belief. It seems to assume that regulated entities would devote no effort and no resources to complying with the proposal. The cost of the actual filing cabinets needed to hold the voluminous paper records that would be required by the Proposal would exceed that much, not to mention the extensive recordkeeping programs and computer systems and hardware that would be necessary to properly manage digital materials. AMS likewise completely overlooks the labor that would be necessary to comply with the proposal and dramatically understates the extent and cost of the professional services, including legal services, that would be necessary to implement the proposal. Moreover, AMS completely fails to consider the cost of the litigation that will undoubtedly result from the vague terms and unclear scope rife throughout the Proposed Rule.

AMS also fails to consider costs to growers, who as part of the same economic system would inevitably bear some of the compliance costs. New growers would face fewer opportunities for new entrants, and it would be more difficult to reward top-performing growers. Consumers, too, would suffer costs in the form of a less efficient chicken production system, leading to higher costs at the supermarket and restaurants. AMS fails to even acknowledge these costs.

In reality, the cost of compliance together with anticipated litigation will undoubtedly result in costs of over $100 million, orders of magnitude greater than AMS predicts. By comparison, independent economic analyses of previous AMS rulemakings on similar topics have indicated

economic impact costs in excess of $1 billion,[63] and these were prepared 13 years ago, before unprecedented inflation. It is simply not credible for AMS to conclude the Proposed Rule would impose such paltry costs.

IV. Conclusion

NCC appreciates the opportunity to comment on the Proposed Rule. We are deeply concerned that the Proposed Rule would impose substantial costs, expose live poultry dealers to significant legal and compliance risks, and undermine the successful and mutually profitable grower contracting system. We urge AMS to withdraw the proposal. If AMS were to continue to pursue this rulemaking, it should repropose this and all other similar PSA proposals together in a single consolidated rulemaking process.

Sincerely,

Mike Brown
President
National Chicken Council

[63] *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act*, 81 *Fed. Reg.* 92566, 92576 (discussing cost estimates prepared by Thomas Elam and Informa Economics).

EXHIBIT 5

NCC Comments to Docket No. FSIS-2022-0029 Proposed Salmonella Framework
(Dec. 16, 2022)

NATIONAL CHICKEN COUNCIL

1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622

December 16, 2022

Submitted electronically via regulations.gov

Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
1400 Independence Avenue SW
Mailstop 3758
Washington, DC 20250-3700

Ms. Sandra Eskin
Deputy Under Secretary for Food Safety
Office of Food Safety
Food Safety and Inspection Service
1400 Independence Ave SW
Washington, DC 20250-3700

Re: Docket No. FSIS-2022-0029: Proposed Framework for Controlling *Salmonella* in Poultry

Dear Ms. Eskin:

The National Chicken Council (NCC) appreciates the opportunity to provide comments regarding the United States Department of Agriculture (USDA), Food Safety and Inspection Service (FSIS or the Agency) Proposed Framework for controlling *Salmonella* in poultry. NCC is the national, non-profit trade association that represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States.

The Agency's Proposed *Salmonella* Framework raises several questions about numerous complex topics, including risk assessment and public health modeling, pathogenicity data, current and future laboratory testing technologies, detailed applications of highly technical Hazard Analysis and Critical Control Point (HACCP) systems, and legal and technical considerations, to name but a few. NCC member companies would be significantly impacted by the Agency's Proposed Framework, and NCC encourages the Agency to take a science-based, data-driven approach to impacting public health. However, as the Proposed Framework is not based on science, data, or the results of a risk assessment(s), it is challenging for the regulated industry to provide meaningful comments. Instead, we encourage the Agency to take a more measured approach and use robust data demonstrating true impact on public health when proposing sweeping regulatory changes.

The concerted efforts by both the broiler chicken industry and FSIS to drive down *Salmonella* rates have been enormously successful. Based off the most recent FSIS testing results[1], *Salmonella* prevalence on young chicken carcasses is 3.1% and *Salmonella* prevalence on chicken parts is 7.1% across all broiler processing establishments. These testing results are well below the *Salmonella*

[1]FSIS, Sampling *Results for FSIS Regulated Products*, USDA.gov (2022), https://www.fsis.usda.gov/science-data/sampling-program/sampling-results-fsis-regulated-products.

performance standard for both young chicken carcasses and chicken parts. Coupled with performance standards, currently over 90% of the industry is meeting or exceeding the performance standard for both young chicken carcasses and chicken parts.[2] In just the past few years, FSIS has significantly tightened existing *Salmonella* standards; introduced new performance standards for chicken parts; rolled out a new, scientifically driven, modernized poultry inspection system that allows for greater testing and analysis; released detailed guidance on controlling *Salmonella* through processing controls; and approved numerous new interventions; among many other endeavors. FSIS has taken or is in the process of rolling out similar programs for other species. These actions are consistent with the science-based, data-driven actions NCC believes are beneficial to public health.

As with FSIS, food safety is a top priority for the broiler chicken industry, and we support changes in food safety regulations that are based on sound science, robust data, and are demonstrated to positively impact public health. For years the industry has implemented a multi-hurdle approach focused on the continual reduction of *Salmonella* from farm to fork – implementing robust vaccination, biosecurity, sanitation, and other effective measures.

In 1996, the CDC created FoodNet Fast to display data for select pathogens transmitted through food, including *Salmonella*.[3] While the incidence of salmonellosis in humans has remained relatively unchanged since 1996, Americans eat significantly more chicken and chicken products today than in 1996. In 1996, chicken consumption in the U.S. was 69.7 pounds per person. In 2022, USDA estimates that Americans will consume 99.0 pounds of chicken per person.[4] This reflects a 42% increase in chicken consumption over the past 26 years. Neither FoodNet Fast nor Interagency Food Safety Analytics Collaboration (IFSAC)[5] takes into account consumption patterns of various food sources, including chicken. When the data from both FoodNet Fast and IFSAC are analyzed based on per-pound consumption of chicken, the rate of salmonellosis associated with chicken is shown to have decreased over the past ten-plus years. This data demonstrates that the robust public-health measures implemented by FSIS and the chicken industry over the past decade have been working.

In short, FSIS's existing framework for approaching *Salmonella* control has been working, and NCC encourages FSIS to continue using the latest science and industry-Agency collaborations to drive improvements in this framework. For example, as discussed in these comments, science-based changes such as transitioning to an enumeration-based performance standard would apply new technological and scientific developments to FSIS's proven approach and would drive continued food safety improvements.

The Proposed Framework would abandon these approaches for legally infirm and technologically infeasible strategies with no clear supporting data. While NCC appreciates FSIS's interest in thinking creatively about food safety, the Proposed Framework is not the right approach. First, the Proposed Framework appears premised on legally infirm conclusions that *Salmonella* may be considered an adulterant in raw poultry and that FSIS can mandate on-farm activities. Second, the Proposed Framework is presented nearly devoid of data, and it lacks specificity as to how the Agency plans to implement and enforce the proposed changes. Additionally, there appears to be a significant misunderstanding about how the broiler industry operates, the industry's supply chain structure, and current industry practices regarding the control of *Salmonella*. As written, the Proposed Framework threatens the economic viability of the entire poultry sector and threatens negative impacts on family

[2]Salmonella Verification Testing: October 31, 2021 through October 29, 2022, FSIS (2022), https://www.fsis.usda.gov/news-events/publications/salmonella-verification-testing-october-31-2021-through-october-29-2022.
[3]FoodNet Fast, Center for Disease Control (2022), https://wwwn.cdc.gov/foodnetfast/
[4]USDA, World Agricultural Supply and Demand Estimates (Dec. 9, 2022), https://www.usda.gov/oce/commodity/wasde/wasde1222.pdf.
[5]Center for Disease Control, *Interagency Food Safety Analytics Collaboration (IFSAC)*, CDC.gov (2022), https://www.cdc.gov/foodsafety/ifsac/publications.html

farmers, company employees, and consumers. The Proposed Framework would have negative impacts on both the availability of chicken and the cost of chicken to consumers of U.S. chicken around the world. Overall, the Proposed Framework appears to be moving away from long-standing HACCP-based principals that focus on identifying and controlling risk to a command and control, once-size-fits-all approach that could have significant negative public health outcomes.

These comments address overarching concerns regarding FSIS's statutory authority under the Poultry Products Inspection Act (PPIA) and the lack of supporting data presented with the Proposed Framework, provide feedback on each of the three Components, and finally address several cross-cutting issues raised in the Proposed Framework.

***Salmonella* Is Not an Adulterant Under the Poultry Products Inspection Act**

Fundamentally, the Proposed Framework is legally infirm because *Salmonella* is not an adulterant in raw chicken under the PPIA.

Under the PPIA, a product is adulterated if it "bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health."[6] Thus, whether a pathogen renders a product adulterated depends on whether the substance is added to the product or occurs naturally in the product. For added substances, the pathogen is an adulterant only if the substance is present in quantities that "ordinarily" render the product injurious to health. As FSIS has consistently recognized, *Salmonella* is not an adulterant in raw poultry because (i) *Salmonella is* not an added substance in raw poultry and (ii) *Salmonella* is not present in levels that render chicken injurious to health because customary cooking practices destroy any *Salmonella* that may be present. FSIS has offered nothing to change this interpretation.

First, *Salmonella* is not an added substance because it occurs naturally within the chicken biome. *Salmonella* is not an avian pathogen, and it exists naturally as part of the microflora in and on chicken. *Salmonella* can exist in a chicken's skin, muscle tissue, and gut. Peer-reviewed literature establishes that healthy, asymptomatic birds are known to carry *Salmonella*.[7] Researchers have also identified *Salmonella* in chicken neck skin, on the outer layer of skin, on feather follicles, connective tissue, and in drumstick muscle.[8] Moreover, literature shows correlations between *Salmonella* loads on the farm or in birds and at various processing steps, reinforcing that *Salmonella* enters the process via the chickens themselves.[9]

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[6] 21 U.S.C. § 453(g)(1).

[7] *See, e.g.*, Rigney, C. P., Salamone, B. P., Anandaraman, N., Rose, B. E., Umholtz, R. L., Ferris, K. E., et al. (2004). Salmonella serotypes in selected classes of food animal carcasses and raw ground products, January 1998 through December 2000. J. Am. Vet. Med. Assoc. 224, 524–530. doi: 10.2460/javma.2004.224.524; Nde, C. W., Mcevoy, J. M., Sherwood, J. S., and Logue, C. M. (2007). Cross contamination of turkey carcasses by Salmonella species during defeathering. Poult. Sci. 86, 162–167. doi: 10.1093/ps/86.1.162; Erol, I., Goncuoglu, M., Ayaz, N. D., Ellerbroek, L., Ormanci, F. S., and Kangal, O. I. (2013). Serotype distribution of Salmonella isolates from turkey ground meat and meat parts. Biomed Res. Int. 2013, 281591. doi: 10.1155/2013/2 81591.

[8] *See* Rimet C-S, Maurer JJ, Pickler L, Stabler L, Johnson KK, Berghaus RD, Villegas AM, Lee M and França M (2019) Salmonella Harborage Sites in Infected Poultry That May Contribute to Contamination of Ground Meat. Front. Sustain. Food Syst. 3:2. doi: 10.3389/fsufs.2019.00002.

[9] *See, e.g.*, Berghaus, R.D., Thayer, S.G., Law, B. F., Mild, R.M., Hofacre, C.L., and Singer, R.S. 2013. Enumeration of Salmonella and Campylobacter spp. in Environmental Farm Samples and Processing Plant Carcass Rinses from Commercial Broiler Chicken Flocks. Applied and Environmental Microbiology. 79:4106-4114; Volkova VV, Bailey RH, Rybolt ML, Dazo-Galarneau K, Hubbard SA, Magee D, Byrd JA, Wills RW. 2010. Inter-relationships of Salmonella status of flock and grow-out

The fact that *Salmonella* may be present in greater expected concentrations in some parts of a chicken than others is irrelevant to this analysis, as is the fact that *Salmonella*, as with any microbe, can be spread through cross-contact during processing. The PPIA asks only whether the organism is an added substance when determining if it is an adulterant. To view all pathogens that can be somehow spread among or within products as "added substances" would read out of existence the second prong of § 453(g)(1) and is simply inconsistent with the normal meaning of the term. Moreover, courts have been clear that an "added substance" refers to a substance not otherwise present in the food and added by man.[10] As established, *Salmonella* occurs naturally within chickens. *Salmonella* is not an added substance in raw poultry, and thus it is an adulterant only if it "ordinarily" renders the product injurious to health.[11] It does not.

Salmonella does not "ordinarily" render raw chicken injurious to health. The PPIA establishes a very high standard to support a conclusion that a naturally occurring pathogen "ordinarily" renders a raw product adulterated. First, in the PPIA, Congress created a strong presumption against viewing a naturally occurring substance as an adulterant in raw products. Congress's choice of language is striking: under the PPIA, added substances adulterate food if they "*may* render it injurious to health," whereas a product with naturally present pathogens "*shall not* be considered adulterated" if the substance "does not ordinarily render it injurious."[12] The statute thus sets up two very different standards. "May" could imply FSIS has a measure of discretion in evaluating added substances, but the statute sets a significantly higher bar for naturally occurring substances. FSIS is prohibited from considering a naturally occurring substance a pathogen ("*shall not* be considered adulterated") unless it can meet the very high bar of proving that the substance would "ordinarily" render the product injurious to health. Reinforcing this high bar, in its statement of policy codified into the PPIA, Congress commanded that decisions such as product condemnation "shall be supported by scientific fact, information, or criteria."[13] By default, naturally occurring substances are not pathogens, and FSIS must go to great scientific lengths to establish otherwise.

Second, the plain meaning of "ordinarily" sets a very high bar. When a statute does not define a term – and the PPIA does not define "ordinarily injurious" – courts will consider its plain meaning with reference to its reasonable use, dictionary definitions, and its use in context.[14] Multiple dictionary definitions contemporaneous with the passage of the PPIA show us what Congress meant when it used "ordinarily." *Webster's* 1953 edition defines "ordinarily" as "according to established rules or settled

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environment at sequential segments in broiler production and processing. Zoonoses Public Health 57:463–475; Fluckey, WM, Sanchez MX, McKee SR, Smith D, Pendleton E, Brashears MM. 2003. Establishment of a microbiological profile for an air-chilling poultry operation in the United States. J. Food Prot. 66:272–279.

[10]*See United States v. Coca Cola*, 241 U.S. 265 (1915); *United States v. Anderson Seafoods, Inc.* 622 F.2d 157, 160 (5th Cir. 1980).

