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U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 2542A-S
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Re: Docket RIN 0580-AB25 Interim Final Rule: Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, Federal Register Vol. 81, No. 244, pp. 92566-94; Docket RIN 0580-AB27 Proposed Rule: Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, Federal Register Vol. 81, No. 244, pp. 92703-23; Docket RIN 0580-AB26 Proposed Rule: Poultry Grower Ranking Systems, Federal Register Vol. 81, No. 244 pp. 92723-40

Thank you for the opportunity to comment on the interim final rule (IFR) "Scope of Sections 202(a) and (b) of the Packers and Stockyards Act" and the notices of proposed rulemaking (NPRMs) "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act" and "Poultry Grower Ranking Systems" (the rules) published in the *Federal Register* on December 20, 2016. Although issued as three separate regulations, the rules are interrelated and we address them collectively in these comments. The National Turkey Federation (NTF) represents nearly 100 percent of all turkey processors, growers, breeders, hatchery owners and allied companies. It is the only national trade association representing the turkey industry exclusively.

NTF is an advocate for all segments of the U.S. turkey industry, which provides more than 63,000 American jobs, with direct wages of $3.7 billon, many of which are located in rural communities across the country. The turkey industry has a direct impact of $32 billion, which increases to a total economic impact of $80 billion overall. In concert, these rules have the potential to dramatically change how the turkey industry operates, and we have serious concerns about their intended and unintended consequences. Taken together, the rules would result in costly litigation, reduced incentives for higher-performing growers, decreased efficiency and freedom to innovate, and could fundamentally alter the structure and production practices of the turkey industry to the detriment of growers and processors alike.

Summary of General Concerns about the Rule

- Our overriding concern is that the increased legal and regulatory uncertainty created by these rules will make it difficult for the industry to reward growers with a premium price for premium performance. Regardless of the rule's commendable intent to benefit growers, the potential for legal challenges when companies write unique contracts or

offer competitive premiums will increase under the rules such that the only way to manage risk may be to make contracts and compensation more uniform, to the detriment of current high-performing growers, or move towards a model that eliminates independent growers entirely.

- We are concerned that the rules' ambiguities, as well as its contradiction of established case law, will lead to a significant increase in lawsuits, to the detriment of growers and processors. These ambiguous requirements will also make compliance difficult and result in added regulatory costs.

- We are concerned that the proposed regulations will have a detrimental effect on the grower-processor relationship, will increase tension, decrease competition and ultimately harm the very growers they were designed to protect.

- The long-term impact of these proposed regulations is unknown and, if the current contract model becomes too risky from a legal or economic standpoint, they could significantly change the structure of the industry over time to one that is far less beneficial for the grower.

In light of these concerns, we strongly urge USDA to suspend the IFR's effective date and to withdraw each of the above-listed rules.

I. The Structure of the Turkey Industry

The modern turkey industry is vertically integrated, and raises approximately 233 million turkeys per year.[1] These turkeys are raised on nearly 2,500 turkey farms that service the major processors. Most of these operations are family farms. There are several production models utilized within the turkey industry, including production contracts, marketing contracts, independent growers, and company-owned farms. The majority of turkeys produced, approximately 68.5 percent, are raised utilizing production contracts.[2] In the production contract model under which the majority of the turkey industry operates, processors contract with family farmers to grow turkeys.

In many regions, this model has been essential to preserving the role of the family farmer in turkey production, while also benefiting the processors. Production contracts allow growers to focus their time, energy and expertise on growing the birds, while insulating them against much of the costs and market risks involved in producing turkeys. Poults, feed, medication, and veterinary services are costs borne by the processor under production contracts, and feed alone is nearly 70 percent of the cost of producing a turkey. Some turkey production contracts also include an energy stipend. Production contracts also mitigate much of the growers' risk resulting from volatile feed prices, as has been seen over the last decade due to corn demand for fuel ethanol, as well as the risk resulting from fluctuating prices and shifting market demands for turkey products.

[1] *National Turkey Federation Sourcebook*, National Turkey Federation, 2016.
[2] *2012 Census of Agriculture*, United States Department of Agriculture, National Agriculture Statistics Service, 2014, https://agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

The production contract model effectively allows processors to meet the increasingly rigorous demands of its customers, including grocery stores, restaurant chains, and foodservice companies. Indeed, the production contract model evolved from the need for processors to exercise maximum quality and cost control over all phases of turkey production. That need, in turn, arises from major societal changes during the last 50 years. Most Americans now purchase their food from large national or regional grocery and restaurant chains, and these chains are the primary customers of the turkey industry. These large customers have the market power to set exacting specifications for product quality, volume and price. The production contract model helps processors meet their customers' requirements and remain competitive, allowing them to work with growers to exercise the necessary control over the production process. As the IFR notes, use of production contracts in the turkey industry has grown substantially over the last 10-15 years, and will likely continue to grow.

