Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Part 201

[Doc. No. AMS–FTPP–21–0046]

RIN 0581–AE04

Fair and Competitive Livestock and Poultry Markets

AGENCY: Agricultural Marketing Service, Department of Agriculture.

ACTION: Proposed rule.

SUMMARY: The United States Department of Agriculture's (USDA or Department) Agricultural Marketing Service (AMS) proposes to amend the regulations under the Packers and Stockyards Act of 1921 (the P&S Act or the Act) to clarify the unfair practices that the P&S Act prohibits. The proposed rule would define unfair practices as conduct that harms market participants and conduct that harms the market. Combined, these comprehensively define the contours of ''unfair practices'' under the P&S Act. The purpose of this proposed rule is to promote fair and competitive markets in the livestock, meats, poultry, and live poultry markets.

DATES: Comments must be received by August 27, 2024.

ADDRESSES: Comments must be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov* and should reference the document number and the date and page number of this issue of the **Federal Register**. AMS strongly prefers comments be submitted electronically. However, written comments may be submitted (*i.e.,* postmarked) via mail to Docket No. AMS–FTPP–21–0046, S. Brett Offutt, Chief Legal Officer, Packers and Stockyards Division, USDA, AMS, FTPP; Room 2097–S, Mail Stop 3601, 1400 Independence Ave. SW, Washington, DC 20250–3601. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting comments will be made public on the internet at the address provided above. Parties who wish to comment anonymously may do so by entering ''N/A'' in the fields that would identify the commenter. Pursuant to 5 U.S.C. 553(b)(4), a plain language summary of this proposed rule is available on *https://www.regulations.gov* in the docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Chief Legal Officer/Policy Advisor, Packers and Stockyards Division, USDA AMS Fair Trade Practices Program, 1400 Independence Ave. SW, Washington, DC 20250; Phone: (202) 690–4355; or email: *S.Brett.Offutt@usda.gov.*

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I. Authority

Section 407 of the Act (7 U.S.C. 228) provides that the Secretary ''may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act.'' The Secretary has delegated the responsibility for administering the P&S Act to AMS. Within AMS, the Packers and Stockyards Division (PSD) of the Fair-Trade Practices Program has responsibility for the day-to-day administration of the Act. The current regulations implementing the Act are found in title 9, part 201, of the Code of Federal Regulations (CFR). Based on the authority Congress delegated to the Secretary to administer the P&S Act, AMS is proposing this rule to amend 9 CFR part 201 to specify the practices that are unfair and in violation of the P&S Act.

Prior to this rulemaking, the decisions of USDA's Judicial Officer,[1] acting for the Secretary, have comprised the bulk of USDA's interpretation of the meaning of ''unfair'' under the P&S Act, and the Judicial Officer's final decisions have the same force as regulation.[2] Those decisions make clear that ''harm to competition can be proven by showing harm to competitors; . . . the Packers and Stockyards Act does not require that the person harmed be a direct competitor of the person causing the harm, viz., it would be a violation of the Packers and Stockyards Act if it were shown that a packer caused harm, which the Packers and Stockyards Act is designed to prevent . . . .'' [3] Although, the Federal courts have not expressly rejected the Judicial Officer's overall interpretation of the Packers and Stockyards Act, courts have inconsistently applied the Judicial Officer's decisions. As a result, AMS proposes this regulation to provide a clear interpretation and promote consistency and predictability in its application of the law.

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g); Reorganization Plan No. 2 of 1953, 18 FR 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and sec. 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(a)(1)).

[2] *See, e.g., City of Arlington, Tex.* v. *F.C.C.,* 668 F.3d 229, 240 (5th Cir. 2012), aff'd, 569 U.S. 290 (2013) (''It is well-established that agencies can choose to announce new rules through adjudication rather than rulemaking.'' (*citing NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974))); *Mobil Exploration & Producing N. Am., Inc.* v. *FERC,* 881 F.2d 193, 198 (5th Cir.1989); *see also Sec. & Exch. Comm'n* v. *Chenery Corp.,* 332 U.S. 194, 207 (1947) (''The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action.'').

[3] *In re: IBP, Inc.,* 57 Agric. Dec. 1353 (U.S.D.A. July 31, 1998).

II. Purpose of This Rulemaking

Congress enacted the P&S Act, 7 U.S.C. 181 *et seq.,* to promote fairness, reasonableness, and transparency in the livestock, meat, and poultry marketplace by prohibiting practices contrary to these goals. Enacted in 1921 ''to comprehensively regulate packers, stockyards, marketing agents and dealers,'' [4] the Act, among other things, prohibits actions that hinder integrity and competition in the livestock, meat, and poultry markets. Section 202(a) of the Act states that it is unlawful for any packer, swine contractor, or live poultry dealer to ''[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device.'' [5]

Congress granted rulemaking and enforcement authority to USDA to ensure that appropriate competitive and fair trade and market protections are afforded to those participating in agricultural activities pertaining to livestock, meat, and poultry.[6] To date, USDA has largely left these determinations to a case-by-case analysis. Court decisions interpreting this statute, however, have not been consistent with respect to the evidence needed to establish, and the legal standard that applies to, unlawful unfair practices under section 202(a) of the Act, particularly as to whether competitive injury is a requirement and what the term ''unfair practice or device'' means. This proposed rule, therefore, seeks to clarify what falls under the scope of unfair practice or device.

From the plain language of the text, section 202 of the Act is broader than the antitrust laws and does not necessarily require harm to competition as that term is understood under the antitrust laws. The term ''unfair'' applies to conduct that harms the market (anticompetitive harm) and conduct that harms market participants (market abuse), similar to section 5 of the Federal Trade Commission Act, which prohibits both unfair methods of competition and unfair and deceptive acts or practices. Based on the text of section 202, legislative history, and both agency and judicial decisions, this proposed rule defines the term unfair. Those definitions draw on longstanding understandings of the term unfair both under the Act as well as the related Federal Trade Commission Act. The proposed rule also clarifies that the statute addresses conduct in its incipiency, does not require proof of actual harm, nor does it require proof of predatory intent.

USDA recognizes that some courts have recently required proof of competitive injury before finding that conduct is unfair. Those courts were not offered an alternative definition for unfair, which this rulemaking would propose. A competitive injury requirement cannot be imposed in a way that abrogates part of a statute. To the degree requiring a ''competitive injury'' precludes finding conduct is unfair when it satisfies criteria in the proposed rule, such a requirement would unduly limit the reach of section 202(a) and is improper. Moreover, the statute and P&S Act case law make plain that competitive injury under the P&S Act is broader than harm to competition under the antitrust laws. To the extent that ''competitive injury'' is shorthand for the scope of harm section 202 reaches, competitive injury as understood under the P&S Act should include both harms to the market and harms to market participants as defined in the proposed rule.

A. Unfair Practices and Prior Rulemakings

Section 202(a) of the Act prohibits any unfair practice or device. The Act does not, however, specify what those practices and devices are, and in section 228(a), Congress has granted to the Secretary the authority to interpret and apply the Act to effectuate its purposes. Under the Act, this authority includes complete supervisory and regulatory power, which includes, *inter alia,* ''the power to prevent packers . . . from engaging in unfair, unjustly discriminatory or deceptive practices or devices.'' [7] USDA has consistently viewed the Act as prohibiting both market abuses (unfair trade practices) and competitively unfair conduct or unreasonable acts and practices (including anticompetitive conduct) owing to the adverse impact both have on the fair functioning of the marketplace and the importance of ensuring that producers can obtain the full value of their livestock and poultry despite economic power imbalances.[8]

The Department has consistently interpreted unfair practices—and thus applied the Act—to protect producer welfare and advance fair-trade practices in the livestock, meat, and poultry industries. The Department's policy on unfair practices has not changed throughout the course of its enforcement of the Act.

In 2010, the Department issued a proposed rule that was never finalized (''2010 proposed rule''). The 2010 proposed rule was broader in scope than this proposed rule. It addressed undue or unreasonable preference or advantage; undue or unreasonable prejudice or disadvantage; criteria related to reasonable notice of a suspension of the delivery of birds under a poultry growing arrangement; when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act; and whether a packer, swine contractor or live poultry dealer has provided a reasonable period of time for a grower or a swine producer to remedy a breach of contract that could lead to termination of the growing arrangement or production contract (75 FR 35338; June 22, 2010). As it relates to the scope of this proposed rulemaking, the preamble to the 2010 proposed rule stated that ''Section 202(a) of the P&S Act prohibits 'any unfair, unjustly discriminatory, or deceptive practice.' '' The preamble also stated that ''USDA has consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury.'' [9] But the USDA ''always understood that an act or practice's effect on competition can be relevant and, in certain circumstances, even dispositive[.]'' The proposed regulation attempted to define competition, and proposed a series of specific violations of the Act including: ''Any act that causes competitive injury

[4] *Hays Livestock Comm'n Co.* v. *Maly Livestock Comm'n Co.,* 498 F.2d 925, 927 (10th Cir. 1974).

[5] 7 U.S.C. 192(a).