[11]FSIS recognized that *Salmonella* is not an added substance in its recent 2022 denial of a petition requesting *Salmonella* be declared as an adulterant, noting that "FSIS has traditionally viewed *Salmonella* as 'naturally occurring' in food animals." Letter from Rachel Edelstein to William D. Marler, Esq, at 3 (May 31, 2022). Although FSIS in that petition response noted it was considering reassessing its long-held view, the Agency still has provided no information to explain why *Salmonella*—which comes into plants on chicken skin and inside chickens, including in the muscle tissue—is not a substance naturally occurring in chickens. More established agency precedent reinforces that *Salmonella* is naturally occurring in raw chicken. *See, e.g.*, Letter from Carmen Rottenberg, Acting Deputy Undersecretary, Office of Food Safety, to Laura MacCleery, Director, Center for Science in the Public Interest, at 1-2 (Feb. 07, 2018) ("We also disagree with your assertion that ABR *Salmonella* is an 'added substance' within the meaning of the adulteration provisions of the FMIA and PPIA.").

[12]21 U.S.C. § 453(g)(1).

[13]21 U.S.C. § 452.

[14]*Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

method."[15] *Black's Law Dictionary*, 1951 edition, defines the adverb by reference to "ordinary," stating it means "regular" or "normal."[16] And *Oxford English Dictionary*, which examines the historical development of the term, defines it as "[b]elonging to the regular or usual order or course" or occurring in "regular custom or practice."[17] The term retains its meaning in modern parlance and as defined "usually; as a rule."[18] Thus, under the plain language of the PPIA, a naturally occurring substance can be considered an adulterant only if the substance "regularly" or "normally," or through "regular or usual . . . course" or "regular custom or practice," or "usually" or "as a rule" renders the product injurious to health.[19] This simply is not the case.

As is well established, thorough cooking destroys *Salmonella*. Specifically, cooking raw chicken to an internal temperature of 165°F achieves a 7-log reduction in *Salmonella*.[20] In fact, even a slightly lower temperature still achieves instant lethality (162°F or 163°F, depending on the fat content), as can reaching yet-lower-still temperatures with sufficient dwell time, often of just a few seconds.[21] Even in the event raw chicken were cooked at yet lower temperatures, there would be a substantial log-reduction in *Salmonella*.

Consumers customarily cook chicken in a manner that achieves thorough cooking and destroys *Salmonella*. Chicken is customarily cooked through. Consumers are regularly reminded to use a meat thermometer to cook chicken to an internal temperature of 165°F – including on the package itself – which achieves lethality. While NCC's strong recommendation is that consumers use a meat thermometer, other less analytical ways to gauge "doneness", such as cutting into the meat to see if it is visibly white and firm, are also highly likely to achieve lethality and certainly cannot be said to "usually" or "normally" result in the product being injurious to health. Chicken is not customarily cooked "rare" or "medium," and waitstaff at restaurants do not ask patrons how they would like their chicken cooked because the default approach is to cook chicken all the way through. Certainly, it is not the case that due to handling and cooking practices, *Salmonella* in "regular custom or practices" causes the chicken to be injurious to health.

In this manner, *Salmonella* in raw chicken is fundamentally different than Shiga toxin producing *E. coli* (STECs) in raw non-intact beef. FSIS attempts to draw parallels between these product-pathogen pairs, but the analysis misses the key distinctions. In the Proposed Framework, FSIS attempts to reduce its 1994 decision declaring *E. coli* O157:H7 an adulterant in raw ground beef (and subsequent extension to STECs in raw non-intact beef) to a set of "criteria," all of which appear equally weighted: association with human illness, low infectious dose, severity of human illness, and typical consumer cooking practices.[22] However, that is not actually the approach FSIS took, nor is it the analysis courts performed when evaluating FSIS's *E. coli* policy.

In fact, FSIS's analysis turned *primarily* on whether *E. coli* was likely to be destroyed under customary cooking practices for raw ground beef. In explaining its policy on *E. coli* O157:H7, FSIS provided

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[15]Webster's New Twentieth Century Dictionary 1177 (1953).
[16]*Ordinary*, Black's Law Dictionary (4th ed. 1951).
[17]*Ordinary*, Oxford English Dictionary (2d ed., 1989).
[18]*Ordinarily*, Webster's New World College Dictionary (4th ed., 2010).
[19]The legislative history behind comparable language in the Federal Food, Drug, and Cosmetic Act reinforces this interpretation. In one debate, members stated "ordinarily injurious" meant "that people—substantial numbers of people—must actually be harmed by the product before it can be restricted in any way. This provision . . . puts the burden of proof on the FDA." 120 Cong. Rec. 36007 (1974) (Statement of Rep. Peter Kyros).
[20]FSIS, *FSIS Cooking Guidelines for Meat and Poultry Products (Revised Appendix A)*, Table 3, USDA.gov (2021), https://www.fsis.usda.gov/sites/default/files/media_file/2021-12/Appendix-A.pdf.
[21]FSIS, *FSIS Cooking Guidelines for Meat and Poultry Products (Revised Appendix A)*, Table 3, USDA.gov (2021), https://www.fsis.usda.gov/sites/default/files/media_file/2021-12/Appendix-A.pdf.
[22]Proposed *Salmonella* Framework at 10.

background on the risks of *E. coli* O157:H7 but then expressly tied *E. coli* O157:H7's status as an adulterant to cooking practices: "Raw ground beef products present a significant public health risk *because* they are frequently consumed after preparation (*e.g.*, cooking hamburger to a rare or medium rate state) that does not destroy *E. coli* O157:H7 organisms that have been introduced below the product's surface."[23] If that were not clear enough, FSIS continued, "the Agency believes that the status under the FMIA of beef products contaminated with *E. coli* O157:H7 *must depend* on whether there is adequate assurance that subsequent handling of the product will result in food that is not contaminated when consumed."[24] Cooking practices were expressly the dispositive factor. This is reinforced by the fact that FSIS determined that intact cuts of beef, when contaminated with the exact same *E. coli* O157:H7, were not adulterated because "[i]ntact steaks and roasts and other intact cuts of muscle with surface contamination are customarily cooked in a manner than ensures that these products are not contaminated with *E. coli* O157:H7."[25] FSIS again cited to customary cooking practices as the dispositive point in its 2011 *Federal Register* notice declaring several other STECs to similarly be adulterants in raw non-intact beef.[26] Thus, rather than being a four-factor analysis as presented in the Proposed Framework, there is only question: whether the customary cooking practices would ordinarily render the product injurious to health.

Courts recognize this distinction as pivotal. In upholding FSIS's *E. coli* O157:H7 sampling program, and in a case that fundamentally turned on whether *E. coli* O157:H7 could properly be considered an adulterant in raw ground beef, the District Court for the Western District of Texas focused on whether the cooking practices that most Americans considered "proper" for ground beef were sufficiently "thorough" as to destroy *E. coli* O157:H7:

> However, unlike other pathogens, it is not "proper" cooking but "thorough" cooking that is necessary to protect consumers from *E. Coli.* The evidence submitted by Defendants indicates that many Americans consider ground beef to be properly cooked rare, medium rare, or medium. The evidence also indicated that *E. Coli* contaminated ground beef cooked in such a manner may cause serious physical problems, including death. Therefore, *E. Coli* is a substance that renders "injurious to health" what many Americans believe to be properly cooked ground beef.[27]

In *Texas Food Industry Association*, just as in FSIS's explanation, the entire analysis turned on whether customary consumer cooking practices were sufficient. Under the court's reasoning, had what consumers understood to be "proper" cooking been adequate to destroy *E. coli* O157:H7 in hamburgers, then the substance would not have been an adulterant (just as it is still not an adulterant on raw intact beef).

But raw chicken is handled very differently than ground beef. Consumers do not customarily consider it "proper" to cook a medium rare chicken breast. Even ground chicken products such as chicken burgers or meatballs are customarily cooked through, not served rare. What consumers consider to be the "proper" or "customary" method is also a method that cooks chicken "thoroughly."[28]

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[23]FSIS*, Beef Products Contaminated with* Escherichia Coli *O157:H7*, 64 Fed. Reg. 2803, 2803 (Jan. 19, 1999) (emphasis added).
[24]Id (emphasis added).
[25]Id at 2804 (emphasis added).
[26]FSIS, *Siga Toxin-Producing* Escherichia coli *in Certain Raw Beef Products*, 76 Fed. Reg. 58157, 58158 (Sept. 20, 2011).
[27]*Texas Food Industry Ass'n v. Espy*, 870 F. Supp. 143, 149 (W.D. Tex., 1994).
[28]Other critical distinctions exist between STECs in raw non-intact beef and *Salmonella* in raw poultry. For example, *E. coli* typically enters the cattle slaughter process through cross contamination with fecal matter on the outside of the hide, which can get transferred to the meat if sanitary practices are not observed. By contract, *Salmonella* actually enters in the chicken, including in edible parts of the chicken.

Courts have likewise recognized this distinction. The Fifth Circuit recognized that "*Salmonella* [is] present in a substantial proportion of meat and poultry products" and "is not an adulterant *per se*" because "normal cooking practices for meat and poultry destroy the *Salmonella* organism."[29] The D.C. Circuit reached a similar conclusion in *American Public Health Ass'n v. Butz*, holding "the presence of salmonellae on meat does not constitute adulteration" and that "American housewives and cooks are not ignorant or stupid and their methods of preparing and cooking of food do not ordinarily result in salmonellosis."[30] In other words, existing circuit precedent indicates the mere "presence of *Salmonella* in meat products," without more, does not support USDA regulation under § 453(g)(1).[31]

FSIS, too, has long and consistently recognized that *Salmonella* is not an adulterant in raw poultry. For example, as recently as this year, FSIS denied a petition requesting FSIS declare certain *Salmonella* strains to be adulterants in raw poultry. In 2018, FSIS denied a different petition making a similar request to declare certain *Salmonella* strains as an adulterant in raw meat and poultry. In its 2016 *Federal Register* notice announcing new *Salmonella* performance standards for poultry, FSIS clearly explained, "*Salmonella* is not an adulterant in NRTE poultry products."[32] In 2014, FSIS rejected a petition to declare antibiotic resistant *Salmonella* an adulterant, stating "we are not aware of any data to suggest that consumers consider ground poultry . . . to be properly cooked when rare, medium rare, or medium."[33] Crucially, USDA has never argued that *Salmonella* is an adulterant under § 453(g)(1). Instead, it has argued the opposite in litigation and policy documents. For example, in the *Supreme Beef* case on the enforceability of *Salmonella* performance standards, the court noted, "The USDA agrees in this case that *Salmonella* is not a[n] . . . adulterant."[34]

In light of this long and consistent history, and even if the PPIA were to permit such an interpretation, FSIS would be hard-pressed to provide a rationale that its change in policy was not arbitrary and capricious or that an abrupt change in position was warranted by the record.[35] As it stands, FSIS has presented no data to support a conclusion that *Salmonella* in raw chicken "ordinarily" or "usually" renders chicken injurious to healthy under customary cooking practices.

Finally, the Proposed Framework would entail creating new substantive requirements affecting the rights of NCC member companies, which would make it a legislative rule, and would require amending or creating multiple regulations. If FSIS were to pursue the Proposed Framework, the Administrative Procedure Act would require FSIS to engage in a substantial amount of notice-and-comment rulemaking, which would require FSIS to develop and make available for public comment a record

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No amount of process control or sanitary dressing can prevent its being in the product because it starts out in the product.

[29]*Supreme Beef Processors, Inc. v. U.S. Dep't of Agric.*, 275 F.3d 432, 438–39 (5th Cir. 2001).

[30]*American Public Health Ass'n v. Butz*, 511 F.2d 331, 334 (D.C.Cir.1974).

[31]*See also, e.g.*, *Starr Surplus Lines Ins. Co. v. Mountaire Farms Inc*., 920 F.3d 111, 117 (1st Cir. 2019) ("[T]he mere fact of the FSIS-orchestrated recall does not give rise to the plausible inference that the type of salmonella found . . . could not be eliminated by proper cooking."); *Craten v. Foster Poultry Farms Inc*., 305 F. Supp. 3d 1051, 1058 (D. Ariz. 2018) (observing that existing case law "suggests Salmonella is not an adulterant" and rejecting several state law tort claims because Salmonella "is killed through proper cooking, which is how raw chicken products are intended to be used").

[32]FSIS, *New Performance Standards for Salmonella and Campylobacter in Not-Ready-to-Eat Comminuted Chicken and Turkey Products and Raw Chicken Parts and Changes to Related Agency Verification Procedures: Response to Comments and Announcement of Implementation Schedule*, 81 Fed. Reg. 7285, 7297 (Feb. 11, 2016).

[33]Letter from Daniel Engeljohn, Assistant Adm'r, Off. of Pol'y & Program Dev., USDA, to Sarah Klein, Food Safety Program (July 31, 2014).

[34]*Supreme Beef*, 275 F.3d at 439 n.21.

[35]*See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

comprehensively addressing the numerous factual and scientific issues raised by the Proposed Framework.

Fundamentally, FSIS has provided no explanation for making an abrupt change in its approach to *Salmonella* in raw poultry, as it would be required to do. Under the plain language of the PPIA and long-standing caselaw, FSIS cannot compile a scientific basis for declaring *Salmonella* an adulterant in raw poultry. Accordingly, the Proposed Framework stands on infirm legal footing. We urge FSIS to instead pursue alternative approaches for which it has authority, such as revamped *Salmonella* performance standards, as explained elsewhere in these comments.

The Proposed Framework Lacks Adequate Supporting Data

As a public health agency, FSIS has long promoted the use of sound science-based decision-making, which by definition must be based on, and driven by, scientific data. FSIS has presented no data to suggest a change in policy is needed or to the support the proposals or assumptions in the Proposed Framework. This is regrettable, as without supporting data, the Proposed Framework appears almost entirely speculative. The complete lack of data makes it impossible to provide meaningful feedback on key areas, such as whether the data calls for a change in policy, whether the Proposed Framework is supported by the data, and whether the specific elements of the Proposed Framework were developed appropriately in light of that data. NCC firmly believes that it is imperative that public health decisions and policy follow the data, not the other way around.

Data Issues Related to the Proposed Framework

FSIS must first develop data and conduct risk assessments and use that data to determine what, if any, policy changes are called for. There are a number of key missing data elements. For example:

- There is no data to support the idea that *Salmonella* levels on incoming flocks overwhelm food safety systems or would need to be monitored.
- There is not data to demonstrate that setting a finished product standard would have public health impacts, or what standard to even set.
- There is no data to suggest that additional testing during the process beyond what is already done would be impactful.
- We understand that FSIS has not even begun the two risk assessments, which would presumably provide useful insight to use in developing policy proposals.

In effect, the Proposed Framework seems to reflect a presumption that the proposed changes would be effective and has asked stakeholders to rebut that presumption. This applies the policy development process backwards.

Moreover, without data or details, it is impossible to provide meaningful feedback on the proposal. For example, stakeholders have no ability to assess whether the data supports the proposed actions or whether the actions are appropriate in light of the data. The Proposed Framework is devoid of virtually all key details, raising many questions and leaving just as many unanswered. To take but one example, FSIS has not explained why it has contemplated proposing a 1 CFU/g finished product standard, especially given that FSIS testing has a limit of detection (LOD) at 10 CFU/g and cannot accurately enumerate at the 1 CFU/g level and that FSIS has not begun two risk assessments seemingly designed to address this exact question.