Despite the growing number of farms operating on production contracts, the turkey industry utilizes a number of other production models (referred to as Alternative Marketing Arrangements in the rules) to meet the needs of different growers and processors. Marketing contracts, an arrangement in which the grower owns the birds, supplying their own feed and medicine, with an agreement to sell the birds to a specific processor, also account for a substantial portion of the market (nearly 10 percent). This type of arrangement may be found in situations where the processor is a grower-owned cooperative, but is also utilized between other processors and independent growers. There are also a large number of processor-owned farms, where company employees raise and care for the birds, with the processor controlling every aspect of production without any involvement from family farmers. In addition to these, there are likely a number of other models whereby growers sell their birds, either to processors, other growers, or directly to customers. These models each offer differing levels of risk to the parties involved, and that level of diversity of contracting is important in the modern day turkey industry.

As NTF addresses its concerns about the rules in more detail, it is important to keep this background in mind. Turkey growers and processors alike share concern that the rules, regardless of USDA's intentions, create legal and regulatory risks for processors that do not currently exist, do not appear to directly help growers, and appear out of proportion to any perceived problem the rules aims to remedy. Decisions about the structure of future production models are issues that cannot be avoided if the rules as currently written go into effect, and could have negative impacts on growers and processors moving forward. Every change made in response to these rules will affect a farm family, and these farm families are concerned GIPSA has failed to adequately appreciate the economic risk this rule creates for them.

II. Interim Final Rule - Scope of Sections 202(a) and (b) of the Packers and Stockyards Act (PSA)

The Interim Final Rule, "Scope of Sections 202(a) and (b) of the Packers and Stockyards Act," amends §201.3 by re-designating the existing text as paragraph (b) and in its place adding the following:

> (a) *Scope of sections 202(a) and (b) of the Act.* The appropriate application of sections 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct or action. A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

NTF believes that this new regulatory language is contrary to the established legal precedent and legislative history of the PSA. Further, we have concerns with the procedural history of the IFR and the substantial economic impacts it may have on the turkey industry.

A. Legal Precedent and Legislative History

Over the last decade, at least four different federal circuit courts have held that proof of harm or likelihood of harm to competition is required to demonstrate a violation of §§202(a) and (b) of the PSA. As the IFR correctly notes, the first of these cases, *London v. Fieldale Farms Corp.*, held "that in order to prevail under the [PSA], a plaintiff must show that the...deceptive or unfair practice adversely affects competition or is likely to adversely affect competition."[3] In interpreting the law, the court looked to past precedents and legislative history reinforcing the primary purpose of the PSA, which was to ensure fair competition and trade in the livestock and poultry business.[4] *Fieldale* delves further into the legal history, going back over half a century of established case law requiring such a showing of harm or likelihood of harm.[5] "To hold otherwise would subvert the purpose of the PSA."[6]

Since the 11th Circuit's decision in *Fieldale*, the 10th, 5th, and 6th Circuits have consistently reached the same conclusion. In *Been v. O.K. Industries*, the 10th Circuit agreed with prior courts that the "primary purpose of [the PSA] is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry".[7] The *Been* court rejected the argument that §202(a) of the PSA does not require proof of an injury to competition[8], and instead joined the other circuits in "requiring a plaintiff who challenges a practice under §202(a) to show that the practice injures or is likely to injure competition."[9]

Sitting en banc, the 5th Circuit ruled consistently with its brethren in 2009, rejecting the district court and the 5th Circuit panel rulings holding that plaintiffs proceeding under §202(a) of the PSA need not prove an adverse effect on competition.[10] "To support a claim that a practice

[3] *London v. Fieldale Farms Corp*, 410 F.3d 1295, 1304 (11th Cir. 2005)
[4] *Id* at 1302 citing H.R. Rep. No. 85-1048 at p. 1 (1958) reprinted in 1958 U.S.C.C.A.N. 5212, 5213 ("primary purpose of the PSA was 'to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry'", *Stafford v. Wallace*, 258 U.S. 495, 514 (U.S. 1922) (noting that Congress primarily sought to combat the threat of monopoly in the meatpacking business), and *Armour Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968) (noting that both Senate and House legislative history makes clear that the act was designed to ward against actions designed to eliminate or lessen competition).
[5] *Id* at 1303-04.
[6] *Id* at 1307.
[7] *Been v. O.K. Industries*, 495 F.3d 1217, 1228 (10th Cir. 2007).
[8] *Id* at 1224.
[9] *Id* at 1230.
[10] *Wheeler v. Pilgrim's Pride Corp*, 591 F.3d 355, 357 (5th Cir. 2009) (en banc).

violates subsection (a) or (b) of §[202] there must be proof of injury, or likelihood of injury, to competition."[11] The court begins its decision by lamenting that "[o]nce more a federal court is called to say that the purpose of the [PSA] of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act."[12] Noting that Congress had amended §202 seven times in the prior 80 years without ever acting to overturn the myriad court decisions requiring this showing of harm to competition, the court found it "reasonable to conclude that Congress accepts the meaning of §[202](a) to require an effect on competition to be actionable" in light of congressional silence in response to "circuit unanimity" on the issue.[13]