[6] See section 407 (7 U.S.C. 228(a)): ''The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter. . .''. Congress understood it was giving the Secretary ''the power to prevent packers, stockyards, companies, and all persons in the stockyards from engaging in unfair, unjustly discriminatory or deceptive practices or devices.'' Report of the House Committee on Agriculture, H.R. Rep. No. 77 67th Congress, 1st session at pg. 2 (May 18, 1921). When amending the statute in 1987, this authority with respect to live poultry dealers was explained: ''the Packers and Stockyards Administration will retain jurisdiction as the act currently provides. These transactions include things like weighing practices and contract compliance.'' 133 Cong. Rec. H9000–02, 133 Cong. Rec. H9000–02, H9002, 1987 WL 850252.

[7] H.R. Rep. no. 67–77 at 2 (1921).

[8] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' chapter 3, *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.* (The report provides the following acknowledgement: ''A U.S. Department of Agriculture-Washington Center for Equitable Growth cooperative agreement supported the research and writing of this report. The findings and conclusions in this report are those of the author and should not be construed to represent any official U.S. Department of Agriculture or U.S. government determination or policy.'').

[9] 75 FR 35338, 35340 (June 22, 2010).

or creates a likelihood of competitive injury.''

The 2010 proposed rule was never finalized due to a series of appropriations riders from fiscal years 2012 through 2015 that prevented the Department from working on rules related to the subjects covered in the 2010 proposed rule.

In 2016, the Department issued an interim final rule that, in relevant part, addressed the scope of section 202(a) and (b) of the P&S Act (''2016 IFR''). The 2016 IFR published what had been issued as the 2010 proposed rule with slight modifications. However, the 2016 IFR reiterated ''USDA has consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury.'' (81 FR 92556, 92567; December 20, 2016). The 2016 IFR preamble also stated that ''USDA has always understood that an act or practice's effect on competition can be relevant and, in certain circumstances, even dispositive with respect to whether an act or practice violates sections 202(a) and/or (b).'' The 2016 IFR did not define competition or describe when harm to competition would not be required.

In 2017, following a change in administration, finalization of the 2016 IFR was delayed, and ultimately withdrawn (82 FR 48594; October 18, 2017). The 2016 IFR was withdrawn on the grounds that USDA believed that specific rule would not have effectively addressed court decisions in several U.S. Courts of Appeals, that the courts would not have deferred to it, and that the ''good cause'' justification for dispensing with notice and comment was inadequate. At that time, the Department further determined that ''[p]rotracted litigation to both interpret this regulation and defend it serves neither the interests of the livestock and poultry industries nor GIPSA.'' [10] The 2017 withdrawal did not alter the longstanding position of USDA articulated in the 2010 proposed rule and again in the 2016 IFR.[11] Nor did the withdrawal announce a policy against regulation in general.

The current proposed rule is less about a judicial debate over competitive injury and instead would establish a more workable standard for USDA to consistently apply in its own administrative hearings and investigations, which in turn would provide a standard that the public can more easily understand. And the current rule is being issued through notice and comment. Thus, AMS does not believe that the same concerns that prompted withdrawal of the 2016 IFR apply to this proposal.

In sum, it has always been USDA's position that it is not necessary in every case to demonstrate competitive injury in order to show a violation of section 202(a). But USDA has also consistently recognized that any act or practice that harms or is likely to harm competition also violates the statute.[12] This proposed rule provides a basis for the public to understand precisely how USDA would apply the statute to both categories of harms.

B. Statutory Language of the Act

The P&S Act's language and structure support USDA's longstanding position on section 202(a) and (b), as well as USDA's position on the Act's legislative history and purposes. Congress drafted section 202(a) to reach a range of unfair practices and devices, such as anticompetitive practices, market abuses, or other distortions of the competitive process.[13] Congress proscribed ''unfair'' practices without limitation, using terms like section 202's proscription of ''deceptive'' and ''unjust'' conduct commonly understood then and now to encompass more than conduct causing competitive injury.[14] Congress confirmed this plain meaning by amending the P&S Act to add specific instances of conduct prohibited as unfair that do not involve any inherent likelihood of competitive injury.[15]

Unlike with other provisions of section 202, Congress chose not to limit section 202(a) and (b) to specific types of competitive injuries identified in other sections of the Act.[16] While section 202(c) through (f) include provisions that address particular competitive injuries—such as where a practice has the tendency, effect, or purpose of ''creating a monopoly'' or ''restraining commerce''—those limitations are absent from section 202(a) and (b).[17] This difference confirms that section 202(a) and (b) do not require a showing of competitive injury for such conduct.[18]

Moreover, Congress has amended the P&S Act to confirm the Department's longstanding view that there are specific instances of conduct that are prohibited as ''unfair'' that do not involve any inherent likelihood of competitive injury.[19] In 1976, Congress confirmed that failing to pay, when due, for livestock and meats was an ''unfair practice'' under the P&S Act, and it did not require any harm to competition to be a violation of section 202(a).

The prevailing interpretation of section 312 of the P&S Act, which uses similar language, further confirms USDA's interpretation of section 202(a).

[10] Scope of section 202(a) and (b) of the Packers and Stockyards Act, 82 FR 48594, 48597 (Oct. 18, 2017).

[11] 82 FR 48594, 48596 (Oct. 18, 2017) (''The purpose of the IFR was to clarify that conduct or actions may violate 7 U.S.C. 192(a) and (b) without adversely affecting, or having a likelihood of adversely affecting, competition. This reiterated USDA's longstanding interpretation that not all violations of the P&S Act require a showing of harm or likely harm to competition. Contrary to comments that GIPSA failed to show that USDA's interpretation was longstanding, USDA has adhered to this interpretation of the P&S Act for decades. DOJ has filed amicus briefs with several Federal appellate courts arguing against the need to show the likelihood of competitive harm for all violations of 7 U.S.C. 192(a) and (b).'' (footnotes omitted)).

[12] *See id.* at 92568.

[13] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' chapter 3, *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.* quoting, *inter alia,* Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at *https://scholarship.law.upenn.edu/faculty_scholarship/1862.*

[14] When the P&S Act was enacted, *Webster's New International Dictionary* defined ''unfair'' as ''[n]ot fair in act or character; disingenuous; using or involving trick or artifice; dishonest; unjust; inequitable'' (2d. definition); ''unjust'' as ''[c]haracterized by injustice; contrary to justice and right; wrongful''; ''undue'' as ''[n]ot right; not lawful or legal; violating legal or equitable rights; improper'' (2d. definition); and ''unreasonable'' as ''[n]ot conformable to reason; irrational'' or ''immoderate; exorbitant.'' *Webster's New International Dictionary* 578, 2237, 2238, 2245, 2248 (1st ed. 1917). This is the same understanding of the terms today.

[15] See sections 409, 410.

[16] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' chapter 3, *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/,* quoting, *inter alia,* Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at *https://scholarship.law.upenn.edu/faculty_scholarship/1862.*

[17] More specifically, subsection (c) reaches certain sales that apportion supply ''if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly.'' Subsection (d) reaches sales and other transfers wherein parties ''receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce. Subsection (e) reaches a course of business or any act with ''the purpose or with the effect of manipulating. or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce.''

[18] *Department of Homeland Sec.* v. MacLean, 135 S. Ct. 913, 919 (2015), citing *Russello* v. *United States,* 464 U.S. 16, 23 (1983): ''Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.''

[19] *See, e.g.,* secs. 409 and 410 of the P&S Act.

Courts have recognized that the proper analysis under this provision depends on ''the facts of each case,'' [20] and that these sections may apply in the absence of competitive injury.[21]

Furthermore, even with respect to subsections of the Act that do focus on competitive harm, the text of those subsections indicates that competitive harm under the P&S Act goes beyond the types of competitive injuries cognizable under Federal antitrust laws.[22] For example, section 202(d) through (f) unambiguously apply to market injuries that the antitrust laws often do not reach—such as price manipulation, where a single-firm practice ''manipulat[es] or control[s] price'' or otherwise restrains trade, irrespective of conspiracy. These prohibitions in the relevant subsections are each embedded within ''or'' clauses that otherwise cover prohibitions that are squarely about anticompetitive conduct cognizable under Federal antitrust laws. Further, section 202(a) and (b) must cover conduct not covered by section 202(d) through (f) or section 202(a) and (b) would be superfluous. The presence of all of these provisions in the P&S Act shows, at a minimum, the regulatory scheme for fair competition under the P&S Act is broader than competitive injury under the Federal antitrust laws and at least as broad as section 5 of the Federal Trade Commission Act.[23] And, when compared to antitrust statutes, the P&S Act, like section 5 of the Federal Trade Commission Act (FTC Act), covers incipient threats to competition and potential injuries to market participants. In addition, the P&S Act's remedial purposes prohibit incipient violations of the P&S Act even if the practice has no potential anti-competitive or impact on markets at all.[24]

In short, section 202(a) covers unfair conduct beyond harm to competition, and where harm to competition is relevant, the P&S Act is broader than the antitrust laws.