What little data FSIS has referenced contains significant flaws:

- CDC's National Outbreak Reporting System, or NORs, is a web-based platform that launched in 2009.[36] It is used by local, state, and territorial health departments in the United States to report all waterborne and foodborne disease outbreaks and enteric disease outbreaks transmitted by contact with environmental sources, infected persons or animals, or unknown modes of transmission to CDC. From 2009 to 2020, NORs reported 15,344 poultry-related *Salmonella* illnesses, which represents 29.3% of all *Salmonella* illnesses (there were 52,374 total *Salmonella* illnesses reported from 2009 to 2020). Critically, however, that figure lumps together illness from both live poultry (e.g., handling a backyard flock) and consumption of poultry. Separating out the live-poultry exposures yields a very different result. 8,475 of the 15,344 poultry-related illnesses were attributed to live poultry – for example, handling chicks or interacting with backyard flocks – and not related to chicken consumption at all. Chicken consumption accounts for 5,076 cases in the NORS data, which represent 9.7% of all salmonellosis cases in the U.S. from 2009 to 2020. While the industry is committed to driving this number down further, failing to properly distinguish foodborne illness and the more-prevalent live-bird exposures significantly overstates the effect of chicken consumption on illness burden in the NORs data.

- The IFSAC report makes clear several important limitations: The illness estimates "should not be interpreted as suggesting that all foods in a category are equally likely to transmit pathogens." The authors also urge "caution" in "comparing estimates across years" as the percentages reflect a relative contribution to illness burden, which means a category could see its actual illness contribution decrease yet its relative percentage increase if other categories dropped even further. The authors expressly "advise using these results with other scientific data for decision-making."[37] The IFSAC report alone cannot drive scientifically based policy. Further, the illness contribution attributed to chicken is statistically indistinguishable from that of fruits, seeded vegetables, and pork and is followed very closely by "other produce."[38] This statistical parity between product categories suggests that a coordinated approach applying measured strategies against all of these categories would have a much greater public health impact than merely singling out one category without addressing the other.

- As previously mentioned, salmonellosis incident rates attributed to chicken have decreased over the last decade when per-capita chicken consumption patterns are considered. Changes in consumption patterns are critical for assessing foodborne illness and must be considered to properly evaluate changes in illness rates or the significance of source attribution.

- If FoodNet Fast, NORS, and IFSAC data were reflective of consumption patterns of chicken over time, the overall burden of illness attributed to chicken would actually have decreased.

- FSIS has also left unaddressed whether the Proposed Framework would make an impact on the Healthy People 2030 goals, and if so, what impact would be anticipated and how it would be determined.

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[36]Center for Disease Control, *National Outbreak Reporting System, Center for Disease Control, CDC.gov* (2019), https://www.cdc.gov/nors/index.html.

[37]The Interagency Food Safety Analytics Collaboration, *Foodborne illness source attribution estimates from 2020 for Salmonella, Escherichia coli O157, and Listeria monocytogenes using multi-year outbreak surveillance data, United States*, at 12 (Nov. 2022), https://www.cdc.gov/foodsafety/ifsac/pdf/P19-2020-report-TriAgency-508.pdf.

[38]The Interagency Food Safety Analytics Collaboration, *Foodborne illness source attribution estimates from 2020 for Salmonella, Escherichia coli O157, and Listeria monocytogenes using multi-year outbreak surveillance data, United States*, at 8 (Nov. 2022), https://www.cdc.gov/foodsafety/ifsac/pdf/P19-2020-report-TriAgency-508.pdf.

In light of these substantial data gaps, it is essential that FSIS prioritize generating and making publicly-available key data before continuing further in this process. The Agency is currently working towards the development of two quantitative risk assessments – one focused on *Salmonella* in chicken and the other focused on *Salmonella* in turkey. In the July 1, 2022, *Constituent Update*, FSIS announced that it has signed a cooperative agreement with the University of Maryland's Joint Institute for Food Safety and Applied Nutrition (JIFSAN) in partnership with EpiX Analytics to help in the Agency's data collection effort for these risk assessments. NCC has engaged with JIFSAN routinely since July 2022 to understand this group's approach to data collection, the specific data needs, and how NCC and our member companies can aid in this process. Unfortunately, FSIS only provided the JIFSAN team three months to work with trade associations like NCC to understand data needs, develop a platform by which data could be shared, and fully understand the goals of the Agency. This timeline has proven to be insufficient as we are approaching the end of 2022 and this group, in conjunction with several trade associations, industry representatives, and FSIS, has still not been able to execute the intended data collection effort.

Although the process has not progressed as quickly as FSIS seemed to expect, NCC believes that the approach to formalize two risk assessments is appropriate. Moreover, we support the risk management questions that the risk assessments intend to address including:

1. What public health impact (change in illnesses, hospitalizations, and deaths) is achieved by eliminating a proportion of chicken (or turkey) at receiving contaminated with specific levels of *Salmonella* and/or specific *Salmonella* subtypes?
2. What is the public health impact (change in illnesses, hospitalizations, and deaths) achieved by eliminating final product contaminated with specific levels of *Salmonella* and/or specific *Salmonella* subtypes?
3. What is the public health impact of monitoring/enforcing process control from re-hang to post-chill? Monitoring could include analytes such as Enterobacteriaceae, Aerobic Plate Count, or other indicator organisms, analysis could include presence/absence or levels and the monitoring could also include variability of actual result versus expected result, log reduction, absolute sample result, or other individual establishment specific criteria.
4. What is the public health impact of implementing combinations of the risk management options listed above?

As stated in the July 1, 2022, Constituent Update, "These risk management questions reflect the information needed to evaluate and compare the public health benefits of policy options for controlling Salmonella in poultry." The Agency went on to state that the risk assessments would undergo an independent peer review and be released publicly once completed. To reiterate, NCC fully supports the completion of and the independent peer review of both risk assessments. NCC believes that it is imperative that any policy changes rely on the results of the risk assessments and without that information, it is impossible to understand what regulatory changes, if any, would impact public health. It also makes it very challenging for the regulated industry to provide meaningful comments with this information lacking, and the Agency has not disclosed their sources of data used to develop the Proposed Framework. Without the completion, peer review, and publication of the two risk assessments, the Agency risks operating without the benefit of a robust record, undermining informed decision making.

Finally, there are two national advisory committees whose recommendations may influence the content of the Proposed Framework: the National Advisory Committee on the Microbiological Criteria for Foods (NACMCF) and the National Advisory Committee on Meat and Poultry Inspection (NACMPI). Charges of both advisory committees include a focus on *Salmonella* in poultry among other topics. We encourage FSIS to update its thinking on the Proposed Framework in light of many of the recommendations by these advisory committees.

Data Recommendations

Given the critical role data plays in public health decisions, NCC provides the following data recommendations:

1. Complete the two risk assessment studies, submit them for peer review, and release them for public review once complete.
2. Use the risk assessment results to inform further development of the Proposed Framework.
3. Provide the public a detailed report with the data, information, and scientific analysis supporting the key elements of the Proposed Framework and provide an opportunity for public comment on the Proposed Framework based on the report.
4. Consider key NACMCF and NACMPI recommendations as they may apply to the Proposed Framework.
5. Hold technical meetings with stakeholders to discuss in detail the changes and complications that would be raised by any aspect of the Proposed Framework being contemplated. These should be made part of the administrative record in any subsequent rulemaking, and they should be held before any rulemaking is initiated to facilitate open dialogue.

Feedback on Component 1 – Incoming Flock Testing

NCC has significant concerns that Component 1 of the Proposed Framework exceeds FSIS's authorities, is not supported by data, would be impractical, and is unnecessary. We suggest alternative approaches that will better achieve FSIS's objectives within the confines of law and reality.

Component 1 would have FSIS mandate on-farm testing, impose an incoming flock *Salmonella* standard, seemingly provide FSIS inspectors with the ability to dictate which flocks may or may not enter an establishment, and force establishments to view *Salmonella* as a hazard reasonably likely to occur (RLTO) at receiving. None of these actions are appropriate, and they risk significantly undermining existing policy and systems.

FSIS Lacks Authority to Regulate Farms

First, FSIS lacks jurisdiction to mandate on-farm testing, although Component 1 would do just that. The PPIA is clear that FSIS's authority begins at the official establishment. FSIS's primary slaughter-related inspectional authorities are expressly limited to operations in official establishments:

- Ante mortem inspection: "[T]he Secretary shall, where and to the extent considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry **in each official establishment** processing poultry or poultry products. . . ."[39]
- Post-mortem inspection: "The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed . . . in each **official establishment** processing such poultry or poultry products . . . ."[40]
- Sanitary practices: "Each **official establishment** slaughtering poultry or processing poultry products . . . or otherwise subject to inspection under this chapter shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Secretary for the purposes of preventing the entry into . . . commerce, of poultry products which are adulterated."[41]

[39]21 U.S.C. § 455(a).
[40]21 U.S.C. § 455(b).
[41]21 U.S.C. § 456(a).

- General compliance: "No **establishment** processing poultry or poultry products for commerce otherwise subject to this chapter shall process any poultry or poultry product except in compliance with the requirements of this chapter."[42]

It is telling that even ante mortem inspection, which is inspection of live birds, must occur at the official establishment. Had Congress wished for FSIS to be able to oversee farms, Congress could have given that authority to FSIS. Instead, Congress specifically limited FSIS's inspectional and oversight activities to official establishments, even for the inspection of live birds. FSIS has long agreed with this limitation. For example, in the final rule implementing HACCP, FSIS expressly recognized that "FSIS does not intend nor is FSIS authorized, to mandate production practices on the farm."[43] Thus, not only does the statute specifically limit FSIS's authority to official establishments (and further distribution therefrom), but FSIS also expressly recognizes this limitation in its foundational rulemaking for the very HACCP framework that FSIS proposes using to regulate activity on farms.

By establishing *Salmonella* thresholds for incoming flocks, FSIS would require that farms take actions to prevent *Salmonella* levels on flocks from exceeding the incoming threshold level. Farms would have to figure out how to monitor *Salmonella* levels and would be required to take actions to bring levels to within FSIS's target, otherwise the flocks are of essentially no economic value. FSIS is very clear about its intent. Component 1 is entitled, "Requiring incoming flocks be tested for *Salmonella* before entering an establishment."[44] This testing would have to occur on farms, and by the plain language of the Proposed Framework would happen before reaching the establishment. In other words, FSIS would be "mandating production practices on the farms," which FSIS has long recognized it may not do. Positioning the threshold merely as a receiving criteria that applies to the official establishment does not help because the only way to ensure a flock meets the incoming criteria is to require a farm to take various actions to ensure the threshold is met. No matter how FSIS phrases the threshold, the application of a threshold would require farms take actions, which FSIS may not do. FSIS cannot achieve through an indirect regulation what it lacks authority to do directly.

Further, setting a *Salmonella* threshold for incoming flocks necessarily implies that *Salmonella* above the threshold (1) renders the incoming birds adulterated and (2) that the purported adulteration cannot be corrected through processing. The only explanation for prohibiting entry of flocks that test above a certain *Salmonella* threshold is that the flocks would somehow irreparably adulterate any finished product that would be produced from them. FSIS would have no basis to arbitrarily restrict the use of flocks otherwise. But as explained above, *Salmonella* does not render raw poultry adulterated, and FSIS has presented no evidence to change this longstanding conclusion. Moreover, by categorically prohibiting entry, FSIS is indicating there is no means for an establishment to correct the purported adulteration, otherwise under HACCP principles the establishment could accept and process the product to correct the issue. FSIS has presented no evidence to indicate that flocks with *Salmonella* above a certain threshold are *per se* adulterated, much less somehow irreparably so.

Additional Issues Pertaining to Component 1

Even setting aside FSIS's lack of authority to regulate on-farm activities, Component 1 suffers from numerous other issues. First, FSIS has presented no data to demonstrate that an incoming threshold is necessary for an establishment to maintain process control and sufficiently reduce *Salmonella* during processing; no information to explain how a threshold would be determined or what data FSIS or an establishment would use to do so; no data to establish that on-farm *Salmonella* sampling several weeks before a flock is processed correlates in a reliable way to actual incoming *Salmonella* loads at the beginning of processing; no data to demonstrate that reducing incoming loads would achieve any particular public health impact; and no data to demonstrate that incoming loads require measuring for

[42] 21 U.S.C. § 459(a).
[43] 61 Fed. Reg. 38806, 38810 (July 25, 1996).
[44] *Salmonella* Framework at 5 (emphasis added).

HACCP systems to operate as designed. Without data to support such a substantial policy shift, the Agency cannot justify its approach, nor can stakeholders meaningfully provide informed feedback on whether the approach is justified by or consistent with the data. Science-based policymaking must start with data.

Second, a mandatory receiving threshold would be fundamentally inconsistent with HACCP principles. Under HACCP, establishments, not inspectors, make decisions about how to execute their food safety systems. FSIS's role is to verify that the HACCP system is designed and scientifically supported in accordance with FSIS regulations and that the establishment is implementing the HACCP plan as intended. FSIS's role decidedly is not to tell an establishment which flocks may be processed, and which may not. Component 1 would wind back the food safety clock a quarter century and reimpose a long-abandoned command and control approach to poultry processing.

Third, Component 1's proposed requirement that establishments declare *Salmonella* as a hazard RLTO at receiving is inconsistent with HACCP principles. Under HACCP, the establishment – not FSIS – is required to conduct its own hazard analysis, identify those hazards that are RLTO in the process, and implement Critical Control Points (CCPs) accordingly. If *Salmonella* were a hazard RLTO at receiving, it is unclear what step would be the CCP and how an establishment would be expected to validate that CCP.

Fourth, Component 1 is likewise inconsistent with established FSIS inspectional approaches because FSIS cannot verify the testing. FSIS typically must be able to verify the data used by an establishment to support its food safety system, but it is unclear how FSIS would verify incoming flock testing that occurred on a farm several weeks before a flock arrived at the establishment. FSIS's proposal to conduct verification testing at rehang is not appropriate for verifying on-farm testing. Several weeks would have passed from the time an on-farm sample was collected and FSIS's rehang sampling, and the microflora would be expected to change during this time. On-farm data would likely be collected by drag or boot swabs, which is a very different sampling process than taking a rehang sample. More importantly, however, is that fact that there is inconclusive evidence as to what method of on-farm testing actually yields repeatable and defensible results. Additionally, different enumeration technologies could yield different results and different confidence intervals. Moreover, between the time of on-farm testing and rehang sampling, the birds or carcasses will have undergone multiple interventions and processing interventions that affect *Salmonella* load. Even the Agency's own instructions in the Raw Chicken Parts Sampling Program require IPP to sample eligible chicken parts after the last intervention is applied.[45] Simply put, rehang samples would not correlate with on-farm samples, nor has FSIS provided any data to demonstrate otherwise.

