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**BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON AGRICULTURE**

**Hearing on Uncertainty, Inflation, Regulations: Challenges for American Agriculture**

**Testimony of Mike Brown, President of the National Chicken Council**

**February 28, 2023**

Chairman Thompson, Ranking Member Scott, and distinguished members of the Committee on Agriculture, thank you for the opportunity to come before you today to present testimony on the challenges facing American agriculture. The National Chicken Council (“NCC”) is the national trade association representing vertically integrated companies that produce, process, and market over 95 percent of the chicken in the United States. NCC members include allied industry firms that supply necessary inputs and services for the chicken industry. Today’s hearing, entitled “Uncertainty, Inflation, Regulations: Challenges for American Agriculture,” addresses a timely and critical topic, and NCC appreciates the opportunity to participate.

Chicken processors’ positive economic impact stretches from coast to coast, hits every sector of the U.S. economy and is felt in every congressional district. We know that chicken is nutritious, affordable, and versatile, but chicken also means jobs – whether it’s on the farm, in the processing plant, the transportation sector, manufacturing, retail or restaurants. Companies that produce and process chicken in the United States employ as many as 381,164 people across the country and generate an additional 1,136,633 jobs in supplier industries, including jobs in companies supplying goods and services to the broiler industry.<sup>1</sup> Broiler production is the primary economic driver of many rural communities and the livelihood of thousands of small business family farmers—in 2021, small family farms accounted for 47 percent of U.S. poultry and egg output.<sup>2</sup>

Not only does the chicken industry create good jobs in the United States, but the industry also contributes to the economy as a whole. The broader economic impact flows throughout the economy, generating business for firms seemingly unrelated to the chicken industry. Real people, with real jobs, working in industries as varied as banking, real estate, accounting, even printing all depend on the chicken industry for their livelihood. In fact, in 2022, the industry was responsible for as much as \$417.04 billion in total economic activity throughout the country,

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<sup>1</sup> 2022 *Impact Report of the Chicken Industry*, US Poultry & Egg Ass’n (Oct. 18, 2022), <https://chicken.querrillaeconomics.net/reports/2e2ef9af-f1eb-40ca-a0ad-6b21c3e92c13?>; 2022 *Poultry and Egg Economic Impact Study Methodology*, US Poultry & Egg Ass’n (Oct. 18, 2022), <https://poultry.querrillaeconomics.net/res/Methodology.pdf>. To view the economic impact of chicken in your state and district, visit [chickenfeedsamerica.org](http://chickenfeedsamerica.org).

<sup>2</sup> C. Whitt, et al., *America’s Farms and Ranches at a Glance*, USDA Economic Research Service (ERS) (Dec. 2022), <https://www.ers.usda.gov/webdocs/publications/105388/eib-247.pdf?v=9539.4>.

creating or supporting as many as 1,517,797 total jobs.<sup>3</sup> The industry also generates sizeable tax revenues. Nationally, the industry and its employees pay about \$19.73 billion in federal taxes, and \$5.78 billion in state and local taxes.

The U.S. broiler industry is the world's largest producer of chicken. In 2021, U.S. farmers produced nearly 60 billion pounds of broiler chickens valued over \$30 billion.<sup>4</sup> A portion of this product is exported, and the United States is the world's second largest broiler meat exporter, after Brazil.<sup>5</sup>

Chicken is America's preferred protein, and Americans are on track to consume over 102.4 pounds of chicken per person in 2023, more than any other meat protein source.<sup>6</sup> Moreover, at a time when food deserts are commonplace and availability of nutritious food is a top concern among consumers, chicken is the most available meat source in the United States<sup>7</sup> and is recommended by the U.S. Department of Agriculture (USDA) Dietary Guidelines for Americans as a top unprocessed, nutrient-dense protein source.<sup>8</sup> The broiler industry and its partners work hard to make sure consumers have a healthy protein option available to them, doing our part to work towards addressing the first pillar of the White House National Strategy on Hunger, Nutrition, and Health—food availability and affordability.<sup>9</sup>

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. 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. Every weekend, you could find a company selling chicken at reduced prices right out of trucks in the local community. In coordination with Meatingplace News, NCC compiled a snapshot of NCC member community donations in 2020:<sup>10</sup>

- 2,540,000+ pounds of protein
- \$132,800,000+ million dollars
- \$981,000+ in grants

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<sup>3</sup> 2022 *Impact Report of the Chicken Industry*, *supra* note 1.

<sup>4</sup> *US Broilers: Production by Year*, USDA ERS (April 28, 2022), [https://www.nass.usda.gov/Charts\\_and\\_Maps/Poultry/brlprd.php](https://www.nass.usda.gov/Charts_and_Maps/Poultry/brlprd.php); *US Poultry: Production and Value of Production by Year*, USDA ERS (April 28, 2022), [https://www.nass.usda.gov/Charts\\_and\\_Maps/Poultry/valprdbetc.php](https://www.nass.usda.gov/Charts_and_Maps/Poultry/valprdbetc.php).

<sup>5</sup> *2021 Agricultural Export Yearbook, Poultry 2021 Export Highlights*, USDA Foreign Agricultural Service (April 14, 2022), <https://www.fas.usda.gov/poultry-2021-export-highlights>.

<sup>6</sup> See USDA Economic Research Service, 2022 estimates and 2023 forecasts, *Data Products*, USDA ERS, <https://www.ers.usda.gov/data-products/>.

<sup>7</sup> In 2021, 68.1 pounds of chicken per person were available for human consumption. *Food Availability and Consumption*, USDA ERS (Jan. 26, 2023), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-availability-and-consumption/?topicId=080e8d1d-e61e-4bd8-beac-51f0f1d1f0fe>.

<sup>8</sup> *Dietary Guidelines for Americans, 2022-2025, Ninth Edition*, USDA at 33 (Dec. 2020), [https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary\\_Guidelines\\_for\\_Americans\\_2020-2025.pdf](https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf).

<sup>9</sup> *Biden-Harris Administration National Strategy on Hunger, Nutrition, and Health*, White House (Sept. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/09/White-House-National-Strategy-on-Hunger-Nutrition-and-Health-FINAL.pdf>.

<sup>10</sup> Exhibit 1, *NCC 2020 US Broiler Chicken Industry Sustainability Report* (Sept. 2021) at p. 49.

- 22,000,000+ meals

These data do not represent every commitment by every member, but they provide a rough estimate of meals—and hope—delivered in what was a challenging year.