Similarly citing the unanimity amongst circuits, the 6th Circuit in *Terry v. Tyson Farms* joined with its sister circuits in holding that the "construction of this nearly 90-year-old statute to be a matter of settled law."[14] Citing stare decisis, the *Terry* court held, as other courts had previously, "that in order to succeed on a claim under §[202](a) and §[202](b) of the PSA, a plaintiff must show an adverse effect on competition."[15] In this opinion, the court expressly rejected the USDA's argument that it adopt the minority view voiced in the dissent in *Wheeler*, and refused to "deviate from the course taken by the seven other circuits that have spoken on this issue[.]"[16] As the *Terry* court aptly noted, "[t]he tide has now become a tidal wave."[17]

Each of these courts, as well as the courts cited in these opinions, agree a near-unanimous understanding of the legislative history and congressional intent behind the PSA. In the time since most of these cases were decided, Congress passed the 2008 Farm Bill, legislation from which USDA claims its authority to implement the IFR and associated NPRMs. In the 2008 Farm Bill, Congress was once again silent on the issue of removing the competitive injury requirement and did not adopt provisions contradicting the existing legal decisions. Despite the then-recent decisions in *Fieldale* and *Been*, no amendments were adopted to alter the requirement showing of harm to competition.

USDA's original 2010 proposed rule was the subject of substantial congressional debate after its publication, and shortly after the announcement that the final rule was sent to OMB, Congress passed the FY2012 Consolidated and Further Continuing Appropriations Act, defunding the promulgation of large portions of the proposed rule, including §201.3(c), which became §201.3(a) in the interim final rule.[18] Subsequent appropriations acts continued this prohibition on using funds to promulgate §201.3(c), and rescinded certain aspects of the rule.[19] As such, it seems apparent that the legislative history at the time of passage, as well as the thinking of the modern Congresses, are aligned in the purpose of the PSA and the well-accepted principle that a

[11] *Id* at 363.
[12] *Id.*
[13] *Id* at 361-62.
[14] *Terry v. Tyson Farms*, 604 F.3d 272, 279 (6th Cir. 2010).
[15] *Id*.
[16] *Id* at 278.
[17] *Id* at 277.
[18] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 522.
[19] *See* Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198, and Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130.

showing of harm or likelihood of harm to competition is required for a violation of §202(a) and (b) of the PSA.

However, in the preamble to the IFR, USDA rejects well-established legal precedent and legislative history accepted by at least eight of the eleven circuits, pushing once more the same arguments that have been unpersuasive to courts across the country. USDA appears to be pushing an interpretation of the PSA that is contrary to the great weight of court rulings and legislative history, and hopes to eliminate by regulatory interpretation what the courts have found requisite in their analysis of the statue. Citing two dissents from four cases, the agency improperly dismisses the courts' opinions citing a plain language and a Congressional intent argument that has proven unpersuasive in the past, while asserting that there is some longstanding deference to the Secretary of Agriculture that must be respected, although it heretofore seems not to have been exercised by many courts in regards to the harm to competition requirement.

In particular, USDA clings tightly to the Hartz dissent in *Been*, arguing that development of a regulation explaining whether a showing of competitive injury was required in a given circumstance would suffice for courts to grant *Chevron* deference to the agency on the issue. However, as the dissent concedes, *Chevron* deference would be proper only if the USDA had authority to adjudicate alleged violations of §202 by live poultry dealers, which it does not have.[20] On this particular issue, Hartz admits to uncertainty over how the Supreme Court would rule, but asserts that at least *Skidmore* deference should be granted the agency before going on to cite case law concerning the Federal Trade Commission Act.[21] However, the majority rejected deference to USDA even under such a persuasiveness standard, noting that these cases concern interpretation of the meaning of unfairness solely in the context of the PSA, thus rejecting arguments as to the applicability of the Supreme Court's decision in *FTC v. Sperry and Hutchinson Co.*[22] Specifically, the *Been* majority noted that *Sperry and Hutchinson* dealt with questions of agency jurisdiction, whereas PSA cases such as *Been* do not involve "USDA's interpretive or enforcement authority under the statute" but rather the "construing [of] a statute that only the federal courts may enforce against live poultry dealers." As such, USDA offers an answer to a question that no circuit majority has asked.

In light of the overwhelming body of precedential court opinions and the well-accepted purpose of the PSA as evidenced in its legislative history from 1921 to present, NTF urges USDA to rescind the IFR's modified §201.3 that removes the requirement that there be a showing of harm to competition or likelihood of harm to competition to establish a violation of §202(a) and (b). The provisions of the IFR appear to be in excess of USDA's statutory jurisdiction, authority, and limitations, and so should be rescinded.[23] As noted by USDA, the new §201.3(a) will inevitably invite costly litigation between growers and processors over settled issues of case law, resulting in injury to both parties. Indeed, the only parties that seem guaranteed to find benefits in the new scheme are trial lawyers, so much so that one wonders if this is the actual intent. USDA does state that the litigation costs and the number of lawsuits are expected to decrease after precedent

[20] *Been v. O.K. Industries*, 495 F.3d 1217, 1238-39 (10th Cir. 2007) (Hartz, J. dissenting).
[21] *Id* at 1239.
[22] *Been v. O.K. Industries*, 495 F.3d 1217, 1227 n.7 (10th Cir. 2007).
[23] 5 U.S.C. § 706(2)(C).

setting decisions are established, and we are left to merely assume that the agency will treat these precedents differently from existing precedents which, according to the IFR, are to be rejected.