Fifth, pre-harvest sampling would impose significant burden across the entire industry. NCC estimates that between 260,000 and 300,000 flocks were required to reach USDA's estimate for chickens processed in 2021. That would require collecting and testing between 260,000 and 300,000 samples annually, in rural locations, to comply with the proposal, and that is assuming each flock requires only one test. This would impose a substantial cost, pose unnecessary biosecurity risks, and overwhelm existing laboratory capacity and supply availability.

Sixth, challenges would also complicate FSIS verification sampling. For example, FSIS would have to collect a large number of samples to obtain a statistically reliable measure of the *Salmonella* level of a flock – one hot rehang sample would not suffice. It is doubtful FSIS has the sampling or laboratory capacity for this. It is also not clear how FSIS would handle outliers. For example, would the flock be evaluated by the average load or by the highest result, and how would FSIS obtain enough samples to have a sufficiently narrow confidence interval around the result? And even if FSIS could obtain this

[45]FSIS, *Raw Chicken Parts Sampling Program*, USDA.gov (2021), https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/10250.1-Raw-Chicken-Parts-Sampling-Program.pdf.

information, how would FSIS be able to meaningfully compare it to on-farm sampling conducted weeks earlier, using different sampling and possibly test methods, and reflecting birds before they had undergone various processing steps?

Seventh, it is unclear how FSIS would handle the inherent delay in receiving results for its verification testing, which, especially for enumeration, could take a significant amount of time until results are obtained. The flock would likely have been processed, the resulting products shipped, and perhaps even consumed well before FSIS received its verification results. But if the purpose of rehang sampling is to verify the establishment is properly conducing on-farm sampling and meeting the Agency's pre-determined threshold at live receiving, several serious logistical and practical problems arise. If FSIS is framing the proposed live receiving threshold as an acceptance criterion, with the implication being that a flock whose verification sampling exceeds the threshold should be rejected, then typically the establishment would be expected to hold the flock pending the results of FSIS's verification sampling. But holding an entire flock's worth of production every time FSIS conducted verification sampling would be extraordinarily burdensome and in effect impossible for most establishments. But if the establishment were allowed to ship the product before FSIS received the rehang verification results, it is unclear how the establishment would be able to implement corrective action. And it is entirely unclear how FSIS would view a situation in which the FSIS rehang verification sample was above the live receiving "threshold" yet the product from that flock met an enforceable finished product standard.

Additional logistical and practical problems abound. For example:

- It is unclear at what time period a flock would be required to be tested, how that would be determined, whether it would vary for different bird types, housing conditions, farm location, and market weight of the flock, among many other compounding factors.
- It is unclear what test method should be used for on-farm testing, as different methods might yield different types of results.
- Mandating such a high volume of on-farm testing could pose significant logistical difficulties in getting supplies and samples, especially to and from remote rural areas.
- It is entirely unclear what on-farm testing strategies would best reflect the load (or, if used, serotypes) actually entering the plant. Substantial industry testing has shown this is very difficult to do, and FSIS has provided no data on this point.
- How would issues such as testing delays, lost samples, equivocal results, or lab error resulting in a flock not having an on-farm test result be handled? A flock cannot be held past its target catch date without risking serious bird welfare issues.

FSIS has not addressed what would happen to a flock that tested above threshold. FSIS's contemplated policy could have catastrophic bird welfare outcomes and could result in flocks being needlessly held, delayed, diverted, or euthanized. Likewise, the proposal risks imposing substantial financial losses on the family farmers who raise the majority of broiler chickens and now might be left with flocks that cannot be brought to market and processed.

At bottom, FSIS's contemplated proposal would introduce a tremendous number of challenges and would be inconsistent with established HACCP principles. The reality is that the industry already implements numerous preharvest intervention strategies to reduce *Salmonella* loads coming into establishments, and they have done so even though they are not required to. For example, robust preharvest *Salmonella* control strategies are widely implemented across the industry to include programs in the hatchery, feed mill, breeder house, and broiler house. These programs include, but are not limited to:

- Biosecurity programs
- Equipment sanitation
- Feed treatment

- Litter treatment
- Water sanitation programs
- Feeding of prebiotics and probiotics
- Rodent/insect control
- Cleanout programs
- Vaccinations

The industry is already taking significant steps to address *Salmonella* in preharvest. Component 1 would contribute nothing but would impose considerable cost and complication. If FSIS's objective is to enhance process control and drive down finished product *Salmonella* levels, a much more direct and efficient approach would be to consider an enumerated performance standard for finished products and allow establishments to innovate and design their systems as appropriate to meet that target.

Component 1 Recommendations

In light of the substantial legal, scientific, and practical considerations associated with Component 1, NCC recommends the following:

1. FSIS should not establish incoming flock thresholds.
2. If FSIS wants to better understand process control throughout the process, from live receiving to pack-out, FSIS should engage in more extensive exploratory rehang sampling programs and use that data, along with FSIS data from other sampling points, to analyze process control throughout processing and to inform risk assessment modeling.
3. As discussed further below, FSIS should instead consider an enumerative performance standard after a baseline and qualitative risk assessment is performed. Establishments should be provided the flexibility to design science-based systems specific to their operations to meet that standard.

Feedback on Component 2 – In-Process Testing

NCC is concerned that Component 2 would be too prescriptive and could stifle food safety innovation. Component 2 would require establishments to conduct in-process testing at specified points using certain indicator organisms. Establishments already conduct extensive in-process testing, and a command-and-control-style approach dictating testing at certain points would be counterproductive.

As with other elements of the Proposed Framework, FSIS has provided no data to explain why Component 2 is needed, what benefits Component 2 would have on food safety outcomes, or how the testing locations, frequencies, or target organisms would be selected, among others. Without this information, it is impossible to thoroughly evaluate options, offer meaningful feedback, or understand whether the Agency's proposal is a reasonable response to the data. As with the other Components, it is critical that FSIS first develop and make available its data and then make decisions based on that data in a transparent manner.

As discussed above, HACCP principles dictate that establishments, not FSIS, are to develop and implement their food safety plans, including any process control monitoring strategies. Chicken processors do this, and processors collect substantial volumes of data throughout their processes. It is inappropriate to dictate specifically where an establishment must sample, how frequently it must sample, and what it must sample for. Doing so risks stifling innovation. An overly rigid sampling framework will hinder innovation and technology development by creating outsized focus on specific points and specific target organisms. Instead, plants should be encouraged to innovate by testing at the appropriate point for their systems, which in turn will provide more data and more impetus to drive technological improvements. A rigid framework also risks punishing companies whose food safety systems are better monitored using different testing protocols than called for under FSIS's one-size-fits-

all approach. Such a company would be forced to choose between incurring the cost of additional sampling or implementing FSIS's less-effective approach. Similarly, a rigid framework risks diverting limited company resources away from the most effective sampling points to meet the regulatory sampling requirements. None of these outcomes promote food safety.

Moreover, FSIS seems to contemplate requiring all establishments to follow the same process control methodologies, or perhaps requiring all establishments to meet the same process control standard. This would be inappropriate. Each establishment must be free to monitor process control as appropriate for their systems. FSIS has provided no data to show that it is appropriate or even feasible to evaluate all establishments using the same standard, especially if establishments have different line configurations or intervention strategies relative to FSIS-mandated sampling points. Without more information about what FSIS means by "requiring establishments to use the same statistical process-control method," it is difficult to provide specific feedback, but establishments need the ability to design their testing programs to reflect their processes, and they should be evaluated on their ability to implement their plans successfully, not against a rigid benchmark that might not reflect their operations. FSIS's science-based changes implemented through the New Poultry Inspection System created the opportunity for greater science-based decision-making by enhancing establishments' flexibility and promoting more science-based verification activities by FSIS. Mandating that establishments follow fixed sampling plans would be a step backward from this more modernized approach. Instead, FSIS should be encouraging establishments to innovate and implement tailored food safety systems.

Component 2 Recommendations

In light of these concerns, NCC makes the following recommendations:

1. Consider specifying where, when, and how FSIS will collect process control verification samples, and let establishments develop their own individual sampling plans as appropriate for their operations. This approach would provide FSIS a consistent frame of reference but leave establishments free to design their processes as they determine will best promote food safety.
2. Use FSIS verification sampling results to feed into risk assessment modeling to better understand process control considerations.
3. Encourage individualized sampling plans and strategies for establishments.
4. Encourage plants to utilize Statistical Process Control (SPC) by providing detailed guidance on options for application and key locations. This could be particularly helpful for small and very small establishments and could be developed in conjunction with the appropriate academic institution.

<u>Feedback on Component 3 – Enforceable Final Product Standard</u>

NCC strongly opposes setting an enforceable finished product standard for raw chicken. Such a standard would be legally infirm since FSIS has provided no data to demonstrate why any standard, much less the contemplated 1 CFU/g threshold, is scientifically appropriate. Regardless of how implemented, an enforceable finished product standard would impose substantial logistical and technical challenges on the industry.

FSIS Lacks Legal Authority to Implement a Finished Product Standard for Raw Chicken

FSIS lacks statutory authority to establish an enforceable finished product standard for *Salmonella.* For a threshold-based finished product standard to be legally enforceable, FSIS would have to determine, through scientific data, that the substance is not an added substance, and that the substance would "ordinarily render [the product] injurious to health" at levels above the threshold. Otherwise, the product would not be adulterated and there would be no legal mechanism FSIS could use to enforce the standard. As explained above, *Salmonella* is not an adulterant in raw chicken, a position consistently reflected in decades of Agency policy and court decisions.

Such a cavalier proposed change to Agency policy is especially alarming because FSIS has provided absolutely no data to support its proposal. FSIS has provided no data, in the context of the Proposed Framework or otherwise, to support a conclusion that *Salmonella* above any threshold level would "ordinarily render" raw chicken injurious to health, much less the 1 CFU/g threshold contemplated in the Proposed Framework. Nor is NCC aware of any.

NCC is gravely concerned that FSIS has abandoned science-based decision-making in Component 3. Sound science-based policymaking requires first developing data and then developing policies in light of that data. In the Proposed Framework, FSIS has gone about its decision-making backwards. FSIS appears to have a desired outcome in mind and has asked for data to support it. The 1 CFU/g threshold previewed in the Proposed Framework appears entirely arbitrary. If anything, it appears simply to be set as close to zero as possible without actually creating a zero-tolerance standard.

FSIS has not explained why an enforceable product standard is appropriate, why it should be set at 1 CFU/g, or why it should apply uniformly to all raw poultry regardless of differing commercial and consumer applications and known differences in *Salmonella* levels in different types of poultry.

Just as troubling, the Proposed Framework suggests FSIS is not interested in developing data to test its proposed threshold. For example, FSIS has indicated it does not intend to conduct a baseline enumeration survey, which would make it impossible to assess the current level of Salmonella present on raw poultry and to determine the public impacts of this or any other change. We question how FSIS can be confident that 1 CFU/g is an appropriate threshold for a finished product standard when FSIS does not even know what levels are actually present on finished products today. Moreover, FSIS has indicated it is conducting two risk assessments, but we understand the data collection analysis to begin those risk assessments has not even begun. We fail to understand why FSIS would, knowing that it is conducting risk assessments to provide information addressing this very point, nonetheless move forward and propose a specific finished product threshold at this point. The appropriate approach would be to conduct the risk assessments, conduct a baseline, gather and analyze any additional data needed, and only then determine whether a finished product standard might be appropriate and, if so, how to develop such a standard.

Moreover, while a risk assessment is essential for projecting the likely effect of different proposed standards on public health and product risks, for a risk assessment to provide value, the risk must be accurately identified, analyzed, and evaluated. A risk assessment is but one component of the broader science-based decision-making process. To determine the level of risk mitigation that would have a meaningful impact on public health, the Agency must implement a comprehensive risk analysis strategy, which must include three components: the risk assessment itself, risk communication, and risk management. Moreover, a risk assessment cannot itself determine whether a product is adulterated. That standard is established in the PPIA, which as discussed above requires demonstrating that a naturally occurring substance renders the product "ordinarily" injurious to health.

Finally, we understand that FSIS may be considering applying a potential finished product standard differently depending on the size of the establishment. If the finished product standard is an adulteration standard – which is the only way it could be enforceable – the PPIA provides no such flexibility. Under the PPIA, if a product is adulterated, the product is adulterated regardless of the size of the establishment involved.

At bottom, the PPIA's adulteration standard for naturally occurring substances requires a very clear scientific analysis: the substance has to "ordinarily" render the product injurious to health at the threshold level. Otherwise, by law, the product is not adulterated. FSIS has not provided any information to support such a determination. And without such information, it is impossible to meaningfully critique the contemplated approach.

Component 3 Raises Myriad Unresolved Issues

Beyond the grave legal concerns, Component 3 raises numerous other complex issues that remain unaddressed. For example, the necessary testing technology simply does not exist. FSIS's assumption that testing technology with sufficient throughput, sensitivity, and speed will materialize simply because FSIS wills it is arbitrary. In fact, FSIS's own newly approved testing technology has a LOD of *Salmonella* at 10 CFU/g, so it is unclear how FSIS would even evaluate compliance with the contemplated 1 CFU/g standard. Moreover, the fact that FSIS is unable to accurately quantify *Salmonella* at 1 CFU/g with its method casts considerable doubt on how FSIS developed this proposed standard.

Moreover, raw chicken is a highly perishable product with a short shelf life, and supply chains are not set up to hold substantial quantities of raw chicken. But an enforceable finished product standard would require testing and holding of enormous quantities of raw chicken until results are received. There simply is not enough cold storage in the country to accomplish this, and a widescale test and hold program would significantly degrade product shelf life and quality. Companies may be forced to destroy product or divert it to the cooking market, which accounts for only a modest amount of chicken production and would quickly find both demand and processing capacity outstripped. FSIS's policy threatens to constrict the supply of raw chicken, which in turn risks driving up food inflation and heightening food insecurity for America's most vulnerable families.

Likewise, an "enforceable" final product standard implies that FSIS would request a recall if a product were found to exceed the standard, and it is entirely unclear how lotting would be determined when establishing the scope of a recall. For example: Would lots be defined on a flock-by-flock basis? What about other flocks processed earlier or later that day? Would all chicken that contacted the same chiller water be included in recall? How would rework and hang-backs be handled? If parts of a day's production were sent to a different use, would all products from that day or flock be implicated? If a specific part, such as thighs, exceeded the standard, would that also affect other parts made from that flock, such as breasts? What if some types of parts exceed the standard but others do not? All of these questions, and many more, would require careful, considered analysis. NCC is extremely concerned that under the Proposed Framework, a single test result could cause the recall of an extremely large amount of product. There are much better ways to focus efforts on driving down levels of *Salmonella* without raising these extremely complicated issues.