Community support is but one of many factors driving sustainability in the broiler chicken industry. For the chicken industry, sustainability means being responsible stewards of land and water, animal and feed management, our people, and communities into the future. Flowing from this commitment, a lifecycle assessment of the broiler industry found that, from 2010-2020:<sup>11</sup>

- Land use decreased 13 percent
- Greenhouse gas emissions decreased 18 percent
- Water consumption decreased 13 percent
- Fossil-based resource use decreased 22 percent
- Particulate-forming emissions decreased 22 percent

At the same time these important reductions were being achieved, the broiler chicken industry increased overall chicken production by more than 20 percent.<sup>12</sup> In other words, the chicken industry now produces much more chicken using many fewer resources than in 2010. The industry is committed to continuing to advance critical sustainability goals in the years to come. I refer the Committee to the attached NCC U.S. Broiler Chicken Industry Sustainability Report for more information about the many steps being taken to advance sustainability in our industry.

The chicken industry is a model of American innovation and efficiency. The industry has only been able to be America's most affordable, available, and nutritious source of protein by improving its efficiency over many years. The efficiency of the broiler industry, however, is increasingly threatened by overreaching and costly federal regulation that threatens to squeeze the chicken production process from every direction. The results would be devastating: loss of jobs, decimation of family farmers, fewer and more costly exports, and more expensive chicken for American consumers.

NCC urges the Committee to take a critical look at the regulatory barriers being erected around and within the chicken industry and to determine whether they truly are in the interest of American farmers, workers, and consumers. To illustrate the barriers being erected, the harm they would cause across America, and the lack of any legitimate societal benefit, my testimony focuses on three critically important topics: chicken farmer contracting, processing plant line speeds, and USDA's policy toward *Salmonella* in raw chicken.

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<sup>11</sup> *Id.* at 13; *Broiler Production System Life Cycle Assessment: 2020 Update*, NCC, [https://nccsite.wpengine.com/wp-content/uploads/2021/09/Broiler-Production-System-LCA\\_2020-Update.pdf](https://nccsite.wpengine.com/wp-content/uploads/2021/09/Broiler-Production-System-LCA_2020-Update.pdf).

<sup>12</sup> According to USDA's Economic Research Service, domestic chicken production increased from 36.9 billion pounds in 2010 to 44.5 billion pounds in 2020, the same period covered by the lifecycle analysis. See "All Meat Statistics" in *Livestock, Dairy, and Poultry Outlook: Livestock and Meat Domestic Data*, USDA ERS (last updated Jan. 27, 2023), <https://www.ers.usda.gov/data-products/livestock-and-meat-domestic-data/livestock-and-meat-domestic-data/#All%20Meat%20Statistics>.

## USDA Is Proposing to Dismantle Chicken Contract Farming

### *Background on Chicken Contracting*

The American chicken industry is the most competitive in the world. This is no accident, but nor was it foreordained. Rather, the industry is built on a grower compensation system—refined through decades of innovation—that encourages farmers to raise healthy birds in an efficient manner, relieves family farmers of many of the economic risks otherwise inherent in farming, and ensures that hard-working farmers are appropriately rewarded for their efforts.

To briefly describe the chicken contracting structure, broiler integrators contract with independent farmers, often referred to as “growers,” to raise broiler chicks on behalf of integrators. Integrators 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 integrator. Growers are responsible for providing quality housing, farm maintenance, on-farm inputs, and day-to-day care of the broilers.

The system’s fair, honest contracts provide a target pay that high-performing growers can supplement by raising birds efficiently. In a typical grow-out contract, growers and integrators 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 raise healthy birds most efficiently, and it ensures all growers have a strong incentive to raise healthy flocks.

Properly cared-for birds experience optimal growth rates and have lower mortality, both of which increase a grower’s pay. This contract structure makes the well-being of birds the integrator’s and grower’s top priority because incentives are given to farmers who raise the healthiest, highest-quality birds. Similarly, integrators have every incentive to make sure their growers succeed and produce healthy, quality birds, because the integrator is counting on those birds to produce chicken meat. If an integrator sees a flock struggling or identifies opportunities to increase efficiency, the integrator 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.

As importantly, the 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.<sup>13</sup> Expensive and highly variable inputs such as the broiler chicks, feed, and veterinary care are the responsibility of the integrators, who can use their size to negotiate better terms and can better absorb price shocks. Contract chicken farmers, for example, do not need to worry about spikes in feed costs or deploy complex grain-hedging strategies. And because they raise birds under contract, they do not have to find a market for their flocks as they mature, and they never face the risk of investing months in raising a flock only to not be able to find a buyer. Meanwhile, contract growers provide high-quality, day-to-day care, land,

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<sup>13</sup> 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).

and housing for their birds while being shielded from volatile input prices like feed. This mutually beneficial partnership supports the economic viability and independence of family farms by averting risk and promoting stable and predictable income.

The data shows this contracting model is profitable and works well for all parties. NCC commissioned an independent study using recent chicken production statistics, which indicated that chicken contracting relationships are mutually beneficial, successful, and profitable for both growers and integrators.<sup>14</sup> This study revealed several key points:

- Growers have voluntarily chosen to maintain long-term relationships with their integrators. 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 integrator 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 integrator for over five years.<sup>15</sup>
- Growers rarely have their contracts terminated. In 2021, only 0.7 percent of contract growers had their contracts terminated.<sup>16</sup>
- Chicken farming pays well. The median income for chicken farmers exceeds the median income for farm households generally, as well as for U.S. households broadly.
- There is a long waitlist of people wanting to enter chicken farming. In 2021, there were 1,672 applications from potential growers and 335 expansion requests from existing farmers.<sup>17</sup>
- Chicken farmers have very low loan default rates. 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.

These and other data reinforce what the chicken industry has long known: chicken contract farming is a profitable, beneficial arrangement that provides steady and reliable income to family farmers across the country. A series of USDA proposed rules, however, threatens to completely upend this model—a model that has made chicken the most affordable protein in the market.

#### *USDA's Proposed Rules on Chicken Contracting*

In 2022, USDA revived a decade-old, abandoned rulemaking effort that directly threatens this efficient, successful contracting system. Although positioned as intended to promote competition and protect growers, the proposals would, in reality, dismantle the very contract farmer system that has proven so successful for all involved.

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<sup>14</sup> 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>, available as Appendix A to Exhibit 2, NCC Comments to Docket No. AMS-FTPP-21-0044 Transparency in Poultry Grower Contracting and Tournaments (Aug. 23, 2022).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 4.