B. Procedural Concerns with the Interim Final Rule

Originally published as a proposed rule in 2010, just over a month after *Terry* was decided, the precursor to the current IFR was part of a much broader proposed rule that was subsequently broken out into multiple, smaller proposed rules.[24] Each of these proposed rules, including the two issued concurrently with the IFR, went through, or will go through, notice and comment rulemaking. Whereas the industry has evolved over the last 6-7 years and the proposals have been adjusted internally and with respect to one another, it is proper that they be released as proposed rules. NTF supports the notice and comment rulemaking process, and is pleased to be able to offer comments on NPRMs promulgated by the various agencies.

In light of this, NTF is concerned with the method by which the new §201.3(a) was promulgated, given that it was issued as an interim final rule. We believe that this was improper, without observance of procedure required by law, and that if it needed to be issued at all, it should have been issued as a proposed rule. In both the 2010 NPRM and the two concurrently issued proposed rules, the agency did not make any attempt to find good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, nor did it include any such finding in its IFR.[25] In fact, USDA admits in the IFR that it is unable to quantify any benefits of §201.3(a) at all. USDA does cite what it believes to be a qualitative benefit of §201.3(a), specifically the ability of poultry growers to have more protections and be treated more fairly, which it claims *may* result in more equitable contracts, but provides no concrete examples of why the provisions of this particular IFR are required for such protection.

While the industry waits for USDA to finalize its other two proposed rules, the IFR will exist alone, and will cause substantial ambiguity in the industry, exacerbating the concerns that Congress attempted to address in the 2008 Farm Bill. Without the content of the proposed rules, the IFR will allow for much broader avenues of litigation than currently exist, undermining the entire rationale behind requiring USDA to establish criteria to determine whether an undue or unreasonable preference or advantage has occurred in violation of the PSA. Despite a lack of quantifiable benefits and no real sense of urgency, USDA chose to issue §201.3(a) as an interim final rule and avoid the notice and comment rulemaking process. NTF strongly believes that if the agency must move forward on this rule, the proper route should be as a notice of proposed rulemaking (NPRM) first.

C. Impacts on the Turkey Industry

There is serious concern in the turkey industry that the IFR, in concert with the two proposed rules, could have serious negative impacts on turkey growers and processors. We are concerned with the costs of compliance, increased litigation, and how these risks might ultimately transform

[24] Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).
[25] 5 U.S.C. § 553(b)(3)(B).

the turkey industry in a manner that negatively impacts the very growers that the IFR is intended to protect.

USDA is required to explain the need for any significant regulatory action to be taken, assess the costs and benefits of the action, including its impact on small entities, and make such assessments available for public review and comment.[26] Regulatory actions that would likely have an annual effect on the economy of $100 million or more or would adversely affect the economy in a material way are considered "economically significant" and demand a more comprehensive cost-benefit assessment. These assessments must also include the underlying analysis of the anticipated costs and benefits of a proposed rule, including the quantification of the costs and benefits if possible. Moreover, the assessment must include an analysis of the anticipated costs and benefits of any reasonably feasible alternatives to the planned regulations.

In the IFR, USDA concedes that the cost of §201.3(a) could ultimately reach nearly $1 billion over ten years. According to USDA, rewriting §201.3 will result in costly litigation between growers and processors over currently-settled issues of case law, resulting in significant costs to both. USDA admits that an initial increase in litigation costs is a likely result of the IFR, and the overall range of added costs from §201.3(a) alone is between $500 million and $1 billion, not including any added costs associated with either of the other two proposed rules that were released alongside the IFR. Costs of this magnitude create substantial disincentives for processors to continue with their current contracting arrangements.

Many of our members are concerned that although this rule's costs and risks may lead to processors deciding to move away from the contract grower model towards others, such as company-owned farms, thus harming the very growers the IFR claims to be trying to help. As noted above, although several companies utilize processor-owned farms, the vast majority of our industry's growers are comprised of on family farms using production contracts. USDA should avoid pursuing regulatory schemes that shift such risk onto processors that they are hesitant to deal with these growers. We also note that, as we noted in our comments to the 2010 proposed rule, USDA refers to marketing contracts as arrangements "where producers market their livestock to a packer for slaughter under a verbal or written agreement." As mentioned in Section I, marketing contracts are also employed in the turkey industry, and we must ensure that livestock *and* poultry growers can utilize them.

Ultimately, USDA claims that §201.3(a) is needed to protect growers, without managing to quantify any sort of benefits that it will provide. However, USDA's analysis demonstrated that the IFR would place a substantial economic burden upon the livestock and poultry industry. The turkey industry is a relatively small sector that utilizes several production models. The costs and risks associated with the IFR could dramatically alter how processors acquire turkeys, harming the very growers the IFR hopes to aid.