FSIS has also provided no information on how it would expect establishments to test entire production lots of raw chicken in a statistically meaningful way. Raw chicken is not like raw non-intact beef, where lots can be limited to specific source materials and tested individually. Raw chicken production lots are very large, and *Salmonella* is unlikely to be uniformly distributed in a lot. As a result, it would be necessary to collect a tremendous number of samples to have confidence that the result is representative of the entire production lot. A single sample would be wholly inadequate. It is unclear if FSIS has the laboratory resources to adequately sample and analyze finished products lots, and it would impose considerable costs on establishments to do so. Moreover, raw poultry cannot be lotted in a way to limit lot size for finished product testing, and there would be no way to form lots conducive to a finished product test and hold program. We are also concerned about establishments that implement a less than daily (LTD) sanitation program and how those establishments would be expected to lot product. For example, due to time and difficulty involved, some establishments do not completely empty their chiller systems daily and instead have validated LTD sanitation programs in conjunction with FSIS. This facilitates efficient operations and protects the environment by reducing water and chemical use. The environmental impact and resources associated with losing a LTD sanitation program would be significant and must be considered.

Further, to the extent the Agency were considering applying a finished product standard differently based on establishment size or conducting sampling for small or very small establishments, it is unclear

how the Agency would take the necessary number of samples and still have remaining lab capacity to complete any verification sampling.

In practice, a standard like that contemplated in Component 3 would impose substantial cost on the industry, would divert tremendous amounts of raw chicken to less-demanded cooking applications (and would overwhelm the already saturated market for cooked chicken as well as capacity to cook it), and ultimately would mean less chicken at higher costs for consumers.

Component 3 Recommendations

NCC strongly opposed Component 3. FSIS lacks statutory authority to implement it, and the proposal raises numerous insurmountable technical issues. Instead, NCC recommends the following for enhancing *Salmonella* control in raw poultry finished products:

1. Conduct an enumerative baseline for *Salmonella* in raw poultry, focusing on different parts and perhaps different end-use applications or differences between slaughter and further processing facilities. Develop robust enumeration data for different parts.
2. Use enumerative baseline data to inform a risk assessment model.
3. Develop an enumerative performance standard to replace the current presence-based performance standard that is focused on specific parts.
4. Enhance labeling and consumer education. NCC has petitioned FSIS multiple times for more robust and modern labeling for certain types of raw poultry, which FSIS has yet to act on.

In particular, NCC believes that an enumerative performance standard would advance FSIS's public health goals in a much simpler and easier-to-implement manner. History has shown that chicken processors will make changes to meet voluntary performance standards. A properly constructed enumerative performance standard would achieve the same objective of driving down levels of *Salmonella* on finished product raw poultry, but with a number of benefits over the proposed Component 3. An enumerative performance standard provides the Agency and establishments with greater flexibility; can be implemented quickly without the need to rely on a novel application of the adulteration standard; is more responsive to existing supply chains and distribution practices; would not require new rapid testing technologies or complex test and hold programs (but the existence of the program would provide demand to spur testing innovation anyway); and would generate valuable long-term data about *Salmonella* levels on finished product. We strongly encourage FSIS to explore this pathway instead of the proposed Component 3, and NCC stands ready to collaborate with FSIS on this approach.

Cross-Cutting Considerations

NCC has feedback on several cross-cutting considerations related to the Proposed Framework.

Developing a Robust Data-Sharing Mechanism is a Critical Prerequisite Step

Throughout our comments, we have expressed concern about the lack of data and scientific analysis supporting the Proposed Framework. Chicken processors collected substantial quantities of data, dwarfing that collected by FSIS through verification and exploratory sampling. For more than a decade, NCC has sought a mechanism to facilitate aggregate data sharing with FSIS. NCC members are interested in developing an appropriate data-sharing process. In particular, NCC urges FSIS to develop a data-sharing framework that is consistent with the Freedom of Information Act exemption (b)(3), either with FSIS or a sister agency within USDA.[46] This data would provide FSIS with substantially more insight into food safety systems throughout the industry and would facilitate policy development and risk assessment modeling.

[46] 5 U.S.C. § 552(b)(3).

Serotype and Virulence-Based Testing is Not Practical with Current Technology

NCC supports efforts to enhance cutting-edge technologies to better understand *Salmonella* risks. Advanced testing technologies such as serotype-specific testing and virulence-based testing show great promise but, as FSIS recognized in the Proposed Framework, will require additional development before they can be used widely and effectively in everyday food processing operations. We encourage FSIS to support the continued development of and innovation with these technologies, but they are not quick, affordable, or available enough to be used widely in food processing operations. Moreover, we encourage FSIS to support further research on virulence factors and how they may impact public health.

The Proposal Risks Significant Disruption to the Industry and Threatens Food Prices for Consumers

Many aspects of the Proposed Framework threaten to drive up costs and cut availability of chicken. This would be an extremely unfortunate outcome, especially in light of recent record across-the-board inflation and the continuing food insecurity afflicting millions of American families. Chicken is American's most affordable and most consumed protein. It is nutritious and versatile, and it is a staple protein for many, and critically for those families trying to make the most out of every food dollar. Moreover, chicken makes up a significant portion of food bank donations and purchases for federal and state nutrition assistance programs. Aspects of the Proposed Framework threaten to undermine chicken availability.

For example, Component 1 would seem to contemplate entire flocks being turned away from plants before they are even processed. This would have devastating animal welfare implications, and it would reduce the supply of chicken in the market, in turn driving up costs. Likewise, a finished product standard would likely cause substantial amounts of product to be diverted to cooking operations. However, there is limited use and demand for precooked chicken, and that demand is largely saturated. Moreover, there is limited capacity to actually produce cooked chicken. Combined, these factors mean that much of the chicken that FSIS likely anticipates would be diverted to cooking operations would simply be destroyed, again reducing the supply of chicken and driving up costs. It would be most unfortunate for FSIS to choose this moment to worsen food insecurity and to drive up consumer food prices.

Further, the family farmers who raise most of the broiler chickens processed in the United States would be put at great financial risk if FSIS were to subject the marketability of the flocks they raise to a live receiving threshold. It is entirely unclear how FSIS anticipates the threshold affecting farmers, and this change could inject tremendous uncertainty into what has long been a prosperous way to deploy farming capital.

Conclusion

NCC appreciates the opportunity to provide comment on FSIS's Proposed *Salmonella* Framework. NCC member companies share FSIS's goal of reducing *Salmonella* levels on raw chicken and, ultimately, driving down salmonellosis cases. The chicken industry has made tremendous advances in reducing *Salmonella* presence, and the industry continues to drive down *Salmonella*. However, NCC has serious concerns about many aspects of the Proposed Framework. The Proposed Framework contemplates actions that exceed FSIS's statutory authority, that would be extremely difficult and perhaps impossible to implement, and that are not consistent with modern food safety approaches. Moreover, the lack of supporting information and data makes it extremely difficult to meaningfully evaluate and provide feedback on the Proposed Framework. NCC is concerned that policy appears to be getting ahead of the science.

NCC urges FSIS to instead pursue the recommendations made in these comments. The Agency should continue to work closely with all stakeholders through hosting technical meetings prior to the issuance of a proposed rule to ensure the ability for two-way dialogue and the development of the best approach forward based. These recommendations – in particular, conducting additional data gathering and analysis, developing an appropriate industry-agency data sharing protocol, and developing an enumerated performance standard – would significantly advance public health objectives while avoiding many of the complications, uncertainties, and costs raised by the Proposed Framework.

Please feel free to contact us with any questions regarding the above request. Thank you for your consideration.

Respectfully submitted,

Ashley B. Peterson, Ph.D.
Senior Vice President, Scientific and Regulatory Affairs
National Chicken Council

EXHIBIT 6

NCC Petition Regarding NRTE Stuffed Chicken Breast Products (Feb. 25, 2022)

NATIONAL CHICKEN COUNCIL

1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622

February 25, 2022

FSIS Docket Clerk
Department of Agriculture
Food Safety and Inspection Service
Room 2534 South Building
1400 Independence Ave., SW
Washington, DC 20250-3700

Re: Petition to Establish Regulations for the Labeling and Validated Cooking Instructions for Not-Ready-to-Eat Stuffed Chicken Breast Products That Appear Ready-to-Eat

Dear Docket Clerk:

The National Chicken Council (NCC) respectfully submits this supplement updating our 2016 petition requesting that the Food Safety and Inspection Service (FSIS) adopt regulations establishing labeling requirements for not-ready-to-eat (NRTE) stuffed chicken breast products that may appear ready-to-eat (RTE) and to issue a Compliance Guideline for developing and communicating validated cooking instructions for such products. NCC first filed this petition on May 24, 2016 (Attachment 1). This supplement updates the 2016 petition to reflect updates in in collective understanding of these products. Information presented in this supplement should be read cumulatively with our 2016 petition, except that the requested language amending FSIS's regulations identified in our 2016 petition should be replaced with the language provided in this supplemental letter.

NCC remains is aware that some consumers may be uncertain of the proper handling and cooking methods for NRTE stuffed chicken breast products that may appear RTE, and the proposed measures are necessary to ensure proper handling and cooking of these products. FSIS has demonstrated that adding information to labels, such as warning statements and validated cooking instructions, is the appropriate way to address products when the Agency believes that consumers may need additional information to ensure they are consuming the product safely. We agree with this approach.

NCC has long advocated for additional labeling to address consumer confusion related to these products and has worked with its members to develop guidelines for such labels. This labeling would clearly inform consumers that these products are raw and require proper cooking while providing specific and uniform instructions on how to cook the products. NCC has drafted proposed regulatory text establishing the language and prominence requirements that have been shown to be effective in increasing consumer perception and understanding of warning statements. NCC is confident that these proposed labeling regulations would inform consumers

are appropriately informed that NRTE stuffed chicken breast products that may appear RTE are raw and must be handled properly and cooked for safety. An FSIS Compliance Guideline on validating cooking instructions for these products also would reinforce these efforts by ensuring that these products are safe to consume when cooked in accordance with the instructions provided and that cooking instructions can be easily replicated by consumers.

Further, FSIS conducted a Food Safety Consumer Research Project titled "Meal Preparation Experiment on Raw Stuffed Chicken Breasts," which was published in September of 2020. According to the results, consumers often do not pay attention to safe handling instructions required by regulations, yet they are more likely to look at the manufacturer's cooking instructions. Nearly all participants in this study reported reading the instructions on the package and the majority of participants believed that the product was raw or partially cooked. Given these findings, it is of upmost importance that labels are clear and provide appropriate information and instructions on how to properly cook these products.

The National Advisory Committee on Meat and Poultry Inspection (NACMPI) held a public meeting in September 2021 and specifically discussed these NRTE stuffed chicken breast products that may appear RTE. The subcommittee was charged with the following questions:

1. Given FSIS' consumer research findings and an open multistate *Salmonella* Enteritidis illness outbreak, should FSIS re-verify that companies continue to voluntarily label these products as raw in several places on the label and include validated cooking instructions?
2. What, if any, actions can FSIS take to prevent and reduce illnesses associated with the handling or consumption of these NRTE products? For example, should FSIS:
    a. Conduct exploratory sampling for pathogens and/or indicator organisms in these and other similar raw, stuffed or non-stuffed partially processed products?
    b. Require establishments to apply a lethality treatment to ensure that all products are RTE?
    c. Sample these products for *Salmonella* because consumers customarily undercook them?
    d. Require establishments that produce these products to reassess their HACCP plans, in light of outbreak data?
    e. Conduct targeted consumer outreach? If so, please provide some ideas on the best approaches.

The NACMPI subcommittee concluded, in summary, that FSIS should reverify the labeling and validated cooking instructions for these products. In addition, it was recommended that labels should include language warning consumers not to use microwaves or air fryers if validated cooking instructions are not provided for these methods and cooking the product to a minimum of 165°F as measured using a meat thermometer. Moreover, the subcommittee discussed the NCC petition submitted in 2016 and recommended adoption of mandatory labeling requirements for this product category and that FSIS publish a compliance guide on validated cooking instructions for these products.

For these reasons, NCC maintains and requests that the Agency take the following actions:

1. Conduct a rulemaking to adopt a regulation requiring that NRTE stuffed chicken breast products that appear RTE be labeled to clearly inform consumers that the products are raw and how to properly handle and cook them, as proposed below; and
2. Publish a Compliance Guideline explaining how to validate cooking instructions for NRTE stuffed chicken breast products that appear RTE, which incorporates NCC's "Best Practices for Cooking Instruction Validation for Frozen NRTE Stuffed Chicken Breast Products." (Attachment 2 – NCC Best Practices.)

Specifically, NCC requests that FSIS amend Part 381 of Title 9 of the Code of Federal Regulations to add a new subsection (c) to Section 381.125, to read as follows:

> (**c)(1)** ***Definition.*** For purposes of this section, the term "not-ready-to-eat (NRTE) stuffed chicken breast product that appears ready-to-eat (RTE)" means a non-homogenous product that contains raw, comminuted chicken breast meat, which has been heat-treated only to set the batter or breading but has not received a full lethality treatment; which has an RTE appearance such as a set or hardened breaded crust or grill marks; and which has an inner cavity filled with ingredients, including, but not limited to, raw vegetables, butter, cheese, or meat. NRTE stuffed chicken breast products that appear RTE do not include the following products, among others: par-fried products such as chicken nuggets or chicken tenders unless they have been stuffed; or stuffed products such as whole stuffed chickens, or chicken thighs stuffed with stuffing and almonds, which do not appear RTE.
>
> **(2)** ***Product Name.*** Unless the product is destined to be fully cooked or to receive a full lethality treatment at an official establishment or at a foreign establishment certified by a foreign government found equivalent under Section 196 of this Part, the product name for a NRTE stuffed chicken breast product that appears RTE must contain:
>
> (i) the term "raw" as a descriptive designation; and
>
> (ii) an accurate description of the poultry component (e.g., "Raw Stuffed Chicken Breast" or "Raw Chicken with Broccoli and Cheese").
>
> (3) ***Required labeling to signal the product is raw.*** The principal display panel of NRTE stuffed chicken breast product that appears RTE and is destined for household consumers (not for hotels, restaurants, or similar institutions) must bear:
>
> (i) the following safety statement:
>
> "RAW PRODUCT. For food safety, cook to a minimum internal temperature of 165°F measured by a meat thermometer."
>
> (A) Such that the word "RAW" may be used in lieu of the term "RAW PRODUCT";
>
> (B) With the words "RAW" or "RAW PRODUCT" capitalized and in a minimum type height of ¼ inch; and
>
> (C) With the statement "For food safety, cook to a minimum internal temperature of 165°F measured by a meat thermometer" capitalized or in a combination of upper and lowercase letters, with the letter height of the capitalized letters at least ½ the height of the words "RAW" or "RAW PRODUCT"; and

(D) With the statement appearing on a solid color background that contrasts with the text and the portion of the label on which it appears. Either the text color or the background color must be red in color, but not both.

(ii) a "raw chicken" icon, which must be prominent, conspicuous, and legible; comprise at least 5% of the principal display panel in area; contain the statement "RAW CHICKEN" in all capital letters; and include:

(A) The statement "Do Not Microwave" accompanied by an illustration of a microwave enclosed in a red circle, square, or rectangle with a red line across it; and

(B) The statement "Oven Bake Only" which should appear written across the door of an illustration of an oven enclosed in a green circle, square, or rectangle; and

(C) The statement "Do Not Air Fry" with an illustration of an air fryer enclosed in a red circle, square, or rectangle with a red line across it.