First, USDA issued a proposed rule titled “Transparency in Poultry Grower Contracting and Tournaments” (“Tournament System Proposed Rule”).<sup>18</sup> Ostensibly positioned as a transparency initiative, this proposed rule would impose substantial recordkeeping costs on chicken companies, would require establishing complex and costly internal auditing frameworks, and seems designed to greatly ratchet up litigation risk for integrators using the current grower contracting model.

This proposed regulation would require integrators to make a substantial number of disclosures at various points during the chicken contracting process and to certify their accuracy, even for forward-looking financial projections. For example, when entering a new contract, integrators would have to provide detailed information about past litigation; bankruptcy filings for all related entities; average payments to all growers companywide in the past year; average payments to all growers at the complex for the past five years or, if that does not reflect anticipated income, projected future grower income under the contract; and information about grower-controlled costs outside an integrator’s control, such as utilities, fuel, water, labor, and repairs and maintenance. A senior executive would have to certify the accuracy of this information, including the forward-looking financial projections. At chick placement, integrators would be required to provide information such as stocking density, breed details, chicken gender ratios, information about the breeder flock facility, breeder flock age, information about health impairments, and how the integrator would adjust payment based on these factors. At settlement, the integrator would have to provide much of the same information, but for all growers in the settlement pool. In addition to these disclosures, the proposal would require integrators establish a costly “governance framework,” complete with audits, testing, and document reviews.

Adding further uncertainty and raising the specter of yet more rulemaking, USDA released a companion to the Tournament System Proposed rule, an advanced notice of proposed rulemaking entitled “Poultry Growing Tournament Systems: Fairness and Related Concerns,”<sup>19</sup> which requested information on dozens of leading questions about the current chicken grower contracting process. Although USDA cited no example of actual Packers and Stockyards Act (PSA) violations, the nature of the questions strongly suggest USDA is considering engaging in yet more rulemaking.

Following USDA’s proposed rule regarding poultry grower contract disclosures, USDA issued a second proposed rule under the PSA targeting the broader meat and poultry industry and threatening more fundamental changes to the broiler industry. The proposal, titled “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act” (“Inclusive Competition Proposed Rule”)<sup>20</sup> would create a potential cause of action for virtually any unequal treatment between two growers, even if there were no actual harm to competition. For example, the proposal would create a vaguely defined concept of a “market-vulnerable individual” and prohibit nearly any unequal treatment of a person on account of their being a market-vulnerable individual. The proposal would define a broad swath of everyday business conduct as retaliation, making it more difficult to terminate a contract or even choose not to enter a contract

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<sup>18</sup> 87 *Fed. Reg.* 34980 (June 8, 2022); *see also* Exhibit 2, NCC Comments to Docket No. AMS-FTPP-21-0044 Transparency in Poultry Grower Contracting and Tournaments (Aug. 23, 2022).

<sup>19</sup> 87 *Fed. Reg.* 34814 (June 8, 2022); *see also* Exhibit 3, NCC Comments to Docket No. AMS-FTPP-21-0046 Poultry Growing Tournament System Fairness and Related Concerns (Sept. 6, 2022).

<sup>20</sup> 87 *Fed. Reg.* 60010 (Oct. 3, 2022); *see also* Exhibit 4, NCC Comments to Docket No. AMS-FTPP-21-0045 Inclusive Competition and Market Integrity Under the PSA Proposed Rule (Jan. 17, 2023).

in the first place. The proposal would likewise expand the concept of deceptive practices and ban without defining the use of “pretexts” in many contracting situations. As with the Tournament System Proposed Rule, this proposal would impose substantial recordkeeping burdens, requiring broadly that a company maintain for five years “all records relevant to its compliance” with the proposal, without actually defining what those records would be.

Third, USDA has signaled it intends to release a third proposed rule, tentatively called “Unfair Practices, Undue Preferences, and Harm to Competition Under the Packers and Stockyards Act,”<sup>21</sup> which we understand may attempt to reinterpret Section 202 so that it is not necessary to prove injury to competition to establish a violation, despite universal rejection of this position by every federal court of appeal to have heard the issue.

Together, these three proposed rules, plus the further rulemaking foreshadowed in the advanced notice of proposed rulemaking, threaten to completely dismantle the existing chicken contracting system, impose billions of dollars of regulatory cost on the industry, and expose chicken processors to a flood of litigation. Ultimately, everyone will suffer: consumers will face higher prices, the best farmers will see their income go down, and chicken companies will have to absorb extreme costs.

#### *Fundamental Problems and Costs with USDA’s PSA Proposals*

At bottom, USDA’s PSA proposals are an attempt to resurrect a misguided rulemaking started in 2010 that was blocked by Congress and later abandoned by USDA. The policies were unnecessary and costly then, and they are even more so now. They would achieve nothing but driving up the cost of putting wholesome, nutritious chicken on the dinner table and making it more difficult to earn a living in agriculture. Trial lawyers seem to be the only ones who would benefit.

USDA has positioned the set of proposals as intended to reduce costs and foster competition, but nothing could be further from the truth. Rather, the proposals would inject costs and heighten litigation risk at every step in the chicken production process, discourage innovation, and drive the best farmers out of chicken production. While I am focused today on the impact these rules would have on the chicken industry, they would also prove catastrophic for the beef, pork, and turkey industries.

USDA stated the reason for the Tournament System Proposed Rule is to help growers anticipate their income from broiler contracts and reduce information asymmetries between integrators and growers. The scope of the disclosures would not achieve that goal and would require integrators to collect and disclose items like bankruptcy history, litigation history, payment information for different regions, and breeder flock information, that are entirely irrelevant for determining how much income a grower might earn. Some of the information to be disclosed would already be available in the public domain (e.g., bankruptcy history), while other information like that pertaining to breeder information and grower payments, is competitively sensitive.

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<sup>21</sup> *Unfair Practices, Undue Preferences, and Harm to Competition Under the Packers and Stockyards Act (AMS-FTPP-21-0046)*, OMB Unified Regulatory Agenda Fall 2022 (Jan. 4, 2023), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0581-AE04>.

The proposal entirely overlooks factors inherent in the system that protect against the hypothetical problems USDA is targeting with the proposal. Integrators own the birds and need a consistent supply of healthy birds to keep their processing plants operating at capacity. Integrators already have every incentive to ensure they are placing healthy birds, providing appropriate feed, and maintaining reputations as good business partners. Further, many growers obtain financing from agricultural lenders, who are experienced in reviewing chicken growing contracts and evaluating their economic viability.