C. Legislative History of the Act

The legislative history and purposes of the P&S Act also support USDA's interpretation of section 202(a) with regard to the role of competitive injury. As the Supreme Court has stated, when interpreting a statute, a provision ''must take meaning from its historical setting.'' [25]

The genesis of the P&S Act predates its enactment by several decades.[26] On May 16, 1888, the U.S. Senate authorized an investigation ''to determine whether there exists or has existed any combination . . . on the part of those engaged in buying and shipping meat products, by reason of which the prices of beef and beef cattle have been so controlled or affected as to diminish the price paid the producer without lessening the cost of meat to the consumer.'' [27] In 1902, a bill of equity was filed by the United States to enjoin the alleged conspiracy as a violation of the antitrust laws. In 1903, an injunction was issued, which was sustained by the U.S. Supreme Court.[28] The dominance and unfair or unreasonable anticompetitive conduct of the packers continued; on February 7, 1917, President Wilson directed the Federal Trade Commission (FTC) to investigate and report the facts with respect to the packing industry.[29]

The FTC meat industry investigation found that, in 1916, the Big Five [30] (the five largest meatpackers) controlled the processing of 82 percent of cattle, 79 percent of calves, 87 percent of sheep, and 63 percent of swine in the U.S.[31] The Big Five also controlled an interlocking network of feed mills, stockyards, and transportation infrastructure that supported the industry. As extensively documented in an FTC report, those five packers used their market power to engage in a range of practices to further entrench their dominance of the meat industry.[32] The FTC report documented a number of complaints by producers that the U.S. Supreme Court summarized in the synopsis of the case upholding the constitutionality of the P&S Act, including excessive charges by stockyards for hay and other facilities, the duplication of commissions by commission men and dealers, and fraudulent reporting of livestock being crippled in transit, in addition to suppression of competition through collusion.[33]

Following the FTC's report, and before the passage of the signed a consent decree in 1920.[34] The decree enjoined the packers from pursuing combinations to monopolize the purchase and control the price of livestock and the sale and distribution of meat products, and from being involved in other food sectors.[35] In this way, the decree sought to break the industry up vertically, underscoring the broad approach of the P&S Act.

After the consent decree, the Senate and House of Representatives held extensive hearings on several bills to address problems related to concentration and market domination in the meat industry, one of which, H.R. 6320, eventually became the P&S Act of 1921.[36]

The House of Representatives' report on the P&S Act stated, ''A careful study of the bill, will . . . convince one that it and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is the most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the Interstate Commerce Act.'' [37] The Conference Report on the P&S Act stated that: ''Congress intends to exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits . . .''.[38]

It was emphasized by Representative Samuel T. Rayburn (later Speaker of the House of Representatives) that although Congress ''gave the Federal Trade

[20] *Capitol Packing Company* v. *United States,* 350 F.2d 67, 76 (10th Cir. 1965); see also *Spencer Livestock Comm'n Co.* v. *USDA,* 1988.

[21] *Spencer Livestock Comm'n Co.* v. *USDA,* 841 F.2d 1451, 1454 (9th Cir. 1988): section 312 covers ''a deceptive practice, whether or not it harmed consumers or competitors.''

[22] In particular see the FTC Act (15 U.S.C. 41 *et seq.*), Sherman Antitrust Act (15 U.S.C. 1 *et seq.*), and the Clayton Antitrust Act (15 U.S.C. 12 *et seq.*).

[23] *See* Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, 9 (Nov. 10, 2022) (discussing competitive injuries cognizable under section 5 of the FTC Act that are not cognizable under the Sherman or Clayton Act); *Been* v. *O.K. Indus., Inc.,* 495 F.3d 1217, 1241 (10th Cir. 2007) (Hartz, J. concurring) (''[I]t would be somewhat surprising if 'unfair practices' under the PSA had a narrower meaning than 'unfair methods of competition' in the FTCA.'').

[24] *See, e.g., Bowman* v. *United States Dep't of Agric.,* 363 F.2d 81, 85 (5th Cir. 1966) (finding the Department's insolvency standard was not an abuse of discretion because it helps to prevent the unfair practice of late payment).

[25] *United States* v. *Henning,* 344 U.S. 66, 72 (1952).

[26] 10 N. Harl, Agricultural Law sec. 71.4. (1987), 71–4.

[27] 61 Cong. Rec. 2614.

[28] *Swift & Co.* v. *United States,* 196 U.S. 375 (1905).

[29] *Stafford* v. *Wallace,* 258 U.S. 495 (1922).

[30] The highly concentrated meatpacking industry of the early 20th century was controlled by the industry's ''Big Five'' operators of Armour, Cudahy, Morris, Swift, and Wilson.

[31] ''Annual Report for 1918,'' FTC, p. 23, *https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1918/ar1918_0.pdf.*

[32] *Id.*

[33] Stafford at 501–502.

[34] *United States* v. *Swift & Co.,* Equity No. 37623 (Sup. Ct. of D.C. 1920); *United States* v. *Swift & Co.,* 286 U.S. 106 (1932).

[35] Id. at 399; *see, generally,* Michael C. Stumo & Douglas J. O'Brien, ''Antitrust Unfairness vs. Equitable Unfairness in Farmer/meat Packer Relationships,'' 8 Drake J. Agric. L. 91 (2003).

[36] See 10 N. Harl, Agricultural Law sec. 71.2. (1987).

[37] House Report No. 67–77, at 2 (1921).

[38] House Report No. 67–324, at 3 (1921).

Commission wide powers'' to prohibit unfair methods of competition, the authority of the Commission at that time was not as broad as that given to ''the Secretary of Agriculture under this bill,'' which became the P&S Act.[39]

Congress subsequently made clear, through further legislative developments, that its goals for the statute extended beyond the prohibition of anticompetitive conduct in the manner of the antitrust laws. For instance, in a 1935 amendment adding live poultry dealers to the coverage of section 202(a) and (b), Congress amended the text to specify that ''[t]he handling of the great volume of live poultry . . . is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry . . . '' [40] Similarly, the House Committee Report regarding 1958 amendments identified ''[t]he primary purpose'' of the P&S Act as ''assur[ing] fair competition and fair trade practices'' and ''safeguard[ing] farmers . . . against receiving less than the true market value of their livestock.'' [41] In accordance with this legislative history, courts and commentators have, over a span exceeding 70 years, recognized that although the purposes of the P&S Act include proscribing anticompetitive conduct, they are not limited solely to conduct that injures competition as understood in the antitrust laws.[42] Indeed, for these seven decades, USDA has regularly maintained and enforced a wide range of fair trade rules and principles including prompt payment, standardized weights and measures, sufficient bonding and solvency, prohibitions on commercial bribery, and more. These rules and enforcement mandates play important roles in protecting market participants from abuse, and to that end, they proscribe conduct that USDA has also viewed as distorting the competitive process within the livestock, meat, and poultry markets.[43] To that end, proscribing abuses of market participants is integral to any effort to understand ''harm to competition'' under the P&S Act itself.[44]

Nor is the statutory history of the P&S Act monolithic: it was used as a pattern for other laws as well, notably changes to the FTC Act. When Congress passed the FTC Act in 1914, the statute prohibited only unfair methods of competition, which was a then-new term of art with a broad scope.[45] In 1937, the Supreme Court in *FTC* v. *Raladam Co.* gave a narrowing interpretation, holding that the FTC's unfairness authority was limited to conduct causing competitive injury.[46] Congress disapproved of this interpretation, and in 1938 it passed the Wheeler-Lea Act,[47] which clarified the expansiveness of the FTC's unfairness authority by specifying that it covers acts or practices that injure consumers, regardless of whether the acts or practices may also injure competition.

Notably, the Wheeler-Lea Act was modeled on the P&S Act, specifically section 202(a)'s prohibition on unfair practices that injure producers. When the FTC proposed the Wheeler-Lea Act, the FTC pointed to the P&S Act as the precedent for its text.[48] If it were not enough that the FTC succeeded—that it persuaded Congress to pass the Wheeler-Lea Act by relying on the P&S Act as precedent for prohibiting unfair practices without a competitive injury requirement—the 17 years of P&S enforcement prior to the Wheeler-Lea Act are especially telling. During the period from 1921 to 1938, the Secretary frequently found unfairness violations under section 202 that would *not* have been ''unfair methods of competition'' under the narrowing gloss the Supreme Court applied in *Raladam*—and that Congress subsequently rejected by passing the Wheeler-Lea Act.

The design of the P&S Act's text, and the legislative history, thus clearly reflect Congressional intent that the Act's unfairness authority extend beyond unfair methods of competition.[49] The Act ''was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of Agriculture complete regulatory power over packers and all activities connected therewith.'' [50] It was hailed as a ''far-reaching measure and extend[ing] further than any previous law into the regulation of private business.'' [51] If the existing antitrust laws and the consent decree signed by the Big Five packers had been sufficient to protect market participants from unfair practices, Congress would not have passed the P&S Act.