(iii) a serving suggestion notice explaining that the label illustrates the suggested serving of the product after baking, if the label contains an illustration of the cooked product (e.g., "serving suggestion after oven baking" or "serving suggestion: photo shows product after oven baking"). The serving suggestion notice, if used, must:

(A) Appear in red, bold text with at least 1/8 inch size font height; and

(B) Appear on a solid color contrasting background.

(4) ***Validated cooking instructions.*** The labels on NRTE stuffed chicken breast products that appear RTE destined for household consumers must contain validated cooking instructions. The validated cooking instructions may appear anywhere on the label and must contain all information necessary to instruct consumers how to cook the product safely. Such information shall include, at a minimum:

(i) The proper cooking method;
(ii) The endpoint temperature;
(iii) Instructions to measure the internal temperature using a meat thermometer;
(iv) The "Do Not Microwave" icon with an illustration of a microwave enclosed in a red circle, square, or rectangle with a red line across it;
(v) The "Oven Bake Only" icon with an illustration of an oven enclosed in a green circle, square, or rectangle;
(vi) The "Do Not Air Fry" icon with an illustration of an air fryer enclosed in a red circle, square, or rectangle with a red line across it;
(vii) A website URL, QR code, or similar mechanism that takes the consumer to a webpage or similar openly accessible platform that includes a video demonstrating proper cooking methods, which shall be placed near the written cooking instructions;
(viii) The statement "Raw Chicken – Do Not Microwave" in at least 3/16 inch font followed by the explanation "to help prevent foodborne illness caused by eating raw poultry" in at least 1/16 inch font; and

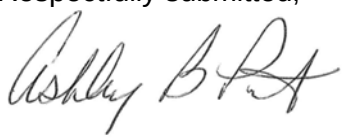
(ix) Any additional statements or illustrations, as appropriate, to inform the consumer that the product is raw and must be cooked in an oven to ensure product safety.
(x) The cooking instructions and icons identified in subparagraphs (i) through (ix) must be placed on a solid color background in a contrasting color to the text.

(5) ***Additional Validated Cooking Methods.*** The elements identified in paragraphs (3)(ii)(A)-(C) and (4)(iv)-(vi) and (4)(viii) may be modified to reflect any additional validated cooking instructions provided on the label. For example, if a label for an NRTE stuffed chicken breast product that appears RTE destined for household consumers contains validated cooking instructions for air frying, the "Do Not Air Fry" elements otherwise required in paragraphs (3)(ii)(C) and (4)(vi) may be omitted, and the element required in paragraphs (3)(ii)(B) and (4)(v) may be modified to say "Oven Bake or Air Fry Only."

In conclusion, NCC believes it is necessary that the Agency adopt these proposed regulations to require that the labels of NRTE stuffed chicken breast products that may appear RTE adequately indicate to consumers that these products are raw and must be prepared according to the validated cooking instructions provided to ensure the product safety. A corresponding FSIS Compliance Guideline incorporating NCC's Best Practices for validating cooking instructions will also provide industry with the guidance needed to ensure its instructions are effective and consistent with typical consumer use. NCC believes these requests complement the FSIS consumer research published in September 2020 and the recommendations set forth by the NACMPI Subcommittee in September 2021.

Thank you for your consideration of this updated petition. Please do not hesitate to contact me if I can provide any additional information.

Respectfully submitted,



Ashley B. Peterson, Ph.D.
Senior Vice President, Scientific and Regulatory Affairs
National Chicken Council

cc: Sandra Eskin, Deputy Under Secretary for Food Safety
Paul Kiecker, FSIS Administrator
Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development
Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Division

Attachments:
Attachment 1 – NCC 2016 Petition
Attachment 2 – NCC Best Practices
Attachment 3 – NCC Consumer Perception Research

Attachment 1

NATIONAL CHICKEN COUNCIL

1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622
FAX: 202-293-4005

May 24, 2016

FSIS Docket Clerk,
Department of Agriculture
Food Safety and Inspection Service
Room 2534 South Building
1400 Independence Ave., SW
Washington, DC 20250-3700

Re: Petition to Establish Regulations for the Labeling and Validated Cooking Instructions for Not-Ready-to-Eat Stuffed Chicken Breast Products That Appear Ready-to-Eat

Dear Docket Clerk:

The National Chicken Council (NCC) respectfully submits this petition requesting that the Food Safety and Inspection Service (FSIS) adopt regulations establishing labeling requirements for not-ready-to-eat (NRTE) stuffed chicken breast products that may appear ready-to-eat (RTE) and to issue a Compliance Guideline for developing and communicating validated cooking instructions for such products. NCC increasingly is aware that some consumers may be uncertain of the proper handling and cooking methods for NRTE stuffed chicken breast products that may appear RTE, and the proposed measures are necessary to ensure proper handling and cooking of these products. As evidenced in FSIS's recent rule requiring labeling of mechanically tenderized beef products, FSIS takes the view that adding to labels warning statements and validated cooking instructions is the appropriate way to address products when the Agency believes that consumers may need additional information to ensure they are consuming the product safely. Our request is consistent with—and indeed extends beyond—FSIS's policy toward labeling of mechanically tenderized beef.

NCC has long advocated for additional labeling to address consumer confusion related to these products and has worked with its members to develop guidelines for such labels. This labeling would clearly inform consumers that these products are raw and require proper cooking while providing specific and uniform instructions on how to cook the products. Drawing upon our members' insights and consumer perception testing, we have drafted proposed regulations establishing the language and prominence requirements that have been shown to be effective in increasing consumer perception and understanding of warning statements. NCC is confident that these proposed labeling regulations would make certain that consumers are appropriately informed that NRTE stuffed chicken breast products that may appear RTE are raw and must be handled properly and cooked for safety. An FSIS Compliance Guideline on validating cooking

instructions for these products also will ensure that these products are safe to consume when cooked in accordance with the instructions provided and that cooking instructions can be easily replicated by consumers.

I. Requested Actions

NCC requests that the Agency take the following actions:

1. Conduct a rulemaking to adopt a regulation requiring that NRTE stuffed chicken breast products that appear RTE be labeled to clearly inform consumers that the products are raw and how to properly handle and cook them, as proposed below; and

2. Publish a Compliance Guideline explaining how to validate cooking instructions for NRTE stuffed chicken breast products that appear RTE, which incorporates NCC's "Best Practices for Cooking Instruction Validation for Frozen NRTE Stuffed Chicken Breast Products." (Attachment 1 – NCC Best Practices.)

The requested regulations and Compliance Guideline would work in tandem. The regulations would require that the products bear validated cooking instructions and establish required uniform label statements necessary to inform consumers that the products are raw and must be prepared according to the cooking instructions provided to ensure food safety. The Compliance Guideline would assist industry in validating cooking instructions to comply with the regulation and identify any additional statements that should accompany the validated cooking instructions to reinforce for consumers that they must cook the product in an oven, not a microwave, to prevent foodborne illness.

Specifically, we request that FSIS amend Part 381 of Title 9 of the Code of Federal Regulations to add a new subsection (c) to Section 381.125, to read as follows:

(c)(1) ***Definition.*** For purposes of this section, the term "not-ready-to-eat (NRTE) stuffed chicken breast product that appears ready-to-eat (RTE)" means a non-homogenous product that contains raw, comminuted chicken breast meat, which has been heat-treated only to set the batter or breading but has not received a full lethality treatment; which has an RTE appearance such as a set or hardened breaded crust or grill marks; and which has an inner cavity filled with ingredients, including, but not limited to, raw vegetables, butter, cheese, or meat. NRTE stuffed chicken breast products that appear RTE do not include the following products, among others: par-fried products such as chicken nuggets or chicken tenders unless they have been stuffed; or stuffed products such as whole stuffed chickens, or chicken thighs stuffed with stuffing and almonds, which do not appear RTE.

(2) ***Product Name.*** Unless the product is destined to be fully cooked or to receive a full lethality treatment at an official establishment or at a foreign establishment certified by a foreign government found equivalent under Section 196 of this Part, the product name for a NRTE stuffed chicken breast product that appears RTE must contain:

(i) the term "raw" as a descriptive designation; and
(ii) an accurate description of the poultry component (e.g., "Raw Stuffed Chicken Breast" or "Raw Chicken with Broccoli and Cheese").

(3) ***Required labeling to signal product is raw*****.** The principal display panel of NRTE stuffed chicken breast product that appears RTE and is destined for household consumers (not for hotels, restaurants, or similar institutions) must bear:

(i) the following safety statement:

"RAW PRODUCT. For food safety, cook to a minimum internal temperature of 165˚ F measured by a meat thermometer."

(A) such that the word "RAW" may be used in lieu of the term "RAW PRODUCT";
(B) with the words "RAW" or "RAW PRODUCT" capitalized and in a minimum type height of ¼ inch; and
(C) with the statement "For food safety, cook to a minimum internal temperature of 165˚ F measured by a meat thermometer" capitalized or in a combination of upper and lowercase letters, with the letter height of the capitalized letters at least ½ the height of the words "RAW" or "RAW PRODUCT";

(ii) a "raw chicken" icon, which must be prominent, conspicuous, and legible; contain the statement "RAW CHICKEN" in all capital letters; and include:

(A) the statement "Do Not Microwave" above an illustration of a microwave enclosed in a circle with a line across it; and
(B) the statement "Oven Bake Only", which should appear written across the door of an illustration of an oven; and

(iii) a serving suggestion notice explaining that the label illustrates the suggested serving of the product after baking, if the label contains an illustration of the cooked product (e.g., "serving suggestion after baking" or "serving suggestion: photo shows product after oven baking").

(4) ***Validated cooking instructions*****.** The labels on NRTE stuffed chicken breast products that appear RTE destined for household consumers must contain validated cooking instructions. The validated cooking instructions may appear anywhere on the label and must contain all information necessary to instruct consumers how to cook the product safely. Such information shall include, at a minimum:

(i) the proper cooking method;
(ii) the endpoint temperature;
(iii) instructions to measure the internal temperature using a meat thermometer;
(iv) the "Do Not Microwave" icon;
(v) the "Oven Bake Only" icon;

(vi) the statement "Raw - Do Not Microwave" in at least 3/16" font followed by the explanation "to help prevent foodborne illness caused by eating raw poultry" in at least 1/16" font; and
(vii) any additional statements or illustrations, as appropriate, to inform the consumer that the product is raw and must be cooked in an oven to ensure product safety.

II. Support for Requested Actions

We are becoming increasingly aware that some consumers may not know how to properly recognize and prepare NRTE stuffed chicken breast products that may appear RTE. NCC's proposed regulations and corresponding Compliance Guideline would draw consumers' attention to the fact that these products are raw and must be handled accordingly while ensuring that cooking instructions are properly validated to achieve lethality for food safety.

A. Need for Increased Consumer Awareness Regarding NRTE Foods that Appear RTE

NCC member companies strive to produce safe, wholesome products for their consumers to enjoy. As with any raw product, though, consumers are the last line of defense in food safety. No matter how safe a product is, improper handling or cooking may nevertheless render the product unsafe for consumption. Ensuring consumer understanding of proper handling and preparation methods therefore is a vital component of preventing foodborne illness. In the ongoing endeavor to maintain consumer awareness of food safety procedures, NRTE stuffed chicken breast products that may appear RTE present a unique challenge.

NCC understands that some consumers currently may be uncertain of the correct handling and cooking methods for NRTE stuffed chicken breast products that may appear RTE, and further efforts are necessary to ensure that all consumers appreciate the raw nature of these products and the need to cook them for food safety. NCC understands that the labeling, cooked appearance, and often frozen state of these products can sometimes be confusing to consumers, who may believe that the products are fully cooked. As a result, some consumers may only reheat the product for aesthetics or palatability instead of cooking the product to the internal temperature needed to destroy pathogenic bacteria, even when the cooking instructions tell them to do so.

FSIS also is aware of this issue and, following recalls associated with similar products, has advised manufacturers of NRTE breaded chicken breast products that may appear RTE of the need to emphasize to consumers that these products are not cooked.

Thus, there is consensus that clear and uniform labeling is required to ensure consumers understand the proper handling and cooking procedures for NRTE breaded chicken breast products that may appear RTE.

B. Label Warnings, Statements, and Validated Cooking Instructions to Inform Consumers and Ensure Product Safety

NCC believes that mandatory labeling and the use of validated cooking instructions are the best options for equipping consumers to handle and prepare these products safely. In a report to FSIS, the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) similarly recommended that products that contain uncooked poultry but appear cooked should explicitly state on the label that the product contains raw poultry and must be cooked thoroughly.[1] The National Advisory Committee on Meat and Poultry Inspection (NACMPI) also recently concluded that there should be mandatory label statements for NRTE products that appear RTE and that FSIS should require these products to bear validated cooking instructions.[2] NACMPI also suggested that a standard of identity for these products may be appropriate.

A federal regulation defining this category of products and prescribing appropriate and uniform warning statements will ensure that label statements are consistent, so as to avoid further consumer confusion, and effective at alerting consumers to the raw nature of these products. In addition, a mandate that these products bear validated cooking instructions will ensure that the preparation instructions provided on the label can achieve the necessary level of lethality in a manner that can be replicated by consumers.

III. Explanation of Proposed Regulations and Compliance Guideline

NCC proposes to amend FSIS's existing regulation for special handling labeling requirements at 9 C.F.R. § 381.125 to include labeling requirements for NRTE stuffed chicken breast products that may appear RTE. Below we describe the components of the proposed regulation and explain how each provision will increase consumer awareness and improve product safety. We also discuss how NCC's proposed Compliance Guideline will elaborate upon the regulation while allowing for the flexibility needed for this type of product category.

A. Definition of NRTE Stuffed Chicken Breast Product That Appears RTE

As noted above, the challenge of consumer awareness is limited to a narrow category of products—NRTE stuffed chicken breast products that may appear RTE. It therefore is necessary

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[1] NACMCF also recommended that such statements related to safety information should appear on the principal display panel. NACMCF, *Response to the Questions Posed by the Food Safety and Inspection Service Regarding Consumer Guidelines for the Safe Cooking of Poultry Products* (Mar. 2006), available at http://www.fsis.usda.gov/shared/PDF/NACMCF_Report_Safe_Cooking_Poultry_032406.pdf?redirecthttp=true.

[2] NACMPI, *Subcommittee #2 Consideration of Mandatory Labeling Features for Certain Processed Not Ready to Eat Meat and Poultry Products* (Apr. 2016) (hereinafter "NACMPI Report"), available at http://www.fsis.usda.gov/wps/wcm/connect/076f154b-6744-41ef-bc27-7282bee0dfce/NRTE-Labeling.pdf?MOD=AJPERES.

to define this term carefully to ensure that it covers all products for which additional warning statements and validated cooking instructions are needed to address consumer confusion, but does not capture products for which this unique safety issue does not exist.