Most importantly, USDA's proposal would make it more difficult to maintain the performance-based pay structure of grower contracts, threatening the entire broiler industry. The sheer breadth of the disclosures amplifies the litigation risk around every single grower interaction, sharply raising the costs of using a performance-based contract. Eliminating performance-based pay would eliminate any incentive for a grower to put in the hard work and make the necessary investments to raise high-quality flocks. 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. 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.

USDA asserts the goal of the Inclusive Competition Proposed Rule is to promote competition and market integrity in meat production and enhance protections for vulnerable livestock and poultry producers. Not only would the proposal fail to achieve these goals, it would fundamentally alter and constrain the chicken production market to the detriment of growers, consumers, and processors alike. The proposal would have devastating effects on the grower contracting process, resulting in increased costs to integrators making it more difficult to fairly reward their contract farmers.

The proposed rule is rife with vague and undefined terms that fail to clearly express what conduct is prohibited. Even the key term used throughout the rule, "market-vulnerable individual," is so broadly defined that nearly anyone involved in the market could be a vulnerable individual in one way or another. The proposal would make every interaction between an integrator and a grower fraught with financial peril, as any perceived differences in treatment could form the basis for a lawsuit. In addition, the rule fails to provide virtually any guidance on when conduct would be unlawful or how an integrator would demonstrate its conduct reflected reasonable business decisions. A chicken integrator 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.

Both proposed rules drastically underestimate their economic impact at every possible opportunity. The rules fail to properly account for the costs of contract renegotiations, the time required to implement the extensive recordkeeping and record-retention systems, develop new compliance policies, and implement an administratively complicated oversight and compliance system, all of which require highly paid professionals and substantial attorney time. Moreover, the proposals would make contracting more difficult and could deter companies from entering into new grower relationships, reducing overall economic efficiency in the chicken production market, driving up consumer costs, harming processors, and harming growers. The proposals would also drive costly, frivolous litigation.

Both proposed rules pose substantial costs to growers with no concrete added benefit. USDA estimated the ten-year aggregate combined costs of the proposed Tournament System Proposed Rule to be \$20.4 million, over half of which will fall on chicken growers, and NCC believes this figure grossly underestimates the economic harm this rule would inflict by deterring innovation and undermining efficiencies in the contracting system. It would make it more difficult for integrators to properly reward their best-performing growers, and top performers could see their income drop and decide chicken growing is no longer the right choice for them. Tellingly, USDA even recognizes that the proposal would not actually help growers increase their incomes. In other words, even with an understated economic impact analysis, USDA could not show the proposal helps anyone. It simply makes chicken production more difficult and more expensive for all.

The proposed Inclusive Competition Rule could be even more costly, although USDA's economic impact analysis so understates costs as to be meaningless. This proposal would turn every integrator-grower interaction into a potential litigation flashpoint, forcing integrators to carefully guard every word and evaluate every single grower-related decision as one that could cost the company hundreds of millions of dollars. It would have a tremendous chilling effect on new contracting, as any deviation from the norm could be perceived as disparate treatment in violation of the proposal. Integrators would be reluctant to take on new growers, existing growers would see fewer opportunities to expand their income, and it would become much riskier to sever ties with poor performing growers who fail to properly care for their birds. Integrators would have to develop massive recordkeeping and compliance-monitoring systems. A dynamic economic system would stagnate, and these lost efficiencies would be shouldered by consumers, growers, and integrators. USDA's economic impact assessment in the proposed Inclusive Competition Rule fails to consider these or virtually any costs. Despite these economic realities, USDA concluded that this proposed rule would cost companies a few hundred dollars a year, in total. This estimate simply defies belief.

The third proposal, although yet to be released, could prove even more economically devastating. Based on experience with the 2010 rulemaking, any attempt to make a regulatory end-run around the need to show injury to competition when establishing a violation of Section 202 of the PSA would create tremendous confusion and uncertainty, injecting billions of dollars of costs into the industry. The costs of this proposal would likely be measured in the billions of dollars, with only the trial lawyers coming out ahead.

Moreover, even assessing the potential costs of the proposals is impossible because USDA has chosen to release these proposals in piecemeal fashion instead of as a single rulemaking on livestock and poultry contracting. This approach has made it nearly impossible for industry to assess the true cost of these regulations and has almost certainly resulted in lowballed cost estimates. By comparison, independent economic analyses of previous USDA rulemakings on similar topics have indicated economic impact costs in excess of \$1 billion,<sup>22</sup> and these were prepared 13 years ago, before unprecedented inflation. USDA's PSA proposals could well have the same or greater economic impact, but USDA's piecemeal approach has made it impossible to evaluate.

The proposed rules also suffer from grave legal infirmities and would inject tens of millions of dollars of litigation costs into the industry, adding to the basic compliance costs and costs from

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<sup>22</sup> *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).

efficiency losses. The rulemaking records are devoid of any actual instances of allegedly violative behavior to support such sweeping burdens. The proposals are rife with vague, broad, and poorly defined terms, subjecting companies to substantial uncertainty and staggering litigation costs as the courts would be forced to define the terms USDA declined to. Most troubling, both proposals completely overlook that, as an antitrust law, Section 202 of the PSA is violated only if there is a showing of injury to competition.

Every federal circuit court of appeals 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.<sup>23</sup> 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.<sup>24</sup>

The Sixth Circuit became the eighth court to reach this conclusion, and it did so in a case where USDA participated as an amicus and directly argued 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.”<sup>25</sup>

Despite being well familiar with this precedent, USDA through these proposals would force the industry to once more bear the substantial litigation costs to get the courts to again affirm that the PSA requires a showing of injury to competition. These litigation costs are not accounted for in the rulemakings at all.

These proposed regulations are even more troubling because no one has asked for them, and in fact, Congress rejected similar rules stemming from a 2010 rulemaking. USDA previously tried to read into the 2008 Farm Bill a mandate to circumvent the injury to competition requirement and engage in far-reaching rulemaking on the PSA, Congress reacted swiftly and

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<sup>23</sup> *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. USDA*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336–37 (9th Cir. 1980); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369–70 (7th Cir. 1976); see also *Armour & Co.*, 402 F.2d 712 (7th Cir. 1968).

<sup>24</sup> *Terry*, 604 F.3d at 277 (lengthy string citation of supporting cases omitted).

<sup>25</sup> *Id.* at 278.

clearly by preventing the agency from finalizing an overly broad rulemaking for several years.<sup>26</sup> Moreover, the 2014 and 2018 Farm Bills did not call for any new PSA rulemaking, and they certainly did not indicate Congress supported attempts to read the injury to competition requirement out of the PSA.