The P&S Act's legislative history demonstrates Congress intended the Act to cover a broader range of conduct than is covered by the Sherman Act and Clayton Act. Congress intended to regulate practices that would violate those two antitrust laws and practices that would be unfair under the FTC Act, as well as the ''special mischiefs and injuries inherent in livestock and poultry traffic.'' [52] Particularities in the market structure and operation of the livestock, meat, and poultry industries compelled Congress to create a statute specific to them; to regulate fair trade practices among livestock and poultry producers, stockyards, meat packers, swine contractors, and live poultry dealers; and to ensure equal access to

[39] 61 Cong. Rec. 1806. When the P&S Act was passed, the FTC was authorized to prohibit only unfair methods of competition. Congress later gave the FTC additional authority to police unfair and deceptive acts or practices. See infra notes 53–57.

[40] Public Law 74–272, 49 Stat. 648, 648 (1935).

[41] H.R. Rep. No. 85–1048 (1957), reprinted in 1958 U.S.C.C.A.N. 5212, 5213 (emphasis added); *see also, e.g., id.* at 5213 (further observing that protection extends to ''unfair, deceptive, unjustly discriminatory'' practices by ''small'' companies in addition to ''monopolistic practices.'').

[42] See, *e.g.,* Stafford, 258 U.S. at 513–14; Spencer Livestock, 841 F.2d 1451, 1455 (9th Cir. 1988); *United States* v. *Perdue Farms, Inc.,* 680 F.2d 277, 280 (2d Cir. 1982); *Bruhn's Freezer Meats of Chi., Inc.* v. *United States Dep't of Agric.,* 438 F.2d 1332, 1336–37 (8th Cir. 1971); *Bowman* v. *USDA,* 363 F.2d 81, 85 (5th Cir. 1966); *United States* v. *Donahue Bros.,* 59 F.2d 1019, 1023 (8th Cir. 1932).

[43] See, *e.g.,* In re: Central California Livestock, Inc. d/b/a Machlin Meat Packing Company, 15 Agric. Dec. 97, 110 (1956).

[44] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[45] *American Airlines, Inc.* v. *North American Airlines, Inc.,* 351 U.S. 79, 85 (1956); *Fed. Trade Comm'n* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394–95 (1953); *Fed. Trade Comm'n* v. *R. F. Keppel & Bro., Inc.,* 291 U.S. 304, 310 (1934).

[46] *FTC* v. *Raladam Co.,* 283 U.S. 643, 649 (1931). The Supreme Court later relaxed this holding. *FTC* v. *Raladam Co.,* 316 U.S. 149 (1942). *See* Luke Herrine, ''The Folklore of Unfairness,'' 96 N.Y.U. L. Rev. 431, 465–66, 470–71 (2021).

[47] The Wheeler-Lea Act, ch. 49 sec. 2, 52 Stat. 111 (1938); Stephanie W. Kanwit, 1 Fed. Trade Comm'n. sec. 3:5 (2023–2024).

[48] Charles Wesley Dunn, Wheeler-Lea Act: A Statement of its Legislative Record 411, 418 (1938) (testimony of Ewin Davis, Chair, FTC). The FTC did, however, propose an expansion of its authority to include ''unfair acts in commerce'' in 1919, before the P&S Act was proposed. High Cost of Living as Affected by Trust and Monopolies, Hearings Before the H. Comm. on the Judiciary, 66th Cong., 1st Sess. 25–26 (1919).

[49] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[50] *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA,* 438 F.2d 1332, 1339 (8th Cir. 1971), citing H.R. Rep. No. 67–324 (1921); H.R. Rep. No. 67–77 (1921).

[51] 61 Cong. Rec. 1801 (1921), statement of Rep. Haugen; see also *Wilson & Co.* v. *Benson,* 286 F.2d 891, 895 (7th Cir. 1961): ''The legislative history shows Congress understood the sections of the [Act] under consideration were broader in scope than the antecedent legislation,''' citing 61 Cong. Rec. 1805 (1921).

[52] *See Spencer Livestock Comm'n Co.* v. *USDA,* 841 F.2d 1451, 1455 (9th Cir. 1988); *Armour & Co.* v. *United States,* 402 F.2d 712 (7th Cir. 1968).

markets.[53] In these industries, a handful of firms owning a small number of capital-intensive slaughter and meat processing plants exercised substantial market power over thousands of producers spread across rural communities.[54] These conditions continue today and are even more important in light of increased industry concentration. For example, in 2019 the four-firm concentration ratio (the combined market share of the four largest firms in the industry) was as follows: 53% for broiler chickens, 55% for turkeys, 67% for hogs, and 85% for fed cattle.[55] These concentrated industries procure their poultry and livestock for processing from a large number of unconcentrated farms engaged in livestock and poultry production, including 14,144 farms raising broilers under contract, 47,510 farms that sold hogs and pigs, and 25,783 farms with cattle on feed in 2022.[56]

Further, as held by the U.S. Court of Appeals for the Ninth Circuit, the Act was intended to ''assure fair competition and fair trade practices in livestock marketing.'' [57] ''Fair competition'' is consistent with the view of the P&S Act as a device for protecting against not only Sherman and Clayton Act violations but also other unfair methods of competition that tend to negatively affect market conditions, embodied for example in the prohibitions in 202(d) and (e) of the Act.[58] However, ''fair trade practices'' has a different connotation, going beyond practices that cause (or tend to cause) competitive injury to include practices that harm market participants, specifically producers, as well as other regulated entities and consumers. This term invokes a standard of equitable unfairness, which does not implicate market conditions, competition, efficiency, or consumer welfare.[59] USDA has long viewed keeping a marketplace free from abusive conduct for participants as part and parcel of maintaining a fair competitive landscape even if the unfair practice is directed at only a few individuals or firms. To the extent that violations of P&S Act section 202(a) require a showing of ''harm to competition'' under the P&S Act, that would necessarily have to cover both competitively unfair conduct and market abuses.

D. Court Decisions

Courts for decades have made it clear that section 202 of the P&S Act reaches beyond the antitrust laws.[60] That is consistent with USDA's approach to enforcement since the earliest days of the Act. As discussed extensively in section III.A. below, USDA has enforced the Act to prohibit a wide range of unfair practices that harm individual market participants.[61]

AMS has observed that rising market concentration and the growth of vertical contracting in the late 1990s and early 2000s—including insufficient USDA enforcement of the Act—led to increased private actions under the P&S Act.[62] Starting in the 1970s, Congress expanded the Act to authorize private rights of action in Federal court, which could be filed with respect to livestock starting in 1976, and with respect to poultry starting in 1987.[63] By the late 1990s and early 2000s, the Federal courts faced private cases making claims based on alleged unfair practices. In the majority of these cases the Federal courts did not rely upon the opinions of USDA's Judicial Officer, and have come to conflicting conclusions about how to interpret section 202(a) and (b) of the Act.[64] And indeed, notably commencing in 2005 with the Eleventh Circuit's decision in *Pickett* v. *Tyson Fresh Meats, Inc.,* a handful of Circuits have held that private litigants could establish conduct is ''unfair'' in violation of section 202(a) *only* with evidence that the behavior caused competitive injury as a marketwide harm.[65] The courts incorporating a competitive injury requirement point to the P&S Act's ''antitrust origins,'' although those courts also readily acknowledge that the P&S Act is broader than the antitrust laws.

Courts that apply a standard with a competitive-injury component, however, are far from unanimous in their interpretation of the P&S Act's prohibitions, generally, and of competitive injury, specifically. The

[53] Live Poultry Dealers were added to the Packers and Stockyards Act in 1935 by 49 Stat. 648 (August 14, 1935), and most recently modified in 1987 by 101 Stat. 917, Public Law 100–173 (November 23, 1987). Swine Contractors were added by amendment in 2002, 116 Stat. 134, Public Law 107–171 (May 13, 2002).

[54] The imbalance of market power and size between producers, growers, and concentrated processors is discussed in MacDonald, J. M., Dong, X., & Fuglie, K. (2023). Concentration and competition in U.S. agribusiness (Report No. EIB–256). U.S. Department of Agriculture, Economic Research Service. *https://doi.org/10.32747/2023.8054022.ers.*

[55] Industry concentration is discussed in more detail below in the Regulatory Impact Analysis section; additional four-firm concentration data is provided in table 1 of that section.

[56] USDA, National Agricultural Statistics Service, ''2022 Census of Agriculture: United States Summary and State Data,'' issued February 2024, tables 38, 24, and 71.

[57] *Spencer Livestock Comm'n Co.* v. *USDA,* 841 F.2d 1451, 1455 (9th Cir. 1988), citing H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213.

[58] 7 U.S.C. 192.