NCC's proposed definition of "NRTE stuffed chicken breast products that appear RTE" is based upon FSIS's description of these products in Notice 15-16.[3] This category of products contains raw, comminuted chicken breast meat, which has been heat-treated only to set the batter or breading, which has an RTE appearance, and which is stuffed with ingredients such as raw vegetables, butter, cheese, meat, or other fillings. The proposed definition is limited exclusively to retail products because we understand that the awareness issues related to these products do not extend to hotels, restaurants, and institutional users, who recognize these products as being raw and are able to handle them properly.

The term "stuffed chicken breast product" means a product consisting of comminuted chicken breast with an inner cavity that has been filled with additional ingredients, thereby creating two, non-homogenous layers with different densities. The different densities affect thermal transfer, which may contribute to consumer challenges in understanding how to cook these products. It does not refer to homogenous blends or mixtures of comminuted chicken breast and other ingredients. Thus, a comminuted chicken breast product that contains an inner pocket filled with broccoli and cheese would fall under the proposed definition, whereas a mixture of comminuted chicken breast, broccoli, and cheese would not. A product "appears RTE" if it has not undergone a validated lethality step, but has been battered or breaded and then par-fried to set the crust; contains grill marks; or has been colored to create the appearance that the product has been cooked.

NCC agrees with FSIS that this category of products includes items such as breaded, pre-browned chicken cordon bleu, chicken Kiev, and chicken stuffed with broccoli and cheese. NCC also agrees with FSIS's determination that this category does not include par-fried products such as chicken nuggets or chicken tenders unless they have been stuffed or other types of stuffed products such as turducken, whole stuffed chickens, or chicken thighs stuffed with stuffing and almonds, which do not appear RTE. More generally, the term does not refer to stuffed whole muscle cuts.

B. Required Product Name, Warnings, and Statements

The proposed regulations mandating label warning statements for NRTE breaded chicken breast products that appear RTE will increase consumer awareness by providing clear statements conveying that the product is raw and must be cooked and by ensuring that this information is sufficiently prominent for consumers to read it. NCC research confirms that use of the proposed label statements, along with the prescribed prominence requirements, will increase consumer

[3] FSIS Notice 15-16, Profile Update in Establishments that Produce Not-Read-to-Eat Stuffed Chicken Breast Products that Appear Ready-to-Eat (Feb. 18, 2016).

understanding that these products are raw. (Attachment 2 – NCC Consumer Perception Research.) NCC's proposal also is consistent with the principles FSIS has identified for effective product warnings, and in many aspects goes beyond the measures FSIS has recommended.[4]

The proposed regulations would require labels for these products to bear the statement "RAW PRODUCT. For food safety, cook to a minimum internal temperature of 165˚ F measured by a meat thermometer." This proposed statement includes the three elements FSIS has identified as necessary to communicate effectively the proper handling and cooking procedures for these products: (1) the term "RAW PRODUCT" (or "RAW"), which reflects that the product is NRTE; (2) the specific endpoint internal temperature of 165˚ F; and (3) a direction to measure the endpoint temperature using a meat thermometer.[5] This statement, which must appear in all capital letters at least ¼ inch in height on the principal display panel (PDP), will help consumers understand that it is important for them to follow the cooking instructions provided.

The proposed regulations also would require several other components to appear on the PDP, which NCC research has found will reinforce the raw state of these products. First, the word "raw" would be required to be included as a descriptive designation in the product name. Second, a "raw chicken" icon would be required to appear on the label with corresponding "do not microwave" and "oven bake only" illustrations. Repeating the word "raw" on the label, as these requirements would achieve, is important because NCC's research concluded that multiple placements of the word "raw" nearly doubles the percentage of individuals who notice the term. The oven symbol also reinforces the raw state of the product and how it should be cooked. Third, the PDP must include a serving suggestion notice explaining that the label illustrates the suggested serving of the product after baking if the label contains an illustration of the cooked product. This statement will prevent consumers from assuming based on the illustration of the cooked product on the label that the product is RTE.

In addition, the regulations would prescribe the warnings and statements that must be included as part of the validated cooking instructions. These required warnings and statements—a statement that the product is raw, the minimum internal temperature, instructions to measure the temperature using a thermometer, a warning not to microwave the product to help prevent foodborne illness, and the "do not microwave" and "oven bake only" illustrations—are the same or similar to those required to appear on the PDP. This repetition of key words and statements will help reinforce the key messages that the product is raw and must be cooked for food safety.

Requiring that these warnings statements accompany validated cooking instructions would be

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[4] *E.g.*, FSIS, *Labeling Policy Guidance: Uncooked, Breaded Boneless Poultry Products* (Jan. 2007), available at http://www.fsis.usda.gov/wps/wcm/connect/6d7b7f70-e11b-4861-adc8-6f3269c3eeec/Labeling_Policy_Guidance_Uncooked_Breaded_Boneless_Poultry_Products.pdf?MOD=AJPERES.

[5] *See id*.

consistent with NACMPI's recommendations, which suggested that validated cooking instructions should include a disclaimer not to use a microwave and should make clear which steps should be followed for safety.[6] NCC also envisions that FSIS, through its Compliance Guideline on validating cooking instructions, or an establishment based on its experience, may identify additional warnings or statements that would be appropriate to include in the validated cooking instructions. NCC accounted for these additional statements by requiring that the instructions include "any additional statements or illustrations, as appropriate, to inform the consumer that the product is raw and must be cooked in an oven to ensure product safety."

NCC research demonstrates that the proposed label regulations would be successful in increasing consumer awareness that these products contain raw poultry and must be cooked for safety. It is necessary for FSIS to adopt these proposals via mandatory regulation, both to ensure that products bear consistent and uniform language and display methods that have been proven effective and to avoid inconsistent messaging that may cause further consumer confusion.

C. Validated Cooking Instructions and Corresponding Compliance Guideline

NCC agrees with FSIS that the cooking instructions for NRTE stuffed chicken breast products that appear RTE must be validated, and the proposed regulations include a requirement that the products bear validated cooking instructions. This requirement will ensure that labeled cooking instructions will achieve lethality.

To accompany the regulation, we request FSIS issue a Compliance Guideline instructing industry on how to validate cooking instructions for NRTE stuffed chicken breast products that may appear RTE, consistent with the regulation. A corresponding Compliance Guideline would be appropriate because it would provide establishments with firm, clear guidance to follow to ensure cooking instructions are accurate and consumers can replicate them effectively. Based on the Agency's approach toward cooking instructions in other contexts, NCC proposes that FSIS include in the regulations a general requirement to provide validated cooking instructions while also maintaining more detailed recommendations for validation through a Compliance Guideline. This method has been effective in analogous situations that warranted providing flexible general parameters for validation that could be adapted to specific products,[7] and NCC believes it would be appropriate in this instance as well.

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[6] *See* NACMPI Report, *supra* note 2.

[7] For example, FSIS requires that mechanically tenderized beef bear validated cooking instructions, 9 C.F.R. 317.2(e)(3), and the Agency issued a separate Compliance Guideline for the validation of the instructions. FSIS, *Compliance Guideline for Validating Cooking Instructions for Mechanically Tenderized Beef Products* (2015). Similarly, FSIS requires inspected establishments to prepare validated Hazard Analysis and Critical Control Points (HACCP) plans, 9 C.F.R. 417.2, 417.4, and maintains a Compliance Guideline to assist establishments in validating their HACCP plans in compliance with the regulation. FSIS, *Compliance Guideline HACCP Systems Validation* (April 2015).

FSIS's Compliance Guideline should incorporate NCC's *Best Practices for Cooking Instruction Validation for Frozen NRTE Stuffed Chicken Products* ("Best Practices"), which are consistent with and expand upon FSIS's recommendations for validation.[8] NCC agrees with FSIS that microwave cooking may result in inconsistencies and, as described above, supports label statements that discourage consumers from microwaving these products.[9] Because NCC discourages microwave preparation, our Best Practices are limited to validating cooking instructions for oven preparation, and are further limited to gas and electric-style ovens for retail portions. Like FSIS's recommendations, the Best Practices also state that validated cooking instructions must result in all product sizes and varieties reaching an internal temperature of 165˚ F and must be consistent with consumer use.

NCC's Best Practices include a number of other suggestions beyond FSIS's recommendations that will improve the specificity of cooking instructions and increase the ease in which consumers can replicate the preparation methods. In particular, the Best Practices advise that cooking instructions for each product should include guidance for the appropriate metal cooking utensil to support consistent cooking results, appropriate product spacing to support even heating of the product, and the standard placement of the product in the oven, all of which should be validated accordingly. To maximize the efficacy and repeatability of the validation process, NCC also recommends that product and testing ovens be prepared for cooking and validation in a manner that is consistent with consumer use.

NCC's request that FSIS issue a Compliance Guideline incorporating NCC's Best Practices for cooking instruction validation goes hand-in-hand with our proposed label regulations for NRTE stuffed chicken breast products that appear RTE. Industry must alert consumers to the raw state of these products and instruct consumers on the proper method for preparing the products to achieve lethality. An FSIS Compliance Guideline adopting NCC's Best Practices will not only ensure that the cooking instructions provided achieve the necessary level of lethality, but also that they are understandable and easily replicable by consumers.

Conclusion

For these reasons, NCC believes it is necessary that the Agency adopt these proposed regulations to require that the labels of NRTE stuffed chicken breast products that may appear RTE adequately indicate to consumers that these products are raw and must be prepared according to the validated cooking instructions provided to ensure the product safety. A corresponding FSIS Compliance Guideline incorporating NCC's Best Practices for validating cooking instructions also will provide industry with the guidance needed to ensure its instructions are effective and consistent with typical consumer use. If adopted, NCC's proposals will reinforce the safety of

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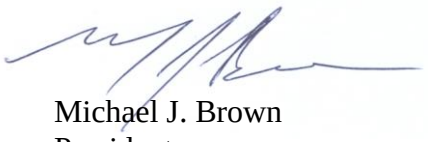
[8] FSIS, *Information on Validation of Labeled Cooking Instructions for Products Containing Raw or Partially Cooked Poultry*, available at http://1.usa.gov/23JFeIe.

[9] NCC would encourage FSIS to revisit this issue should a new cooking technology become available that allows consumers to safely cook these products using an appliance other than an oven.

these popular consumer products.

Thank you for your consideration of this petition. Please do not hesitate to contact me if I can provide any additional information.

Respectfully submitted,



Michael J. Brown
President

cc: Mr. Alfred Almanza, Deputy Under Secretary for Food Safety
Daniel L. Engeljohn, PhD, Assistant Administrator, Office of Policy and Program Development
Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Division

Attachments
Attachment 1 – NCC Best Practices
Attachment 2 – NCC Consumer Perception Research

Attachment 2

NATIONAL CHICKEN COUNCIL

Best Practices for Cooking Instruction Validation For Frozen NRTE Stuffed Chicken Products

Introduction:

An industry group was formed to identify and develop a document of recommended Best Practices for the validation of cooking instructions and labeling for products that are classified as "frozen not-ready-to-eat (NRTE) stuffed poultry that appears ready-to-eat (RTE)".

This Best Practices document is meant to serve as a set of voluntary guidelines which may be used by industry to develop company-specific cooking validation programs. These guidelines were developed to include procedures that companies can consider adopting to ensure product safety and quality. The following recommended Best Practices apply exclusively to frozen NRTE stuffed chicken products.

Cooking Validation Protocols:

Manufacturers of frozen NRTE stuffed chicken products design a variety of entrees to appeal to the varying tastes of their consumers, and, as a result, there may be differences in how to properly cook these products. The manufacturers of these products believe that it is in the best interest of the industry to develop some general parameters for developing cooking validation protocols for each product to ensure high food safety and quality.

The following voluntary guidelines are intended to be used to develop thorough cooking validation measures exclusively for frozen NRTE stuffed chicken products.

General Parameters:

1. Cooking instructions should be developed for each size and variety of stuffed entree product. Each variety and size should be validated in portion sets consistent with or greater than package labeling for the tested product (e.g. 2, 4, 6, etc… portions).

2. Cooking validations should be done with sufficient replication to account for variability of cooking and to ensure consistency of product temperature and quality.

3. Retail portions should be cooked in a retail gas or electric style oven, as these appliances will be used by the consumers.

4. Each portion must reach an internal temperature of 165° F at each point measured on the product to be considered effectively cooked.

    a. Product mapping should be carried out to identify the location(s) of the lowest product temperature after being cooked (e.g. top center, middle center, or bottom center).

5. During the validation procedure, the average operating temperature of the oven used should be at or below target temperature indicated on cooking instructions for the replica set to allow for the safest development of cooking instructions for the consumer.

6. Cooking instructions for each product should include, but is not limited to, guidance for:

    a. The appropriate metal cooking utensil (e.g. metal baking pan, tray, or sheet) for the given product to support consistent cooking results. The cooking utensil used should be the specified utensil on the packaging instructions for the product, and should be validated accordingly.

    b. The appropriate product spacing on the specified cooking utensil to support even heating of the product. Information on spacing must be on the packaging instructions for the product and that spacing should be validated accordingly.

    c. The standard placement of the product in the oven is on the center rack. Products should be validated following this standard.

Equipment / Utensils:

The use of the following cooking equipment and utensils is recommended for optimal product cooking validation and consistency:

1. Two thermometers: one thermometer will measure the internal temperature of the testing oven, and one will measure predetermined points on each product portion. These should be calibrated on the same day as the cooking validation testing.

2. Data loggers, if used, can track temperature measurements taken throughout cooking validation testing. These should be calibrated and certified based on National Institute of Standards and Technology (NIST) standards within one year of testing.

3. Scales for weighing each product portion. These should be calibrated on the same day as cooking validation testing.

4. The metal cooking utensil (e.g. metal baking pan, tray, or sheet) recommended on the package cooking instructions for each product should be used during the validation process to ensure optimal product cooking consistency and completeness.

Oven Preparation:

Testing ovens should be prepared for cooking validation in a manner that is consistent with consumer use and which will maximize the efficacy and repeatability of the validation process:

1. Personnel should ensure that the rack intended to be used for cooking validation is positioned in the middle of the testing oven. The center rack of the oven has been determined to be the easiest location for the consumer to use while providing the maximum available heat distribution for the product.

2. The testing oven should be pre-heated to the set point specified by the product cooking instructions, which will be based on the size, quantity, and variety of product to be tested.

3. The testing oven should be pre-heated using a calibrated thermometer or using a data logger to observe that the oven has reached the specific set point indicated in the package cooking instructions prior to cooking validation.

Product Preparation:

It is important to prepare the product in a way that will be consistent with consumer use and which will maximize the efficacy and repeatability of the cooking validation process. The following guidelines are suggested to ensure accurate cooking validation results:

1. Each product portion must be $\leq 5°$ F prior to cooking to ensure consistency of cooking validation results and testing parameters. This should be verified prior to cooking validation testing by measuring the temperature of each product portion OR confirming a documented correlation of product portion temperature to the freezer storage temperature.