Given this clear direction from Congress, USDA'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 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.<sup>27</sup> 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. Through the present series of rulemakings, USDA 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, as well as by the other aspects of the proposals. 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." USDA cannot take it upon itself to dramatically expand the scope of such a longstanding statute.

At bottom, these proposals reflect tremendous overreach by USDA that promises to encumber a dynamic and innovative aspect of American agriculture with massive amounts of red tape, administrative burden, compliance costs, and legal risks, all for no tangible benefit.

### **USDA Is Threatening Chicken Processing Plant Line Speeds**

USDA has recently initiated a process that threatens to reduce the speed at which chicken processing plants may operate, despite decades of experience showing higher processing line speeds are safe for food and for workers.

#### *Line Speeds in Chicken Processing*

USDA regulations cap the speed at which chicken processing plants may operate portions of their processing lines. In particular, USDA regulations cap the speed at which plants can operate the part of the line known in the industry as the evisceration line. The evisceration line is where organs and other parts are removed and where chicken carcasses are presented to a USDA inspector for visual inspection before moving into the rest of the process. This is a highly

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<sup>26</sup> 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).

<sup>27</sup> 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).

automated part of the production process, relying on carefully calibrated automated equipment to move the carcasses through the process and to perform the various tasks. These evisceration line speeds are established not for worker safety, or even for a particular food safety reason, but rather to make sure that USDA inspectors are able to perform their carcass-by-carcass inspection, as required under the Poultry Products Inspection Act. USDA has never regulated the speed at which any other part of the chicken processing line may operate.

Currently, USDA regulations set the maximum line speed for chicken evisceration lines at 140 birds per minute (bpm) for plants operating under the modernized New Poultry Inspection System (NPIS).<sup>28</sup> However, USDA also has long operated a waiver program allowing plants to operate at up to 175 bpm. This waiver system began with a trail program announced in 1997 called the HACCP Inspection Models Project (HIMP), which became a long-running trial to evaluate modernized inspection systems. Under HIMP, 20 chicken processing establishments were allowed to operate at higher evisceration line speeds of up to 175 bpm. The HIMP trial formed the basis for USDA's NPIS regulations, and the HIMP trial continued all the way until NPIS was finalized in 2014.<sup>29</sup> But because NPIS capped evisceration line speeds at 140 bpm whereas HIMP plants had long operated at higher speeds, USDA created a new waiver program that permitted former HIMP plants and, later, other NPIS plants that met certain food safety metrics to operate evisceration lines at up to 175 bpm. This waiver program was to form the basis for further rulemaking to increase evisceration line speeds across the board, but USDA has yet to issue such a regulation, and the waiver program continues to this day.

Importantly, the HIMP trial and the line speed waiver program have shown that running evisceration lines at 175 bpm does not compromise food safety or worker safety.<sup>30</sup> It does, however, let plants increase processing capacity by 25 percent over the current 140 bpm limit. This lets plants get much greater output from the same equipment, substantially decreasing costs, increasing efficiency, and driving down food prices for consumers. This efficiency is critical. Higher production capacity means lower production costs for integrators, more chickens for growers to raise, and lower prices for consumers. It is also essential for ensuring U.S. chicken processors remain competitive globally. Broiler chicken plants elsewhere in the world—including South America, Asia, Canada, and Europe—are able to safely operate at line speeds of over 200 bpm using the same equipment used in the U.S.

Just as critically, evisceration line speeds do not affect worker safety. Chicken processing plants can be divided conceptually into two segments, commonly referred to as first processing and second processing. The evisceration portion of the operation occurs in first processing, which is the most highly automated portion of the operation. Only about 2 percent of a typical chicken processing plant's workforce is stationed in the evisceration area, and other than the

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<sup>28</sup> 9 C.F.R. § 381.69(a). These line speeds are for the USDA inspectional system known as the New Poultry Inspection System, which has become the most common system used in the chicken industry, although USDA also provides inspection under other legacy inspection systems with lower line speed limits.

<sup>29</sup> *Modernization of Poultry Slaughter Inspection*, USDA Food Safety and Inspection Service (FSIS), 79 *Fed. Reg.* 49566 (Aug. 21, 2014).

<sup>30</sup> A landmark 2001 study by the Research Triangle Institute (RTI) reinforced what the industry and USDA had experienced with HIMP with respect to food safety, finding that "inspection under the new models [HIMP] is equivalent and in some ways superior to that of traditional inspection...and can maintain or even improve food safety and other consumer protection conditions relative to traditional hands-on inspection methods." Cates, et al., *Traditional Versus Hazard Analysis and Critical Control Point-Based Inspection: Results from a Poultry Slaughter Project*, *J. Food Protection*, 64(6), 826-832 (2001).

bird-by-bird inspection and sorting performed by the plant's workforce, they are largely monitoring the operation of the equipment and not directly interacting with the carcasses or machines. To reiterate, the evisceration line speed limit applies only to the evisceration portion of the line. After evisceration, chicken carcasses pass the USDA inspection station, where USDA inspectors visually inspect each carcass, and from there they move to the chilling system to bring the product temperature down to refrigerated temperatures.

The majority of the labor involved in processing chicken occurs in second processing, where birds are trimmed, deboned, and cut into pieces. Plants use varying combinations of automated and manual processes in second processing. Importantly, evisceration line speeds have nothing to do with the rate of work in second processing. One evisceration line feeds into multiple second processing lines, which work at rates independent of the evisceration line. Chicken processors adjust their second processing capacity by adding or removing second processing lines or workers based on the planned production volume. If the evisceration line is running faster, the processor will add more workers on the line and/or increase the number of operating second processing lines. If the evisceration line runs slower, fewer workers or second processing lines may be needed. Therefore, line speeds and work rates do not increase in second processing when evisceration line speeds increase, but the number of workers needed does. Faster evisceration line speeds thus translate directly into more jobs on the second processing line.

Common sense says that faster evisceration line speeds do not compromise worker safety. The data reinforces this. The chicken industry has a long and successful track record of continual improvement of worker safety. Department of Labor (DOL) Bureau of Labor Statistics (BLS) data shows a continued decrease in injury and illness rates in chicken plants. From 1994 (the oldest data available on the BLS website) through 2019 (the most recent data without noise injected by the COVID-19 pandemic),<sup>31</sup> the total recordable poultry processing illness and injury rate decreased from 22.7 cases per 100 full-time workers per year in 1994<sup>32</sup> to 3.2 in 2019,<sup>33</sup> a 91 percent decrease. And the more than five-fold decrease in injury rates in the poultry industry from 1994-2019 coincided with a period of substantial increases in line speeds, bird size, and automation. Technological improvements in processing tend to correspond to safer workplaces.