[59] *See* Michael C. Stumo & Douglas J. O'Brien, ''Antitrust Unfairness vs. Equitable Unfairness in Farmer/meat Packer Relationships,'' 8 Drake J. Agric. L. 91 (2003); *see, also Swift & Co.* v. *United States*, 308 F.2d 849, 853 (7th Cir. 1962) (noting that the petitioner claimed that the P&S Act would be violated if its practice was ''contrary to good morals because characterized by deception, fraud, had faith or oppression[.]''). See also interpretations of unfair practices in various Federal and State contexts, such as the recent guidance by the U.S. Department of Transportation 85 FR 78707 (2020). Other commentary concurs. *See* Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth*, May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/;* Peter C. Carstensen, ''The Packers and Stockyards Act: A History of Failure to Date,'' The CPI Antitrust Journal (2) (2010), available at *https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf;* Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at *https://scholarship.law.upenn.edu/faculty_scholarship/1862.*

[60] *See, e.g.,* In re Pilgrim's Pride, 728 F.3d 457, 460 (5th Cir. 2013): ''violations of the PSA are not strictly limited to the traditional antitrust realms of price-fixing conspiracies and monopolization''; *Swift & Co.* v. *US*, 393 F.3d 247, 253 (7th Cir. 1968): section 202's prohibitions ''are broader and more far-reaching than the Sherman Act or even section 5 of the Federal Trade Commission Act''; *Swift & Co.* v. *US*, 308 F.3d 849, 853 (7th Cir. 1962): section 202 is ''broader in scope than antecedent legislation such as [the Sherman Act, section 2 of the Clayton Act, section 5 of the FTC Act, and section 3 of the Interstate Commerce Act]''.

[61] See, *e.g.,* Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth,* May 5, 2022; *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/;* Peter C. Carstensen, ''The Packers and Stockyards Act: A History of Failure to Date,'' The CPI Antitrust Journal (2) (2010), available at *https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf;* see also Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at *https://scholarship.law.upenn.edu/faculty_scholarship/1862.*

[62] Peter C. Carstensen, ''The Packers & Stockyards Act: A History of Failure to Date,'' The CPI Antitrust Journal (April 2010), available at *https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf;* see also, generally, Leonard, Christopher, ''The Meat Racket'' (2014); see also, *e.g.,* C. Robert Taylor, ''Legal and Economic Issues with the Courts' Rulings in *Pickett* v. *Tyson Fresh Meats, Inc.,* a Buyer Power Case,'' American Antitrust Institute Working Paper No. 07–08, Feb. 2007, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103635* (last accessed April 2024). See, *e.g., IBP, Inc.* v. *Glickman*, 187 F.3d 974, 978 (8th Cir. 1999).

[63] Sec. 308, 7 U.S.C. 209; Sept. 13, 1976, 90 Stat. 1250, Public Law 94–410; Nov. 23, 1987, 101 Stat. 918, Public Law 100–173.

[64] See, generally, John Shively, ''Competition Under the Packers and Stockyards Act: What Now?'' 15 Drake J. Agric. L. 419 (Fall 2010).

[65] *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355 (5th Cir. 2009) (*en banc*); *Been* v. *O.K. Industries, Inc.,* 495 F.3d 1217 (10th Cir. 2007); *London* v. *Fieldale Farms Corp.,* 410 F.3d 1295 (11th Cir. 2005); *Pickett* v. *Tyson Fresh Meats, Inc.,* 420 F.3d 1272 (11th Cir. 2005).

Tenth Circuit has required competitive injury for unfairness but not deception claims, while the Fifth and Sixth Circuit appear to require ''competitive injury'' even for deception claims. Similarly, although the Tenth Circuit in *Been* v. *O.K. Industries, Inc.* adopted the competitive injury requirement, it had previously found violations of section 202 for failure to pay (*Hays Livestock*), market agent's loan to packer, which was a conflict of interest, (*Capitol Livestock*), and failing to disclose a change in grading system (*Excel*).[66]

Some decisions seemingly apply a higher standard than what the antitrust laws require. In *Pickett,* after a jury found that Tyson's vertical supply restrictions adversely affected competition by artificially reducing Tyson's purchase price for cattle, the court required the plaintiff to further rebut Tyson's claimed countervailing justifications in order to establish harm to competition. In *London* v. *Fieldale Farms Corp.,* the court invoked a Sherman Act standard in holding that a plaintiff must show that the defendant's unfair, discriminatory, or deceptive practice adversely affects or is likely to adversely affect competition,[67] but the case also quoted with approval *Armour& Co.* v. *United States,*[68] which held that a violation of section 5 of the FTC Act—which is broader than the Sherman Act—would be sufficient. As discussed below, section 5 reaches conduct that does not violate the Sherman Act, and liability under section 5 does not depend on demonstrable anticompetitive effects or proof of the defendant's market power. The Act reaches practices ''not merely in their fruition, but also in their incipiency'' if they ''could lead to trade restraints and practices deemed undesirable'' and also ''conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit.'' [69] In *Been,* the court similarly required that the plaintiffs show that the ''specific practices have the effect of injuring competition or are likely to do so,'' but then it went further, requiring *more* than courts ordinarily require to prove even a Sherman Act violation. In *Been,* plaintiffs had to show the practices resulted in both lower prices for producers *and* higher prices for retail consumers.[70] Finally, *Wheeler* v. *Pilgrim's Pride Corp.* held that ''an anti-competitive effect is necessary'' to prove a violation of section 202(a) of the P&S Act, despite citing with approval *Farrow* v. *U.S. Dep't of Agr.,*[71] where the court held that harm to competition merely ''can be found'' sufficient to demonstrate violation of the P&S Act. Moreover, the courts' varying interpretations of section 202(a)—including those that have required competitive injury—apply inconsistent legal standards to the evidence. Or, as it has been observed: ''courts' application of the harm-to-competition test is inconsistent with their own antitrust rules that they claim to be applying.'' [72] Simply, ''harm to competition'' fails even its basic function as the judicial stand-in for well-articulated contours of a prohibition on unfair practices.

At the same time, other courts have either explicitly rejected a competitive injury requirement or have found violations without addressing the impact on competition.[73] Disagreement among the courts over the need for competitive injury and what the term means makes enforcement difficult and has created a legal patchwork in which different rules apply depending on the presiding circuit. The lack of consistent legal standards has adversely affected the Department's ability to maintain fair and competitive livestock and poultry markets and ensure producers can obtain the full value of their products and services. Livestock and poultry industries are inherently interstate activities, with activities, services, and trading regularly occurring across multiple states and in regional and national markets. Much like the FTC's policy statements have defined its national approaches to unfair practices and unfair methods of competition, a workable rule governing how the prohibitions on unfair practices will operate and be enforced is important for providing clarity to market participants and for AMS to effectuate its nationwide statutory obligation to ensure fair and competitive livestock, meat, and poultry markets, and ensure livestock producers and poultry growers can secure the full value for their products and services.[74]

The cases mentioned above all applied different standards despite all claiming to have derived their standards from the Act and the caselaw. These opinions gave little or no guidance on the practices that would satisfy their standards. Moreover, in the cases adopting a competitive injury requirement, the litigants did not offer an affirmative definition of ''unfair'' like the criteria in the proposed rule. Those courts never addressed whether ''unfair'' applies to harms typically treated as unfair practices under the FTC Act.

This ambiguity and inconsistency across judicial interpretations of the statute impedes enforcement of the Act under section 202(a) because to date neither the Department nor the public have had appropriate clarity on the meaning of ''unfair'' under the P&S Act. Further, to the extent courts have limited application of the P&S Act's protections against unfair practices to anticompetitive or unfair conduct that causes competitive injury, those courts' decisions are contrary to both the legislative text and Congressional intent.

For over a decade, USDA has received repeated calls from the public to address these court decisions which frustrate the purposes of the Act,[75] although USDA

[66] Even some decisions that have required competitive injury define it more broadly than what might be required to establish antitrust injury. See *e.g., Wheeler,* 591 F.3d at 370 n.5 (Jones, J., concurring) (regulation needed ''to curb practices that resulted in producers receiving far below the reasonable value of their live poultry''); *id.* at 370 (''the PSA was intended to prevent the abuse of monopoly''); *Been,* 495 F.3d at 1234 (manipulation of prices constitutes competitive injury).

[67] *London* v. *Fieldale Farms Corp.,* 410 F.3d 1295, 1303 (11th Cir. 2005).

[68] *Armour & Co.* v. *United States,* 402 F.2d 712 (7th Cir. 1968).

[69] *E.I. du Pont de Nemours* v. *Fed. Trade Comm'n (Ethyl),* 729 F.2d 128, 136–37 (2d Cir. 1984).

[70] *Been* v. *O.K. Industries, Inc.,* 495 F.3d 1217, 1232 (10th Cir. 2007). Also, there seems to be no consideration of the fact that price manipulation is an express violation of section 202(d) and 202(e) of the P&S Act.

[71] 760 F.2d 211, 214 (8th Cir. 1985).

[72] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[73] See, *e.g., M & M Poultry* v. *Pilgrim's Pride Corp.,* No. 2:15–CV–32, 2015 WL 13841400, at *8 (N.D.W. Va. Oct. 26, 2015); *Triple R Ranch, LLC* v. *Pilgrim's Pride Corp.,* 456 F. Supp. 3d 775, 778 (N.D.W. Va. 2019); *Hedrick* v. *S. Bonaccurso & Sons, Inc.,* 466 F. Supp. 1025, 1031 (E.D. Pa. 1978).