2. Product must be verified to be within design specifications at the production plant. If a company determines a product to be out of design specification in the production plant, the company will take appropriate steps to apply alternative validated cooking instructions to the product that is out of design specification.

3. Each portion should be placed on a metal cooking utensil (e.g. metal baking pan, tray, or sheet) with predetermined spacing provided between each portion consistent with packaging instructions for the product.

4. The product portions should be placed in the preheated oven as soon as possible after the product has been removed from the freezer and the metrics have been documented to prevent tempering during the preparation process.

Product Cooking:

It is important that product cooking during testing reflects the instructions that are supplied to the consumer for use. The following are general Best Practices for cooking NRTE products:

1. The minimum required cooking time and temperature should be determined for each labeled portion size.

2. The product portions should be placed on the center rack in the middle of the oven to allow for adequate and even heating of each product portion. This is the location that is recommended to consumers when cooking frozen NRTE stuffed chicken products.

3. The product portions will be appropriately spaced on the metal cooking utensil in accordance with the cooking instructions provided with the NRTE product.

Oven Monitoring:

The internal temperatures of retail gas and electric ovens may fluctuate during a typical cooking test, and this can impact the consistency of cooking validation results and the quality of the product that the customer obtains when following cooking instructions provided with a given product. It is, therefore, important to recognize and account for this variation by following the basic suggestions below:

1. The internal temperatures of the testing oven should be monitored and recorded during the cooking cycle utilizing a calibrated thermometer and/or a calibrated data logger at the following suggested time points:

a. At the start of each cooking cycle after the product is loaded and timer is started

b. At least every 5 minutes during the cooking cycle

c. At the end of the cooking cycle, immediately before removing product

2. Once preheated, data points from the oven should be assessed and compared to set temperature points to determine:

    a. Minimum oven operating temperature

    b. Maximum oven operating temperature

    c. Average oven operating temperature

3. Across the chosen number of replication sets per cooking validation, the average set point of the oven must not exceed the set point temperature in the package cooking instructions.

Product Validation:

Validation of the recommended cooking process is an important step to ensure food quality and safety, and also ensure that the instructions supplied with the product will provide a consistently positive result. Steps to validate the efficacy of the cooking process must include, but are not limited to, the following:

1. The product portion should be temperature mapped to identify the coldest temperature point on the product.

2. The internal temperature of each product portion should be measured as soon as possible after removing the products from the testing oven.

3. The temperature of each product portion should be measured at the coldest spot(s) of each portion, as determined by product temperature mapping, to ensure that the portion temperature is greater than or equal to 165° F.

4. The internal minimum, maximum, and average temperatures of the oven should be measured and recorded for each cooking validation replicate.

Attachment 3

NCC Packaging Consumer Comprehension of NRTE Stuffed Breasts

Objectives:

- Consumer Safety
- Comprehension of “raw” product state
- Proper handling and cooking

Background:

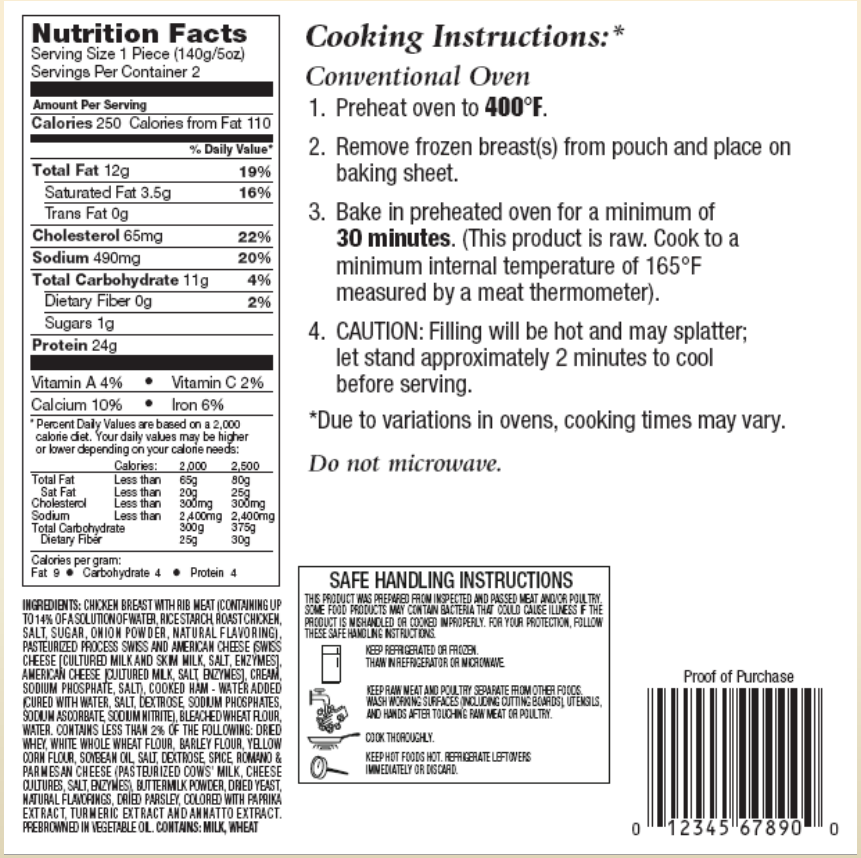
- December 2008 present recommended standard to USDA
- May 2009 present next round continuous improvements

Research of Consumer Comprehension of NRTE Stuffed Breasts Product State and Proper Handling/Cooking

On-line Omnibus 1,000 interviews

- 50% of sample viewed “generic old copy” March 2008 packaging
- 50% of sample viewed “generic new” proposed standard

Appendix: Product Tested – Old Copy



Nutrition Facts
Serving Size 1 Piece (140g/5oz)
Servings Per Container 2

Amount Per Serving	
Calories 250	Calories from Fat 110
	% Daily Value*
Total Fat 12g	**19%**
Saturated Fat 3.5g	**16%**
Trans Fat 0g	
Cholesterol 65mg	**22%**
Sodium 490mg	**20%**
Total Carbohydrate 11g	**4%**
Dietary Fiber 0g	**2%**
Sugars 1g	
Protein 24g	

Vitamin A 4%	• Vitamin C 2%
Calcium 10%	• Iron 6%

* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: CHICKEN BREAST WITH RIB MEAT (CONTAINING UP TO 14% OF A SOLUTION OF WATER, RICE STARCH, ROAST CHICKEN, SALT, SUGAR, ONION POWDER, NATURAL FLAVORING), PASTEURIZED PROCESS SWISS AND AMERICAN CHEESE (SWISS CHEESE [CULTURED MILK AND SKIM MILK, SALT, ENZYMES], AMERICAN CHEESE [CULTURED MILK, SALT, ENZYMES], CREAM, SODIUM PHOSPHATE, SALT), COOKED HAM - WATER ADDED (CURED WITH WATER, SALT, DEXTROSE, SODIUM PHOSPHATES, SODIUM ASCORBATE, SODIUM NITRITE), BLEACHED WHEAT FLOUR, WATER, CONTAINS LESS THAN 2% OF THE FOLLOWING: DRIED WHEY, WHITE WHOLE WHEAT FLOUR, BARLEY FLOUR, YELLOW CORN FLOUR, SOYBEAN OIL, SALT, DEXTROSE, SPICE, ROMANO & PARMESAN CHEESE (PASTEURIZED COWS' MILK, CHEESE CULTURES, SALT, ENZYMES), BUTTERMILK POWDER, DRIED YEAST, NATURAL FLAVORINGS, DRIED PARSLEY, COLORED WITH PAPRIKA EXTRACT, TURMERIC EXTRACT AND ANNATTO EXTRACT. PREBROWNED IN VEGETABLE OIL. CONTAINS: MILK, WHEAT

Cooking Instructions:*

Conventional Oven

1. Preheat oven to **400°F**.
2. Remove frozen breast(s) from pouch and place on baking sheet.
3. Bake in preheated oven for a minimum of **30 minutes**. (This product is raw. Cook to a minimum internal temperature of 165°F measured by a meat thermometer).
4. CAUTION: Filling will be hot and may splatter; let stand approximately 2 minutes to cool before serving.

*Due to variations in ovens, cooking times may vary.

Do not microwave.

SAFE HANDLING INSTRUCTIONS

THIS PRODUCT WAS PREPARED FROM INSPECTED AND PASSED MEAT AND/OR POULTRY. SOME FOOD PRODUCTS MAY CONTAIN BACTERIA THAT COULD CAUSE ILLNESS IF THE PRODUCT IS MISHANDLED OR COOKED IMPROPERLY. FOR YOUR PROTECTION, FOLLOW THESE SAFE HANDLING INSTRUCTIONS.

KEEP REFRIGERATED OR FROZEN. THAW IN REFRIGERATOR OR MICROWAVE.

KEEP RAW MEAT AND POULTRY SEPARATE FROM OTHER FOODS. WASH WORKING SURFACES (INCLUDING CUTTING BOARDS), UTENSILS, AND HANDS AFTER TOUCHING RAW MEAT OR POULTRY.

COOK THOROUGHLY.

KEEP HOT FOODS HOT. REFRIGERATE LEFTOVERS IMMEDIATELY OR DISCARD.

Proof of Purchase

0 12345 67890 0

Appendix: Product Tested – New Copy

Package research Executive Summary

The new package communicates the raw product state significantly better

- Recall of the word “raw” nearly doubles (42% w/ old pack to 82% w/ new pack)
- Understanding of the raw product state increases from 55% to 76% overall
    - Among females who indicate they are the primary meal preparer, it goes from 54% to 82%

The oven symbol does a good job in reinforcing the raw state of the product and how it should be cooked

In both the new and old versions the vast majority of consumers plan to cook the product in the oven (75% for old copy vs. 79% for new copy)

- Open end playback of packaging likes are consistent with the other findings – more mention raw and must be cooked in oven/not microwavable with the new package

Recall of a meat thermometer increases significantly overall (from 53% to 70%)

- The open ends suggest meat thermometer communicates that the product must reach a certain temperature/be cooked well or thoroughly – but not necessarily that the product is raw

Product State – Did you notice the word “Raw?”

- Multiple placements of the word “raw” nearly double the percentage of consumers who notice the word
- The percentage is higher among females compared to males

	TOTAL		TOTAL FEMALES		TOTAL MALES		TOTAL FEMALES + INVOLVED IN PURCHASE/PREP		TOTAL FEMALES + INVOLVED + BUY CHICKEN BREASTS	
	OLD A (499)	NEW B (501)	OLD C (257)	NEW D (263)	OLD E (243)	NEW F (237)	OLD G (237)	NEW H (247)	OLD I (157)	NEW J (167)
Yes	42	82 A	40	85 C	44	78 E	40	85 G	45	87 I
No	58 B	18	60 D	15	56 F	22	60 H	15	55 J	13

Q10: “When you first saw the package, did you notice the word “Raw” to describe the product?”

CAPITAL LETTER indicates 95% confidence level vs. other column

Lower case indicates 90% confidence level vs. other column

Product State – What is the product state?

- New packaging copy has significant impact on the percentage of all consumers who believe the chicken is raw, especially among females and females involved in the category

	TOTAL		TOTAL FEMALES		TOTAL MALES		TOTAL FEMALES + INVOLVED IN PURCHASE/PREP		TOTAL FEMALES + INVOLVED + BUY CHICKEN BREASTS	
	OLD A (499)	NEW B (501)	OLD C (257)	NEW D (263)	OLD E (243)	NEW F (237)	OLD G (237)	NEW H (247)	OLD I (157)	NEW J (167)
The chicken is already fully cooked	33 B	16	31 D	12	35 F	21	32 H	12	36 J	12
The chicken is raw	55	76 A	54	82 C	56	70 E	54	82 G	55	83 I
I am not sure if the chicken is raw or fully cooked	12	8	15 D	6	9	10	15 H	6	10	4

Q4: "Based on what you noticed from the packaging, please select one statement below that describes the chicken in this product"

CAPITAL LETTER indicates 95% confidence level vs. other column

Lower case indicates 90% confidence level vs. other column

Product State – Did anything call your attention to raw state and what appliance should be used?

- The oven symbol does a good job in reinforcing the raw state of the product and how it should be cooked, increasing recognition by over 30 points

	TOTAL		TOTAL FEMALES		TOTAL MALES		TOTAL FEMALES + INVOLVED		TOTAL FEMALES + INVOLVED + BUY CHICKEN BREASTS	
	OLD A (499)	NEW B (501)	OLD C (257)	NEW D (263)	OLD E (243)	NEW F (237)	OLD G (237)	NEW H (247)	OLD I (157)	NEW J (167)
Yes	44	76 A	46	80 C	42	73 E	46	80 G	48	85 I
No	56 B	24	55 D	21	58 F	28	54 H	20	52 J	15

Q11: "When you first saw the front of the package, did you see anything calling your attention to the raw state of the product and what appliance should be used to cook the product?"

CAPITAL LETTER indicates 95% confidence level vs. other column

Lower case indicates 90% confidence level vs. other column

Cooking Method – Proper preparation method

- The vast majority of consumers will bake the product in the oven

	TOTAL		TOTAL FEMALES		TOTAL MALES		TOTAL FEMALES + INVOLVED		TOTAL FEMALES + INVOLVED + BUY CHICKEN BREASTS	
	OLD A (499)	NEW B (501)	OLD C (257)	NEW D (263)	OLD E (243)	NEW F (237)	OLD G (237)	NEW H (247)	OLD I (157)	NEW J (167)
Cook in oven	75	79	79	83	72	74	79	83	81	86
Heat in microwave	10	7	8 d	4	13	11	8 h	4	8	4
Cook in oven or heat in microwave	15	14	14	13	16	16	13	13	12	10

Q5: "Which statement best describes the proper preparation method(s) for this product? (Please select one)

CAPITAL LETTER indicates 95% confidence level vs. other column

Lower case indicates 90% confidence level vs. other column

Meat Thermometer – Notice mention of a meat thermometer?

- Women are significantly more likely to notice the mention of a meat thermometer on the new package than males

	TOTAL		TOTAL FEMALES		TOTAL MALES		TOTAL FEMALES + INVOLVED		TOTAL FEMALES + INVOLVED + BUY CHICKEN BREASTS	
	OLD A (499)	NEW B (501)	OLD C (257)	NEW D (263)	OLD E (243)	NEW F (237)	OLD G (237)	NEW H (247)	OLD I (157)	NEW J (167)
Yes	53	70 A	41	76 C	55	62	52	77 G	53	81 I
No	47 B	31	49 D	24	45	38	49 H	23	48 J	19

Q13: "Did you notice anywhere on the packaging the mention of a meat thermometer?"

CAPITAL LETTER indicates 95% confidence level vs. other column

Lower case indicates 90% confidence level vs. other column

EXHIBIT 7

M. Brown Bio and Truth in Testimony Disclosure Form