III. Proposed Rule - Unfair Practices and Undue Preferences in Violation of the PSA

The Proposed Rule, "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act," adds §201.210 and §201.211 to the PSA. Section 201.210 establishes a non-

[26] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993), and Regulatory Flexibility Act, 5 U.S.C. §601 et seq.

exclusive list of three categories of conduct or action considered "unfair, unjustly discriminatory, or deceptive practices or devices" in violation of §202(a) of the PSA. Section 201.211 similarly establishes a non-exclusive list of criteria to be considered when determining if conduct or action constitutes "undue or unreasonable preferences or advantages" in violation of §202(b).

As noted in Section II.A., NTF believes that the provisions in this proposed rule are contrary to the established legal precedent and legislative history of the PSA. Additionally, the rules also suffer from vague and overbroad language that are sure to increase uncertainty, as well as a number of specific provisions that will dis-incentivize growth and expansions of turkey processors, restricting the entry of new growers into the marketplace.

A. Legal Concerns and Contrary Precedent

This proposed rule is plagued by the same contrary legal precedents and legislative history as the IFR discussed above. Without rehashing the entirety of II.A., it suffices to again remind USDA that the great weight of nearly nine decades of legal precedent and legislative history stand between it and its proposed rule.

Section 201.210 establishes three categories of conduct that constitute unfair, unjustly discriminatory, or deceptive practices or devices in violation of §202(a). Section 201.210(a), establishes that conduct explicitly deemed to be an unfair, unjustly discriminatory, or deceptive practice or device by the PSA is a per se violation of §202(a). Section 201.210(b) establishes a list of actions constituting a violation of §202(a) *regardless* of harm to competition. The proposed rule states that this non-exclusive list of conduct that violates §202(a) regardless of whether it harms or is likely to harm competition, absent a demonstration of a legitimate business justification. Lastly, §201.210(c) states that any conduct or action that harms or is likely to harm competition is a violation of §202(a), once again absent a demonstration of a legitimate business justification.

Section II.A. of these comments, above, details the multitude of court cases and legislative history that contradict USDA's contention that the PSA contemplates a violation of §202(a) absent a showing of harm or likelihood of harm to competition. In spite of this precedent, USDA relegates what is nearly unanimously accepted as a core requirement to show a violation to merely the third in a non-exhaustive list of categories that might be evidence of unfair, unjustly discriminatory, or deceptive practices. Not content to open the litigation floodgates only slightly, USDA caveats §201.210(b) and (c) with an exception for a "legitimate business justification", which is an undefined term despite being utilized over twenty times in this proposed rule alone. Altogether, USDA removes the fundamental requirement to show a violation of §202(a), introduces a nebulous term sure to invite litigation not only between growers and processers, but likely between processors and USDA, and allows a processor to justify its competition-harming conduct through undefined business rationale. Like the IFR, the proposed §201.210 runs contrary to the decision of every circuit court that has taken up the matter, and the clear congressional intent of the rule.

Section 201.211 provides a list of criteria USDA would consider in determining whether conduct violates of §202(b) of the PSA by providing undue or unreasonable preference or advantage.

These criteria include undue or unreasonable preference or advantage applied to a grower as compared to a similarly situated grower based upon the disadvantaged grower engaging in lawful communication, association, or assertion of rights (§201.211(a)), accusations of violations of any applicable law, rule, or regulation related to livestock or poultry operation absent a reasonable basis to determine that the grower committed the violation (§201.211(b)), arbitrary reasons unrelated to the livestock or poultry operation (§201.211(c)), or on the basis of the grower's race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status (§201.211(d)). These broad categories are further blurred by §201.211(e), which introduces §201.210's nebulous "legitimate business justification" as an exemption for conduct that might otherwise constitute undue or unreasonable preference or advantage. And like the prior section, §201.211 relegates the central requirement of harm or likelihood of harm to competition to the final section (§201.211(f)) of a non-exhaustive list.

Aside from the fact that, once again, USDA appears to be attempting to circumvent the clear intent of Congress and reject judicial precedents regarding the requirement to show harm or likelihood of harm to competition, the criteria in §201.211 are vague and overly broad. The list, as with §201.210, is non-exhaustive, inviting litigation to determine what else might go on the list beyond what the agency has determined, as well as which items on and off the list might be circumvented with a legitimate business justification. Like the IFR, the proposed §201.211 attempts an end-run around the circuit courts and Congress in trying to eliminate or limit the requirement that competitive injury be shown to prove a violation of §202(b).

In light of the concerns as to the legal unpinning of §201.210 and §201.211, NTF strongly urges USDA to withdraw the proposed rule and seek other options for meeting its obligations under the 2008 Farm Bill.

B. Ambiguity and Uncertainty in the Proposed Rule

Although not all of the enumerated criteria in §201.210 and §201.211 are unacceptable, some are rather troubling. USDA's explanation demonstrates either an unfamiliarity with the turkey industry, a lack of understanding of the legal landscape surrounding the rule, or indications of a rush to get the rule out the door – or perhaps all three. The legitimate business justification aspect, as noted above, is one example of an undefined, ambiguous term that nevertheless occupies a very important place in the proposed rule, operating to permit actions or conduct that would otherwise run afoul of the new criteria and result in a violation of the PSA.