The effects, or lack thereof, of line speed waivers can be better isolated by comparing worker safety data from 2014, the year NPIS was finalized and before line additional line speed waivers were issued, and 2019, by the end of which 34 chicken processing plants were operating under line speed waivers. In 2014, the total recordable case rate among chicken processing plants was 4.3 cases per 100 full-time workers.<sup>34</sup> In 2019, it was 3.2. Despite nearly three dozen

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<sup>31</sup> During the COVID-19 pandemic, COVID-19 illnesses among plant employees were typically treated as recordable illnesses, regardless of where or how the worker got sick. As with many public health measures, the COVID-19 pandemic has injected considerable noise into the data, and so a truer comparison can be obtained by looking at the most recent pre-pandemic data.

<sup>32</sup> *Industry Injury and Illness Data – 1994*, U.S. Bureau of Labor Statistics (Feb. 1, 2023), [https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical.htm#94Summary\\_Report](https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical.htm#94Summary_Report).

<sup>33</sup> *Industry Injury and Illness Data – 2019*, U.S. Bureau of Labor Statistics (Feb. 1, 2023), [https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical.htm#94Summary\\_Report](https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical.htm#94Summary_Report).

<sup>34</sup> *Industry Injury and Illness Data – 2014*, U.S. Bureau of Labor Statistics (Feb. 1, 2023), [https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical.htm#94Summary\\_Report](https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical.htm#94Summary_Report).

plants operating under line speed waivers, overall worker illness rates continued to decrease during this period.

### *USDA's Line Speed Study*

Despite more than a quarter century of experience with higher line speeds, USDA has embarked on a vaguely defined, open-ended study of the effects of chicken processing evisceration line speeds on worker safety as a condition for deciding whether to continue the program.<sup>35</sup> In response to a lawsuit by labor activists,<sup>36</sup> USDA decided to condition plants' ongoing eligibility for line speed waivers on those plants agreeing to participate sight unseen in an undefined worker safety study by third-party contractors engaged by USDA. As part of this study, plants were asked to submit voluminous quantities of worker safety data to USDA, required to allow third-party researchers unfettered access to processing plants, and made to agree in advance to participate in a more rigorous onsite visit yet to be defined.

This reflects a dramatic regulatory overreach, using plants' reliance on discretionary evisceration line speed waivers from a food safety agency as leverage to force participation in a worker safety study outside USDA's mission area. Chicken processors were required to commit to participate in the study without seeing nearly enough details to understand what it entailed. Even now, the study protocol has yet to be released. But declining would mean cutting processing capacity by 20 percent, which could be financially ruinous for a company and all those who depend on it for their livelihoods. The data requests are broad, ill defined, and burdensome. Some of the requested data includes sensitive medical information that even the DOL's Occupational Safety and Health Administration (OSHA) is prohibited from accessing without special safeguards. The onsite visits by the third-party contractors have focused almost entirely on second processing, which as explained is entirely unrelated to evisceration line speeds. And questions have arisen whether some of the third-party contractors, who have participated in court cases adverse to chicken processors, are appropriate participants in this study. Even though USDA announced this study in July 2022, the agency has yet to provide any information about the actual study protocol, timing, endpoints, or how the agency plans to use the study to inform policy development and rulemaking. The result has been widespread confusion, significant cost and time spent, and tremendous uncertainty about the future of evisceration line speeds in the chicken industry. This uncertainty has prevented companies from making informed long-term investment decisions for their own processing plants as well as what grow-out capacity they will need from their contract growers.

None of this was necessary. USDA itself decided to conduct this study; no party in the litigation compelled this action. As explained, there has been a tremendously long history of experience with elevated line speeds, in both the United States and other countries. The 20 plants that participated in the HIMP trial were closely scrutinized for decades, yet no worker safety issues emerged. Nor have worker safety issues emerged in the years since USDA began issuing line speed waivers under NPIS. Instead, recordable illness and injury rates in the chicken industry have steadily decreased, regardless of how fast evisceration lines are operating. Other

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<sup>35</sup> *Constituent Update*, USDA FSIS (July 29, 2022), <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-july-29-2022#:~:text=Oregon%20Signs%20Cooperative%20Agreement%20for,for%20shipment%20within%20the%20state>.

<sup>36</sup> *United Food and Commercial Workers Union, Local N. 227, et al. vs. USDA*, Case No. 1:20-cv-02045 (D.D.C.). NCC joined this case as an intervenor to ensure the interests of NCC member companies were appropriately represented.

countries, including Canada and many in Europe, have long permitted chicken processors using the same equipment to run much faster than even 175 bpm, with no negative effects on worker safety.

Through sister agencies in DOL, USDA could have easily accessed detailed information about plants' worker safety history, including plant-level illness and injury rates, and compared that information across time as plants transition to line speed waivers and between plants with and without line speed waivers. USDA has never explained why it decided it was necessary to use its economic leverage to compel plants to participate in an ill-defined study conducted by third parties on a topic well outside USDA's mission area instead of simply asking its sister federal agency directly responsible for worker safety, DOL, to share or analyze the relevant information already in DOL's possession.

As a result, USDA has injected tremendous economic uncertainty into the chicken industry. Chicken companies that have invested heavily in installing new equipment and reconfiguring lines to run at 175 bpm have no idea whether the program will continue or their investments will evaporate overnight. This uncertainty makes it very difficult for companies to plan, and it deters investment in modernized equipment and plant expansions. If line speed waivers were revoked and plants forced to operate evisceration lines at 140 bpm, the economic effects would be catastrophic. Industry capacity would drop dramatically, jobs in second processing would be lost, rural communities would lose their economic engines, chicken farmers would have fewer birds to raise and see their earnings plummet, export competitiveness would drop off, and consumers would have to pay more for chicken. NCC urges Congress to ensure chicken processing line speeds are protected and that line speeds are expanded so that all chicken processors can run at the line speeds we already know are safe.

### **Potential Policy Changes Regarding *Salmonella* in Raw Chicken Risk Food Security**

The final item I wish to raise for your attention is USDA's proposal to dramatically shift its policy toward *Salmonella* in raw chicken, which risks drastically affecting food security, food availability, and consumer prices. In October 2022, USDA announced a proposed *Salmonella* Framework that signaled a fundamental change in how the agency might regulate *Salmonella* in raw poultry.<sup>37</sup> Similarly, in a speech last summer, Deputy Under Secretary for Food Safety Sandra Eskin announced that USDA intended to declare *Salmonella* as an adulterant in a very specific category of breaded and stuffed chicken products that are sold frozen and not fully cooked, such as chicken cordon bleu. Although the *Salmonella* Framework raises a number of issues of concern, I will focus primarily on USDA's suggestion that it might declare *Salmonella* an adulterant in raw poultry.