[74] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth,* May 5, 2022; *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[75] See, *e.g.,* Farm Action et al., ''Letter to Bruce Summers,'' April 5, 2022, available at *https://farmaction.us/wp-content/uploads/2022/04/Letter-re-Unfair-Practices-in-Violation-of-the-Packers-and-Stockyards-Act.pdf* and *https://farmaction.us/2022/04/07/dear-usda-issue-the-packers-and-stockyards-rules-now/* (last accessed April 2024); Sarah Carden, ''The Fall of Antitrust, the Rise of Corporate Power: Impacts of Market Concentration on Farmers and Ranchers,'' Farm Action, March 2022, available at *https://farmaction.us/wp-content/uploads/2022/04/P-S-Act-Report-for-ABA-Farm-Action.pdf;* Hon. Keith Ellison, et al., ''Letter to Hon. Tom Vilsack,'' December 21, 2021, on file at USDA, referenced in Hon. Thomas Vilsack, ''Letter to State Attorneys General Ellison, Hill, and Colleagues,'' Sept. 26, 2022, available at *https://www.usda.gov/media/press-releases/2023/07/19/usda-launches-historic-partnership-bipartisan-state-attorneys* and *https://www.usda.gov/media/press-releases/2023/07/19/usda-launches-historic-partnership-bipartisan-state-attorneys* (last accessed April 2024); Claire Kelloway and Sarah Miller, ''Food and Power: Addressing Monopolization in America's Food System,'' Open Markets Institute, Sept. 21, 2021

also notes that some industry groups have generally opposed changes to the existing regulatory landscape.[76]

Consistent with Executive Order 14036, this proposed rule would, however, make those changes.[77] Specifically, it would provide regulatory clarity in the face of these conflicting interpretations so as to more fully and effectively enforce section 202(a)'s prohibition on unfair practices. To do so, it proposes to establish clearer tests and frameworks with which to apply section 202(a)'s prohibition on unfair practices, provide guidance to those hearing enforcement cases as to what unfairness means, and, in circumstances when competition is relevant, provide a framework for assessing the impact of a practice on the competitive environment. USDA intends with this proposed rule to provide clearer standards for the Department, courts, and private parties to use in understanding what conduct the P&S Act prohibits.

III. The Proposed Rule

In this proposed rulemaking, AMS proposes separate comprehensive rules intended to protect both market participants and the market from harm.[78] In the very first docket under the P&S Act in 1922, the Secretary stated: ''It is not the purpose of the Act to destroy business, but to require the observance of the public's interests in the conduct of business by conforming to standards laid down in the law.'' [79] In other words, the Act is broader than an antitrust law; it is a comprehensive regulation of the poultry and livestock industry that enforces norms of fair behavior for the public benefit. Thus, since passage of the Act, the Department has taken the position that section 202(a) could be violated if a challenged practice injures the market to the detriment of the public interest, or if it injures market participants without any specific harm to the market. Often, in the Department's view, a challenged practice could cause both kinds of injuries in unison.

For example, a supply broker was found to have engaged in both an unfair and deceptive practice in agreeing to provide a hidden ''kickback'' that affords unduly preferential treatment to a powerful retailer at the expense of rival retailers. Indeed, the practice was unfair both in the sense that it specifically injured the rival retailers, who were forced to pay discriminatorily higher broker fees, and in the sense that it harmed competition because the hidden competitive advantage bestowed upon the powerful retailer tampered with the competitive process for procuring supply.[80] This comprehensive analytical approach, which the Secretary applied in cases as diverse as failure to pay in full [81] and price cutting,[82] never required the Secretary to draw distinctions between unfair conduct that injures producers, unfair conduct that injures competition, or unfair conduct that caused both kinds of injury. But in analyzing these cases the Judicial Officer determined harm to an individual or harm to competition in each separate administrative case rather than a specific ''test'' or ''rule.''

In building the analytical framework for this proposed rule, USDA considered, in addition to the forgoing, the contemporaneous statutory history of section 5 of the FTC Act, which bans both unfair methods of competition and unfair or deceptive acts or practices. While Congress never limited the scope of the P&S Act's ''unfair practices'' to ''unfair methods of competition,'' the first FTC Act was purportedly so limited. The amendments to the FTC Act in 1938 reflected Congress's intent to make the scope of the FTC Act more aligned with the P&S Act's broader scope.

A standard should be consistent and consistently applied, so this proposed rule would explain the P&S Act in terms more widely understood. USDA has found the framework of the FTC Act and the FTC's policy statements useful in understanding the past century of USDA's administrative and Federal caselaw.

Thus, for this proposed rule, USDA employs an analytical structure similar to that presently used by the FTC and proposes two analyses. First, proposed § 201.308(a) and (b) would protect against injuries to market participants from unfair practices. Second, proposed § 201.308(c) and (d) would protect the market from unfair practices. When the Secretary considers whether an injurious practice rises to the level of an unfair practice, either or both approaches may be relied on.

Although the proposed tests are distinct, in the context of the P&S Act, they are not mutually exclusive. Just as it has always been true that an unfair practice can be simultaneously injurious to individual market participants and to market conditions more generally, an unfair practice under this proposed rule may be unfair to an individual market participant (under proposed

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updated version, at 12, available at *https://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system* (last accessed April 2024); see also John Shively, ''Competition Under the Packers and Stockyards Act: What Now?'' 15 *Drake J. Agric. L.* 419 (Fall 2010); C. Robert Taylor, ''Legal and Economic Issues with the Courts' Rulings in *Pickett* v. *Tyson Fresh Meats, Inc.,* a Buyer Power Case,'' American Antitrust Institute Working Paper No. 07–08, Feb. 2007, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103635* (last accessed April 2024); United States Department of Justice, United States Department of Agriculture, (May 2010), Public Workshops Exploring Competition in Agriculture, *https://www.justice.gov/archives/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10* (''As a state regulator, when I enforce my state's unfair or deceptive practices act on behalf of consumers, I don't have to demonstrate that that deceptive act injured every consumer in the state. I only have to demonstrate that one consumer. I think what we do owe our—we owe our producers at least as much as we owe the individual consumers of our respective states and a fair reading of 202(a) shouldn't require the rancher to demonstrate harm to everyone.'' ''The only way to protect the cash market is to halt the growth of captive supplies and possibly even roll back practice. As it should be, the language of Section 2(a) and (b) of the Packers & Stockyards Act does not require the finding of harm to the industry. . . How is it that if I strong-arm someone out in the hall I could be put in jail, but if a—but to receive just and due compensation for my hard work and efforts, I have to prove that there is an injury to the industry and not just to myself? That's a pretty ridiculous test to overcome.'' ''Now, I understand the Packers and Stockers Act is being undermined by this proof to harm to competition. When they're cheating all of these farmers out here, they're getting a monetary advantage in the market. . . And that's the excuse that the Federal judges say that we—you know, that we can't have this law enforced'').

[76] See, *e.g.,* North American Meat Institute Issue Statement on President Biden's Executive Order & USDA's Proposed Changes to Packers & Stockyards Rules, July 9, 2021, available at *https://www.meatinstitute.org/press/north-american-meat-institute-issues-statement-president-bidens-executive-order-usdas* (last accessed April 2024).

[77] Executive Order No. 14036 ''Promoting Competition in the American Economy,'' July 2021, available at *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.*

[78] Although using different terms, this understanding is consistent with the consensus academic literature. See, *e.g.,* Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/;* Peter C. Carstensen, ''The Packers and Stockyards Act: A History of Failure to Date,'' The CPI Antitrust Journal (2) (2010), available at *https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf;* Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at *https://scholarship.law.upenn.edu/faculty_scholarship/1862.*

[79] *Kansas City Live Stock Exchange* v. *Armour and Company and Fowler Packing Company,* Docket No. 1 (August 30, 1922).

[80] *Trunz Pork Stores* v. *Wallace,* 70 F.2d 688 (2d Cir. 1934).

[81] *De Jong Packing Co.* v. *U.S. Dep't of Agric.,* 618 F.2d 1329, 1337 (9th Cir. 1980): agreeing that failing to pay for condemned cattle within one business day following sale was an ''unfair practice''. The violations in this case occurred in 1972 and 1974. Id. at 1333.

[82] *See Wilson & Co.* v. *Benson,* 286 F.2d 891, 895 (7th Cir. 1961).

§ 201.308(a)), to markets (under proposed § 201.308(c)), or unfair under each proposed test.

Thus, based on the statutory language, administrative case law, and Federal case law, this proposed regulation clarifies that unfair acts under the P&S Act apply to harms to market participants and harms to the market. The scope of section 202(a) is similar to section 5 of the FTC Act, which prohibits both unfair and deceptive acts or practices and unfair methods of competition. Further, the operative definition of harm to market participants (substantial harm, not reasonably unavoidable, and not outweighed by benefits) is analogous to the codified definition of unfairness under the FTC Act. The operative definition for harm to the market is analogous to the principles the FTC has adopted in that context (collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition that may negatively affect competitive conditions).