As another example, USDA states in its explanation of §201.211(b) that "unless there is some reasonable basis for such a determination, such as a finding by a government agency charged with enforcing the Clean Water Act, GIPSA believes treating growers differently under these circumstances would violate the prohibition of section 202(b)." This provision has the potential to complicate relationships between growers and processors. In the event that a grower is in violation of some law or regulation, a turkey processor might be unable to terminate their contract until the agency completes its determination, which can often take months or longer. Furthermore, many legal and regulatory regimes provide mechanisms to challenge and appeal a determination, potentially tying a processor to a grower for months or years. Conversely, if a mere allegation by a government agency suffices to constitute a "reasonable basis" then a grower

might be terminated based on an investigation or regulatory action that in which the grower ultimately prevails. Under such ambiguous criteria a "finding by a government agency", a bad actor on either side of the contract could potentially harm the other in ways that USDA surely does not intend.

Another such instance of ambiguity is under §201.210(b)(1), where unjust discrimination is considered a retaliatory action, which is unjustly discriminatory. It is somewhat confusing to see such an ouroboros of language in a proposed rule to regulate poultry contracts, although it elicits a strong desire to note parallels to the proverbial chicken-and-egg conundrum. Nevertheless, it is just one of several instances of confusing or ambiguous language that could lead to uncertainty for those turkey processors attempting to abide by the proposed rule's requirements and avoid the impending litigation that USDA estimates will result from the rule. As such, NTF believes that the proposed rule should be withdrawn and any future criteria from USDA should be significantly revised to reduce ambiguity, potential for litigation, and uncertainty for growers and producers.

C. Impacts on the Turkey Industry

NTF is concerned about the economic impacts that this proposed rule may have on the turkey industry. USDA estimates the ten-year cost for this proposed rule will be $54 million across the meat and poultry industry. Although we believe that this number is an underestimate, given that the proposed rule's list is non-exclusive and removes the primary requirement to show violation of §202 of the PSA, much of that cost is potentially captured in USDA's nearly $1 billion upper estimate of costs relating to the IFR. Regardless, USDA was unable to quantify the benefits of §201.210 and §201.211, much like benefits of the IFR. Here, the estimated cost of $54 million is weighed against no benefit estimate at all. Given that USDA stated an important qualitative benefit of §201.210 is that, coupled with §201.3(a), it increases the ability to bring lawsuits under the PSA for violations of 202(a) that do not result in harm or likely harm to competition, it appears that the costs of litigation are actually what USDA considers the benefits—lawsuits are quantitative costs, but access to lawsuits is a qualitative benefit!

Beyond the monetary costs, however, is the risk that the requirements in the proposed rule will make it more difficult for processors to terminate growers when necessary. Although there are certainly instances where this might protect the grower, we are also concerned that it could lead to a situation where processors are wary of contracting with new growers. This could hamper expansion of processors attempting to meet growing demand for turkey products. It might also lead to processors expanding their business with growers already under contract, concentrating turkey flocks into a smaller number of growers, and making it harder for new growers to enter the market. Further, it could lead to processors altering their production systems due to government intervention instead of adapting to the needs of the processors, growers, or marketplace.

In the end, the proposed rule could create a harmful environment for new and existing growers that the rule hopes to protect, pushing the production system in a direction that it would not go absent the need to mitigate the proposed rule's risks and costs. For these reasons, NTF urges USDA to withdraw this proposed rule.

IV. Proposed Rule - Poultry Grower Ranking Systems

The Proposed Rule, "Poultry Grower Ranking Systems," adds to proposed §201.210(b) a tenth criteria, §201.210(b)(10), which considers a live poultry dealer's failure to use a poultry grower ranking system in a fair manner – after applying the criteria in §201.214 – to be an unfair, unjustly discriminatory, or deceptive practice or device and a violation of §202(a) of the PSA, regardless of whether it harms or is likely to harm competition. The proposed rule also adds a proposed §201.214 to the PSA, which establishes a non-exhaustive list of criteria that USDA would consider when determining whether a live poultry dealer's poultry grower ranking system violates the PSA. Section 201.214(a) considers whether live poultry dealers provide sufficient information to enable a poultry grower to make informed business decisions, including flocks per year, average gross income from each flock, and other information necessary to enable the grower to calculate expected income from a poultry growing arrangement. Section 201.214(b) considers whether a live poultry dealer supplies inputs (namely birds, feed, medication, and other inputs supplied by the dealer) of comparable quality and quantity to all poultry growers in the ranking group, and whether there is a pattern of supplying inferior inputs to one or more poultry growers in the ranking group. Section 201.214(c) considers whether growers provided with dissimilar production variables (such as density of placed birds, the target slaughter weights, and bird ages varying by more than seven days) are included in the same ranking system in a manner that affects a grower's compensation. Lastly, §201.214(d) introduces the legitimate business justification exception to the proposed rule.

As noted in Section II.A. and III.A., NTF believes that these provisions are contrary to established legal precedent and legislative history of the PSA. Further, the proposed rule does not properly recognize the differences between the broiler and turkey industries, is based upon a flawed premise, and will have negative unintended consequences for the turkey industry.