#### *Background on Salmonella in Chicken*

The U.S. food supply is the safest in the world, and food safety is a top priority for the broiler chicken industry. NCC members are committed to continuing to enhance their food safety systems, and NCC works continuously with USDA to improve the control of pathogens in

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<sup>37</sup> See *Proposed Regulatory Framework to Reduce Salmonella Illnesses Attributable to Poultry*, USDA (Oct. 14, 2022), <https://www.fsis.usda.gov/inspection/inspection-programs/inspection-poultry-products/reducing-salmonella-poultry/proposed> (noting in "Component 3, Enforceable Final Product Standard," that USDA is considering implementing a final product standard regarding *Salmonella* in raw poultry products); see also Exhibit 5, NCC Comments to Docket No. FSIS-2022-0029 Proposed *Salmonella* Framework (Dec. 16, 2022).

chicken products and to address other food safety issues. This is a shared challenge and a shared commitment. NCC supports food safety regulations that are based on sound science, robust data, and are demonstrated to positively impact public health. Americans eat 150 million servings of chicken every day, and nearly all of them are eaten safely. But NCC members want every meal to be safe, and our members continue to work to drive down foodborne illness.

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 just the past few years, USDA 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. This approach has been enormously successful. Based off the most recent USDA testing results<sup>38</sup>, *Salmonella* prevalence on young chicken carcasses is 3.1 percent and *Salmonella* prevalence on chicken parts is 7.1 percent across all broiler processing establishments. These testing results are well below the *Salmonella* performance standard for both young chicken carcasses and chicken parts. Currently over 90 percent of the industry is meeting or exceeding the USDA performance standard for both young chicken carcasses and chicken parts.<sup>39</sup>

On a per-consumption basis, chicken is safer than ever. While the overall incidence of salmonellosis in people has remained relatively unchanged since the Centers for Disease Control and Prevention (CDC) starting tracking it using the FoodNet Fast system in 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. USDA estimated that Americans would consume 102.4 pounds of chicken per person in 2023.<sup>40</sup> This reflects a 42 percent increase in chicken consumption over the past 26 years, with no increase in salmonellosis. This means that on a per-consumption basis, salmonellosis illness rates attributable to chicken have dropped significantly over the past 26 years. This is an important point that sadly has been overlooked in how USDA has talked about *Salmonella* in recent years.

This data shows that USDA's existing framework for approaching *Salmonella* control has been working, and NCC has encouraged USDA to continue using the latest science and industry-Agency collaborations to drive improvements in this framework. For example, science-based changes such as transitioning to an enumeration-based performance standard would apply new technological and scientific developments to USDA's proven approach and would drive continued food safety improvements.

#### *Issues with USDA's Proposed Salmonella Framework*

The proposed *Salmonella* Framework would abandon tried-and-true approaches for legally infirm and technologically infeasible strategies with no clear supporting data. Under the

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<sup>38</sup> *Sampling Results for FSIS Regulated Products*, USDA FSIS (2022),

<https://www.fsis.usda.gov/science-data/sampling-program/sampling-results-fsis-regulated-products>.

<sup>39</sup> *Salmonella Verification Testing: October 31, 2021 through October 29, 2022*, USDA FSIS (2022), <https://www.fsis.usda.gov/news-events/publications/salmonella-verification-testing-october-31-2021-through-october-29-2022>.

<sup>40</sup> *Data Products*, USDA ERS, <https://www.ers.usda.gov/data-products/>; see also *World Agricultural Supply and Demand Estimates*, USDA (Dec. 9, 2022), <https://www.usda.gov/oce/commodity/wasde/wasde1222.pdf>.

proposed *Salmonella* Framework, USDA has telegraphed its intent to declare *Salmonella* an adulterant in raw poultry when *Salmonella* is present above certain yet-to-be-specified levels. Such an approach would be a dramatic and unwarranted departure from USDA's longstanding approach toward *Salmonella* in raw poultry, an approach that has been recognized by the courts and supported by science. Critically, despite releasing the proposed *Salmonella* Framework last October, USDA has still yet to provide any scientific data supporting its proposed approach. The lack of data supporting a considered approach is especially troubling given the grave consequences the approach contemplated in the *Salmonella* Framework would have on food availability, food prices, and food security.

The *Salmonella* Framework appears premised on legally infirm conclusions that *Salmonella* may be considered an adulterant in raw poultry. Under the Poultry Products Inspection Act (PPIA), a product is adulterated if it "bears or contains any poisonous or deleterious substance which may render it injurious to health."<sup>41</sup> The statute notes, however, that for substances that are not added, "such article shall not be considered adulterated . . . if the quantity of such substance in or on such article does not ordinarily render it injurious to health."<sup>42</sup> Thus, for naturally occurring substances, the pathogen is an adulterant only if the substance is present in quantities that "ordinarily" render the product injurious to health.

As USDA has consistently recognized, *Salmonella* is not an adulterant in raw poultry because it is not an added substance and occurs naturally within the chicken biome. *Salmonella* can exist in a chicken's skin, muscle tissue, and gut, and healthy, asymptomatic birds are known to carry *Salmonella*.<sup>43</sup> As USDA has also consistently recognized, *Salmonella* is not present in levels that ordinarily render chicken injurious to health because customary cooking practices call for thoroughly cooking raw chicken, which destroys any *Salmonella* that may be present. Cooking raw chicken to an internal temperature of 165°F achieves a 7-log reduction in *Salmonella*.<sup>44</sup>

USDA has suggested it plans to approach *Salmonella* in raw chicken similarly to how it approaches certain strains of *E. coli* in raw ground beef. But there are critical differences between the two. Unlike with ground beef, consumers have long customarily cooked 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 "ordinarily" 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,

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<sup>41</sup> 21 U.S.C. § 453(g)(1).

<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> See, e.g., Erol, et al., *Serotype distribution of Salmonella isolates from turkey ground meat and meat parts*, Biomed Res. Int. 2013, 281591 (2013); Nde, et al., *Cross contamination of turkey carcasses by Salmonella species during defeathering* Poultry Sci. 86, 162–167 (2007); Rigney, et al., *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 (2004).