A. Proposed § 201.308(a) and (b)

USDA proposes the addition of § 201.308(a) and (b) as a comprehensive rule for unfair practices with respect to market participants.

The proposed test under § 201.308(a) for whether a practice unfairly injures market participants is similar to the FTC's test for consumer protection injuries. Under the FTC Act, an unfair practice is an act or practice that ''causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.'' [83] Harm to competition is not part of the test. Although section 202(a) of the P&S Act's authority precedes the FTC's 1980 policy statement and subsequent Congressional amendments to the FTC Act, the FTC's current approach offers useful pillars around which to anchor P&S case law that has developed over the years.[84]

USDA thus proposes under § 201.308(a) that a practice is unfair if the practice (1) causes or is likely to cause substantial injury to one or more market participants, which (2) the participant or participants cannot reasonably avoid, and which (3) the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury. Application of these three elements, when combined, explain the outcome of a great many of the cases brought under the P&S Act, and provide a clear and workable standard for adjudicating many kinds of unfairness claims.

The simplest example that illustrates the principles underlying these proposed provisions is the failure to pay for meat,[85] live poultry,[86] or livestock.[87] First, it causes a substantial injury to the seller or grower. When a seller or grower delivers product to a regulated entity and the entity arbitrarily refuses to pay, the seller or grower loses the value of the product, and they lose the opportunity to use the capital from selling their product to grow more food, invest in their farm, or process more products. Second, they cannot avoid this breach of contract. Instead, they must either engage in costly litigation or settle for less than they are owed. Finally, there is no benefit to the market for the purchaser to fail to pay for the product they received. If this practice is adopted by all purchasers, the sellers become increasingly less efficient as trust fails and less livestock, meat, and poultry is produced. Thus, even if the seller or grower is eventually paid, and suffers no loss of business, the regulated entity's failure to pay when due can still cause substantial, unavoidable market injury. That is, in the aggregate, even a small delay suffered by many producers produces a substantial harm.

Similar principles have guided the Secretary's interpretation for the entire history of the Act. In the 1956 decision in *In re: Central California Livestock, Inc. d/b/a Machlin Meat Packing Company,* the Judicial Officer held that accord and satisfaction could not be a defense to the failure to pay for livestock because a refusal to abide by contract terms that occurs after the livestock is slaughtered leaves the seller or grower with no other remedy than to sue. If a refusal to pay is not based upon a bona fide dispute, but rather is a deliberate policy of contract noncompliance, then it is ''obvious that by the activities in issue the respondent engaged in or used an unfair practice'' in violation of section 202(a) of the Act.[88] And ''[n]ot only was it unfair to the sellers but it was unfair competitively with respect to other packers.'' [89]

Even in 1956 those principles were not a new application of section 202(a). In 1937, USDA Secretary Wallace found that discounting the agreed upon price for a defect (so-called oily hogs) undiscoverable until after slaughter rather than as a condition of the contract was an ''unfair, unjustly discriminatory, and deceptive practice'' in violation of section 202(a) of the Act.[90]

Congress drafted the Act to provide every participant in the industry due consideration, and honest, transparent, and equitable treatment. Accordingly, dishonest, hidden, and inequitable practices that injure market participants, like mis-weighing, are unfair because the producer or grower suffers a substantial injury that they cannot avoid. For example, a producer delivers their product for the regulated entity to establish the grade, weight, and payment. The producer's loss of physical control of the animal is

[83] 15 U.S.C. 45(n).

[84] See Michael Kades, then of Washington Center for Equitable Growth, reaching a similar conclusion in ''Protecting Livestock Producers and Chicken Growers,'' chapter 3, *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/;* see also, Peter C. Carstensen, ''The Packers and Stockyards Act: A History of Failure to Date,'' The CPI Antitrust Journal (2) (2010), available at *https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR–2.pdf;* see also Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at *https://scholarship.law.upenn.edu/faculty_scholarship/1862.*

[85] In Re: Rotches Pork Packers, Inc. & David A. Rotches., 46 Agric. Dec. 573, 579 (1987).

[86] *In Re: Empire Kosher Poultry, Inc.,* No. P & S Docket No. D–10–0109, 2010 WL 7088565, at *6 (U.S.D.A. July 20, 2010), *aff'd Empire Kosher Poultry, Inc.* v. *U.S. Dep't of Agric.,* 475 F. App'x 438, 444 (3d Cir. 2012).

[87] Courts that examine the history of the P&S Act often overlook that failure to pay in full was an ''unfair practice'' under the Act for many decades before Congress clarified that delay of a single payment for livestock was an unfair ''practice'' under the P&S Act in 1976. For example, in *In re: Eastern Meats, Inc.,* 21 Agric. Dec. 134, 141, (1962), the Judicial Officer found ''without a doubt'' failing to timely pay the full amount agreed for a single shipment of meat was ''an unfair and deceptive practice and device'' and cited administrative cases. And, in *In Re: Mid-W. Veal Distributors, d/b/a Nagle Packing Co., & Milton Nagle,* 43 Agric. Dec. 1124, 1138 (U.S.D.A. July 13, 1984) USDA's Judicial Officer noted it had been held consistently in cases arising under both title II and title III of the P&S Act that failure to pay, when due, for livestock constitutes a violation of sections 202(a) and 312(a) of the P&S Act., citing *In re Rosenthal,* 36 Agric. Dec. 210 (1976); *In re San Jose Valley Veal, Inc.,* 34 Agric. Dec. 966 (1975); *In re Sebastopal Meat Company, Inc.,* 28 Agric. Dec. 435, (1969), aff'd, 440 F.2d 983 (9th Cir. 1971); *In re Nolan E. Poovey, Jr.,* 27 Agric. Dec. 1512 (1968); *In re Joe Doctorman & Son, Inc.,* 28 Agric. Dec. 840 (1969); *In re S.M. Jamison,* 28 Agric. Dec. 581 (1969); *In re Neil Harlan,* 25 Agric. Dec. 5 (1966); *In re Royce Lehman Moore,* 26 Agric. Dec. 230 (1967); *In re Augustin Brothers Co,* 27 Agric. Dec. 350 (1968); *In re R.J. & C.W. Fletcher, Inc.,* 23 Agric. Dec. 1400 (1964); *In re Rosenthal Packing Co.,* 19 Agric. Dec. 971 (1960); *In re Harry Thomas,* 35 Agric. Dec. 490 (1976).

[88] In re: Central California Livestock, Inc. d/b/a Machlin Meat Packing Company, 15 Agric. Dec. 97, 110 (1956).

[89] Id.

[90] *Secretary of Agriculture* v. *Scala Packing Company, Inc.,* Bureau of Animal Industry Docket No. 581 (January 7, 1937).

inherent in a failure-to-pay or a mis-weighing case, illustrating the unavoidability of the injury.

Some elements of the dangers of unavoidable injuries have informed prior rulemaking. For example, when USDA required packers to pay on actual hot weights—the weight before the carcass is cooled to storage temperatures—in 1968, USDA noted that allowing packers to set shrinkage amounts for a projected weight after refrigeration (a cold weight) was an unfair and deceptive practice: ''In these instances, the packer decides what shrinkage factor he will use. . . . The farmer is not in a position to bargain freely on the basis of a full understanding of the contract terms which are within the control of the packer and can only accept or reject the bid offered by the packer.'' [91] Market participants are often at the mercy of regulated entities, who often pay based on factors that the livestock seller or poultry grower is unable to personally witness or negotiate, thus making their injury from the use of variable cold weights or shrinkage unavoidable.

Even absent an express rule, the principles maintaining that unjustified practices that produce unavoidable injury violate section 202(a) of the Act have been, and still are, applied in ''unfair practices'' cases.[92]

The final factor in the proposed regulation at § 201.308(a) is that the conduct does not violate section 202(a) of the Act if regulated entities prove that countervailing benefits to producers, growers, or to competition outweigh the harm. In practice, the question is whether the regulated entity can show benefits of the alleged unfair conduct outweigh the injury or likely injury.

The proposed rule allows the consideration of not only harm to the market, but also likely harm to Congressional policy goals concerning the structure of agricultural markets over and against possible countervailing benefits to other producers or the market.[93] Congressional policy goals have included, for example, supporting new, beginning, and military veteran producers.[94]

Balancing allegedly unfair conduct against countervailing benefits is not a new consideration for the Secretary. For example, when examining the allegedly unfair and discriminatory preferences given to one group of sellers over others in *In re: IBP, Inc.* (57 Agric. Dec. 1353 (U.S.D.A. July 31, 1998)), the Department considered whether right of first refusal of the contract terms was ''worth extra payment'' and whether the contract was profitable for both the buyers and the sellers of livestock. Preferences for lengthening extra delivery times justified higher payments (even if higher payment was not proven), and so concluded that the practice was not unduly discriminatory.[95]

Accordingly, when examining the practice, ''actual competition carried on in good faith by normally fair methods not 'heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression[']. . . . is a fact which must be given substantial weight . . . .'' [96] Unfair practices under section 202 is not only a matter of unfair market conditions; the intention and results of the unfair acts and practices are relevant.[97] For example, if a company intends to act to monopolize, even if the intended mechanism would not achieve it, the practice would be unfair. Moreover, some practices have no benefit, even if unintentional: mis-weighing, failing to pay when due for livestock or meats, failure to maintain a bond, and insolvency.