A. Legal Concerns and Contrary Precedent

Proposed §201.210(b)(10) declares that if it deems the use of a poultry grower ranking system unfair, such use constitutes a violation of §202(a), regardless of whether it harms or is likely to harm competition. We once again direct USDA to the legal precedent and legislative history cited in Section II.A. of these comments. Each circuit that has taken up this issue agrees on the purpose, history, and function of the PSA regarding §202 violations requiring harm or likelihood of harm to competition. That USDA maintains it is not bound by the will of Congress or the rulings of at least eight circuit courts is extraordinary.

Further, the proposed §201.214 establishes a list of criteria, aside from injury to competition, that it will look to in order to determine if a poultry grower ranking system is unfair, unjustly discriminatory, or deceptive manner. As with the provision in §201.210, this list seems to set aside requirements that the courts and Congress have conclusively established. To compound matters, USDA introduces into this list its undefined "legitimate business justification" criteria, which, while nebulous, can absolve a processor for use of a poultry grower ranking system in a manner that would otherwise be in violation of §202(a) of the PSA according to the proposed rule's new criteria. Such a vague exemption could even, as noted in III.A., protect a processor from conduct or activity that harms competition in violation §202(a). USDA claims that this

exemption will allow the Secretary to consider such justifications and somehow thwart frivolous litigation. This could force companies to justify their business decisions before USDA in anticipation of litigation, adding yet another layer of regulation for businesses pursuing certainty, and making USDA, not the courts, an arbiter of which turkey production models violate the PSA.

Aside from these issues, the proposed rule also appears to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, as USDA appears not to have genuinely engaged in reasoned decision-making, fact-finding, or a sufficient administrative record. For example, the agency states in §201.214(b) that it will consider whether inputs (birds, feed, and medication) provided to growers are comparable, and whether there is a pattern of supplying inferior inputs to one or more growers. However, elsewhere in the proposed rule, USDA states that, whereas the Food and Drug Administration approves all medications administered to broilers (as well as turkeys), it "believes that live poultry dealers would not alter medication to such an extent that inferior medicine is consistently supplied to a grower and that this criterion would not be costly to the industry." USDA goes on to say essentially the same of feed, stating that it "also believes that feed provided by live poultry dealers would be consistent across a group of growers and that this criterion would not be costly to the industry" since feed is produced by processors at a feed mill, and the "same batch of feed is distributed to growers until more feed is produced." The very system the turkey industry employs for production and distribution of feed, according to USDA, "ensures consistency across the group of growers that receive the same batch of feed." If the agency's economic analysis indicates that compliance with §201.214(b) will not be costly, as the industry already supplies comparable inputs, one wonders why the agency would create seemingly needless requirements at all.

As with the IFR and proposed rule discussed above, NTF believes that USDA should rescind this proposed rule in light of its obvious legal deficiencies.

B. Inapplicability to the Turkey Industry

Although poultry grower ranking systems are utilized in the turkey industry, they are not as widely used as in other industries. Much of this proposed rule appears to target the broiler industry, with little thought of how it would apply to the turkey industry. While we believe the broiler industry has many legitimate reasons of its own to object to this proposed rule, the differences in the two industries are substantial and should also be considered. Turkeys live much longer than broiler chickens, with a market age of 18 to 20 weeks—which is about three times that of a broiler. Further, due to the sexual dimorphism in the species, most turkey production is segregated between hens and toms, each with different liveweights and used for different products. Toms take longer to reach market age, with a liveweight often in excess of 40 pounds, and are generally not sold as whole birds but instead cut up and used for further processed products. Hens on the other hand generally only reach up to 20 pounds liveweight, and are often sold as whole birds, such as those seen on dinner tables around the country at Thanksgiving. The dramatic size differences make processing turkeys of different sexes technically challenging. Turkey farms are also not uniform with one another, and the barns used for housing turkeys can vary substantially between regions, as well as for different ages (a brooder barn will usually differ from a grow-out barn on the same farm). In light of these

differences in production of different turkeys, it seems apparent that USDA did not consider how many of the provisions in this proposed rule would apply to the turkey industry.

For example, §201.214(b) refers to birds as inputs, with USDA referring to "chicks" (whereas newly hatched turkeys are called "poults") provided to growers. It references comments that discuss providing more or fewer female chicks in a flock as an example of inferior inputs, and §201.214(c) considers whether bird ages vary by more than seven days. USDA states in a footnote that "[r]eferences in this document to chicks, chickens, or broilers are also relevant to the use of grower ranking systems in turkey production." Although this seems like a simple case of substituting existing language for "poults, turkeys, or turkeys", respectively, it glosses over the substantial differences that exist between the broiler industry and the turkey industry. For an animal that lives approximately six weeks, a single week of age difference can be substantial, but the impact is less severe for an animal living up to 20 weeks. And, as noted above, turkey production is normally segregated by sex, so the issue of consistently providing too large a percentage of female poults is unlikely to arise. There are also only two primary breeders of turkeys, so the specific breed of turkeys is less diverse than the proposed rule seems to understand. The turkey industry's geographic diversity leads to distinct challenges for raising turkeys, as the issues facing growers in California or Minnesota differ substantially from those facing growers in Texas or North Carolina. With some processors operating in multiple states, raising different types of birds, applying a single CMS applied across a company may be much more challenging than USDA anticipates.