<sup>44</sup> *FSIS Cooking Guidelines for Meat and Poultry Products (Revised Appendix A)*, USDA FSIS, Table 3, [https://www.fsis.usda.gov/sites/default/files/media\\_file/2021-12/Appendix-A.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2021-12/Appendix-A.pdf).

it is not the case that due to handling and cooking practices, *Salmonella* “ordinarily” causes the chicken to be injurious to health.

USDA has offered no information supporting a change in its longstanding position that *Salmonella* is not an adulterant in raw chicken. The proposed *Salmonella* Framework is nearly devoid of data, and USDA has not provided any scientific information to support this change in classification, including risk assessments, product testing, or scientific analysis. Nor has USDA provided any data to indicate why it has floated the idea of setting its adulteration threshold at one colony forming unit (cfu) per gram, or why this would be appropriate for all forms of raw chicken. This is regrettable, as without supporting data, the proposed *Salmonella* Framework appears almost entirely speculative. What data is available suggests that salmonellosis cases attributable to chicken consumption are actually going down when considering the overall number of servings of chicken consumed. NCC firmly believes that it is imperative that public health decisions and policy follow the data, not the other way around.

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 a result, the policy contemplated in the proposed *Salmonella* Framework would result in untold amounts of food waste. 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. 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, in addition to being extremely expensive, would significantly degrade product shelf life and quality. Companies may be forced to destroy product or divert the product to be fully cooked, which accounts for only a modest amount of chicken production and would quickly find both demand and processing capacity outstripped.

Likewise, if *Salmonella* were declared an adulterant in raw poultry, USDA would expect a recall if a product were found to exceed the standard, and it is entirely unclear how the agency would determine what products to recall. Chicken processing plants produce enormous volumes of chicken each day, processing birds from multiple chicken houses each day. The birds from a day’s production commingle at various points, such as in the chilling systems, and it is impossible to break up a day’s worth of production into microbiologically distinct production lots. The problem compounds because different parts of birds go to different uses in the supply chain. NCC is extremely concerned that under the proposed *Salmonella* Framework, a single test result could cause the recall or destruction 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 and so carelessly wasting food.

As written, the proposed *Salmonella* Framework threatens the economic viability of the entire poultry sector and would result in increased costs and reduced availability of chicken. This would be an extremely unfortunate outcome, especially in light of recent record-setting, across-the-board inflation and the continuing food insecurity afflicting millions of American families. Chicken is America’s most affordable and most consumed animal 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 *Salmonella* Framework threaten to undermine chicken availability.

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 hundreds of millions of pounds of chicken would simply be destroyed each year, reducing chicken supply, and driving up costs.

NCC member companies share USDA'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 USDA's proposed *Salmonella* Framework. This proposed policy contemplates actions that exceed USDA'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 make it extremely difficult to meaningfully evaluate the policies and suggest the agency is changing its longstanding process of using science to inform policy. The one certainty about this policy is that it would result in hundreds of millions of pounds of chicken being thrown into landfills each year, exacerbating food insecurity and driving up the cost of chicken.

#### *Salmonella in Certain Not-Ready-To-Eat Breaded and Stuffed Chicken Products*

In addition to the *Salmonella* Framework, USDA has also indicated it is considering declaring *Salmonella* an adulterant when present above a threshold level in certain not-ready-to-eat (NRTE) breaded and stuffed chicken products that require cooking but may appear ready-to-eat (RTE) to a consumer because of breading (e.g., chicken kiev or chicken cordon bleu). A subset of NCC members produce various types of these products, which are consumed safely nearly every time they are eaten. NCC and its members have worked for more than a decade to develop and refine best practices for these NRTE but appear RTE products, including labeling guidelines and intervention strategies, all of which are designed to ensure that consumers can prepare and consume these products safely. These efforts have successfully resulted in a substantial reduction of foodborne illness outbreaks related to this product category, reducing the incidence of ten *Salmonella* outbreaks in these products between 1998 to 2015 down to just one from 2015 to present.

While USDA's proposal is not yet public, we understand USDA is considering declaring *Salmonella* an adulterant when present at more than one cfu per gram in these products. Like with the broader proposed *Salmonella* Framework discussed above, USDA has not provided any scientific information to support this position. This change would also have serious economic impacts on industry, reducing availability of safe, nutritious products for consumers and eliminating jobs in rural communities. Based on a survey NCC conducted, on an annual basis, NCC member companies produce over 75 million pounds of finished NRTE but appear RTE stuffed chicken products, which equates to almost 193 million servings and an estimated finished product annualized value of almost \$284 million dollars. Declaring *Salmonella* an adulterant in these products would undermine their commercial viability and would likely result in the closure of five total production lines, job losses for almost 550 fulltime-equivalent employees, and the departure of smaller producers from the market entirely. NCC estimates the net economic costs of this proposal at more than \$100 million annually to those NCC member companies. It is unclear why USDA is devoting so much attention and effort to a niche product category that is not likely to materially affect overall public health. The poorly thought-out policy works against several goals of the current presidential administration and Congress by increasing food prices, decreasing competition, and eliminating jobs in rural areas.

NCC has long sought to work with USDA to develop a science-based policy that enhances food safety of these products and benefits consumers without the drastic negative impacts described above. In particular, NCC has identified alternative approaches that use mandatory safety labeling to ensure consumers properly prepare these products, an approach recommended by one of USDA's own committees. NCC has twice petitioned USDA to adopt regulations establishing labeling requirements for NRTE stuffed chicken breast products that may appear RTE and issue a Compliance Guideline for developing and communicating validated cooking instructions for such products, neither of which has been acted on, and a copy of NCC's most recent petition is attached for further reference.<sup>45</sup> Alternatively, or in addition to, these labeling interventions, USDA could work with industry to conduct baseline sampling on raw chicken source material to assess the presence of *Salmonella* before products enter a manufacturing facility and develop performance standards for raw materials based on that information.

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In short, the broiler industry is committed to continuing to produce safe, wholesome, high-quality protein for American consumers and supporting rural economies across the country. Congress can help us achieve these goals by ensuring federal regulatory requirements are based in science and common sense, are achievable, and do not jeopardize the industry efficiency we have worked so hard to build. To supplement my testimony, I am enclosing as attachments rulemaking comments, reports, and petitions providing more detail on the chicken industry and our concerns with the regulatory approaches I have discussed.

Thank you for this opportunity to appear before the Committee and for your continued efforts to support America's meat and poultry industry. Chicken is the most important protein in the world, and we are proud of the work our industry does to feed, employ, and support hard-working Americans. I look forward to answering your questions.

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<sup>45</sup> Exhibit 6, NCC Petition Re NRTE Stuffed Chicken Breast Products (Feb. 25, 2022).