As such, many of the requirements that adversely impact the broiler industry are magnified when applied to the turkey industry. NTF recommends that USDA rescind this proposed rule and, if it must promulgate a future, related rule, that significant attention be paid to requirements as they are applied to turkeys.

C. The Proposed Rule's Flawed Premise

As stated elsewhere in these comments, the turkey industry uses a number of different production systems to raise toms and hens over a geographically diverse area. Although many turkey processors do not use a grower ranking system as described in the proposed rule, others do. NTF supports the diversity of arrangements that now exist to provide both processors and growers the flexibility to meet the demands of their customers. However, this proposed rule seems based upon a flawed premise that one of these systems, the poultry grower ranking system, is inherently different and less desirable.

This premise is evidenced by the proposed rule exists in the first place. Whereas USDA assumes that other production and contracting systems are adequately regulated by existing requirements as well as the IFR and proposed rule on unfair practices and undue preferences, it promulgates this rule specifically to target ranking systems with additional requirements. In the context of the existing and proposed regulatory requirements, USDA estimates that a processor may contract with a grower or group of growers, and then consistently supply them with inferior information, inputs, or production variables. The processor would do this seemingly in an attempt to get out of the contract that, as per the other proposed rule, would be difficult to terminate and, as per the IFR, would allow for litigation with the grower even if no competitive harm resulted from this

practice. The proposed rule assumes all of this is exclusive to production contracts involving grower ranking systems, but not production contracts utilizing other payment mechanisms. The proposed rule sets requirements to prevent incidents which USDA concedes do not occur, such as supplying inferior feed and medication.

In the end, despite motivation for any single requirement of the rule, in totality it seems designed to eliminate or curtail use of poultry grower ranking systems. NTF's members utilize a diverse array of production systems, and for those employing grower ranking systems, we request that USDA withdraw this proposed rule.

D. Impacts on the Turkey Industry

Once again, USDA was unable to quantify the benefits of the rule, although it does quantify the costs of the proposed rule (approximately $35 million over ten years). As with the other proposed rule, "increased ability for enforcement", e.g. increased litigation, is seen as a benefit as well as a cost.

Beyond the raw dollar figures, however, NTF is concerned that the proposed rule will ultimately discourage unique contracts and make grower compensation more uniform, which a significant percentage of turkey growers are likely to view as harmful. In a volatile poultry market operating on tight margins, the pool of money a processor has available to raise turkeys will not increase simply because these proposed rules go into effect. Rather, we are worried that contracts would migrate toward a median, since the amount of money processors can spend to raise turkeys will not automatically increase. Funds will be distributed among the existing grower base according to the new rules, and this will almost certainly result in economic gain for some growers at the expense of other growers.

If the proposed rule is adopted, we are also concerned that it will provide a disincentive for innovation for those processors using grower ranking systems, advantaging processors using other systems. Not only would the means of rewarding above-average growers that take risks or improve their systems be diminished, but it could also deter these processors from trying new breeds, feed formulations, or treatment regimens for fear of violating the criteria of §201.214 or having to defend their legitimate business justifications, some of which might be proprietary, in court. Although surely unintended, the potential consequences of this proposed rule could result in substantial harm to our growers and processors. For this reason NTF cannot support the proposed rule in its current form.

V. Conclusion

For the reasons outlined in the prior sections, NTF cannot support these rules as currently written, and strongly urges USDA to rescind all three. We are concerned that beyond the contradiction of established case law, the rules will lead to a significant increase in litigation and compliance costs, and inhibit innovation, to the detriment of growers and processors. While the rules may have been well-intentioned, we also share the concerns of our members that these rules might lead processors to alter their production systems, stop contracting with independent growers, or move to processor-owned arrangements out of a need to avoid the risk and costs of

litigation rather than due to their own economic and market-based reasons. The turkey industry is diverse, with a variety of different production systems that spread risk and costs differently, and we believe that is one of the industry's strengths. NTF cannot support regulatory actions that advantage certain growers, processors, and production systems at the expense of others for arbitrary reasons.

Additionally, NTF believes that the rules reflect insufficient pre-publication analysis and foresight with respect to the long-term implications of these rules, particularly as they would apply to the turkey industry. USDA would have benefited from attempting to craft the rules in a manner that reasonably accounts for the structure of the turkey industry beyond a passing reference. As a result of this failure to comprehensively address the turkey industry and the economic environment in which it is operating, USDA has applied an unnecessarily broad approach to address those problems that it believes it must solve. The end result is a series of regulations that are overbroad, ambiguous, and insufficiently tailored to successfully address the ills that USDA hopes to cure in the turkey industry. They also stray beyond the bounds Congress outlined in the 2008 Farm Bill, and in major instances contradict the will of Congress and the rulings of the judiciary.

We appreciate consideration of these comments.

Respectfully submitted,

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President