B. Evaluation of Potential Injury to Market Participants

To date, no court has disagreed with the principle that the P&S Act not only reaches practices that directly injure, such as failures to pay and changes to the terms of payment without notice, but also acts that are likely to cause injury. Congress designed the Act to prevent actual monetary loss [98] and those practices are ''unfair'' even though they require no evidentiary showing of completed injury. Even courts that have adopted the competitive injury standard have affirmed that the Act does not require actual harm. The Fifth Circuit stated, the ''Act is designed to '. . . prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required.' '' [99] Those potential injuries may be any injury the Act was designed to prevent, including financial loss to sellers.[100]

Therefore, the Department has taken the view that some practices must be stopped before they harm market participants.[101] For example, a packer operating while insolvent or without a bond can present a great risk of potential harm to the livestock sellers who may find that their livestock is being used to finance a packer's operations.[102] If the undercapitalized packer fails, even with the rights of a floating trust, livestock sellers are vulnerable to protracted litigation and non-payment. The livestock seller's ability to participate in the market would be imperiled, the magnitude of potential injury would be great, and without prior knowledge of the insolvency, the seller's ability to freely

[91] Purchase of Livestock by Packers on a Carcass Grade, Carcass Weight, or Carcass Grade and Weight Basis, 33 FR 2760, 2761 (Feb. 9, 1968).

[92] *E.g. In Re: Excel Corp.,* No. P. & S. Docket No. 99–0010, 2003 WL 205562, at *31 (U.S.D.A. Jan. 30, 2003) (finding that producers were likely injured by Respondent's failure to notify hog producers of its undetectable change in lean formula, and regardless, the practice impeded competition); *In Re: Stull Meats, Inc.,* 49 Agric. Dec. 309, 329 (U.S.D.A. Feb. 15, 1990) (finding in a commercial bribery case that ''the type of violations alleged and proven in this case are not only unfair to the firm being overcharged for its purchases . . . but also to the competitors . . . who are not in a position to gain entry . . . unless they are willing to make the same illegal inducements to its agent''); *c.f. In Re: Cedar Vale Sale Barn, Inc., Doyle Hawkins & Jerry Mullins.,* 52 Agric. Dec. 546, 554 (1993) (check kiting poses a great risk to the sellers of livestock); *In Re: Great Am. Veal, Inc. A Corp., & Thomas Burke, an Individual,* 48 Agric. Dec. 183, 198 (U.S.D.A. Jan. 19, 1989) (holding that dissipating the statutory trust ''enacted to protect livestock sellers'' was unfair).

[93] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' chapter 4, *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[94] See, *e.g.,* ''How to Start a Farm: Beginning Farmers and Ranchers,'' available at *https://www.farmers.gov/your-business/beginning-farmers* (last accessed April 2024); Congressional Research Service, ''Farm Bill Primer: Beginning and Underserved Producers,'' May 2022, available at *https://crsreports.congress.gov/product/pdf/IF/IF12096/2.*

[95] The Judicial Officer also considered the specific right of first refusal a practice that was likely to harm competition in violation of section 202 of the P&S Act. While the 8th Circuit agreed with the legal statements of the Judicial Officer—specifically that the Act prevents likely harm to competition—the court disagreed with the factual conclusions and reversed. *IBP, Inc.* v. *Glickman,* 187 F.3d 974, 978 (8th Cir. 1999).

[96] *Swift & Co.* v. *Wallace,* 105 F.2d 848, 856 (7th Cir. 1939).

[97] *See Armour & Co.* v. *United States,* 402 F.2d 712, 717 (7th Cir. 1968).

[98] *See In re: Arizona Livestock Auction, Inc.,* 55 Agric. Dec. 1121 (U.S.D.A. Nov. 21, 1996) (finding that the purpose of title III of the Act was ''to protect the producer or seller from monetary loss'').

[99] *Bowman* v. *United States Dep't of Agric.,* 363 F.2d 81, 85 (5th Cir. 1966) (finding the Department's insolvency standard was not an abuse of discretion).

[100] Id.

[101] *See* In Re: Corn State Meat Co., Inc.; Terrance P. (Terry) Prince, Jr. & James L. Wiggs., 45 Agric. Dec. 995, 1023 (U.S.D.A. May 8, 1986); c.f. In Re: Danny Cobb & Crockett Livestock Sales Co., Inc., 48 Agric. Dec. 234, 234 (U.S.D.A. Feb. 13, 1989) (finding bonds protect against incipient violations); In Re: Paul Rodman & David Rodman, 47 Agric. Dec. 885, 903–04 (U.S.D.A. May 27, 1988) (finding there is a duty to prevent all unlawful acts under the P&S Act, including the potential losses from failing to maintain a custodial account).

[102] For an example of how under-capitalization can force producers to finance the operation of a livestock buyer, see *Van Wyk* v. *Bergland,* 570 F.2d 701, 704 (8th Cir. 1978).

exercise decision-making would be undermined.

As another example, an exclusive agreement between packers and livestock dealers not to bid against one another might severely restrict the ability of other livestock sellers to participate in the market, because packers would not accept offers from other livestock dealers or from sellers directly.[103] The agreement is an unfair practice, among other reasons, because it injures sellers by restricting them from making offers and thus tends to subvert market forces. Proposed § 201.308(a) recognizes that although a specific injury has not occurred, the potential for injury is so great that the Secretary must stop the practice in advance.[104]

Proposed § 201.308(b) is intended to explain those instances where likely or potential harms to producers rise to violations of the P&S Act, and so this rulemaking sets out factors or criteria that attempt to cover that broad scope. Thus, the Secretary retains the statutory authority to identify and regulate unfair practices or devices in a manner not predicted by this proposed rule, either through subsequent rulemaking or in particular enforcement matters.

First, proposed § 201.308(b)(1) includes consideration of the extent to which the practice may impede or restrict the ability to participate in a market, interfere with the free exercise of decision-making by market participants, tend to subvert the operation of competitive market forces, deny a covered producer the full value of their products or services, or violate traditional doctrines of law or equity.

This is not entirely dissimilar from comment (g) in the Restatement (Third) of Unfair Competition, which noted that unfair practices are not merely a matter of antitrust harms:

> Courts continue to evaluate competitive practices against generalized standards of fairness and social utility . . . . An act or practice is likely to be judged unfair only if it substantially interferes with the ability of others to compete on the merits of their products or otherwise conflicts with accepted principles of public policy recognized by statute or common law. [105]

Thus, proposed § 201.308(b)(1) provides standards to evaluate when a practice under § 201.308(a) is likely to cause a substantial injury.

Second, proposed § 201.308(b)(2) provides a clarification of ''substantial injury'' by considering the magnitude of a likely injury that the Secretary must halt: an injury may be substantial if it causes significant harm to one market participant or if it imposes a small harm to many market participants. AMS does not propose to eliminate from regulatory oversight those injuries that the Department has deemed in past cases as substantial. A single failure to pay, for even a relatively small amount of money, is sufficiently substantial for USDA to bring administrative action against a regulated entity, and to be a basis for an order of the Secretary to cease and desist. Notably, an injury that does not harm a market participant is not a violation of the Act.[106]

Third, in proposed § 201.308(b)(3) AMS proposes considering the extent to which the producer would have to take unreasonable steps to avoid injury. An injury is not reasonably avoidable solely because the practice has been disclosed. A market participant is also not required to take unreasonable steps, such as exiting the market or making unreasonable additional investments or efforts, to avoid the harm. The harder it is for market participants to escape the injury, the more likely the harm would be to occur and the more likely that it would not be reasonably avoidable.

Again, returning to failure to pay, it would be unreasonable for a livestock seller to cease selling livestock on the open market to prevent themselves from being victims of a breach of contract or to ask them to accept revised contract terms after delivery of the livestock. To determine otherwise would undermine the regulatory purpose, which is to give the producers of livestock, and the growers of poultry, the opportunity to receive the fair value of their participation in the market. Nor would it benefit consumers to encourage producers to leave the market or accept substandard payment terms that would discourage appropriate market participation.

C. Proposed § 201.308(c) and (d)

AMS proposes § 201.308(c) and (d) as a comprehensive rule with respect to markets.

Unfair practices are not only those that injure producers, but also those that may negatively impact competition because they injure or tend to injure competition or competitive market conditions. AMS takes the position in this proposed rulemaking that harmful methods of competition under the P&S Act are similar to the practices that the FTC and the courts have long recognized as either anticompetitive or unfair: collusive, coercive, predatory, restrictive, deceitful or exclusionary methods of competition that may negatively affect competitive conditions.

Congress intended the prohibitions in section 202(a) (and, also, section 312(a)) of the P&S Act to go further than the prohibition in section 5 of the FTC Act against ''unfair methods of competition.'' [107] Not only did the P&S Act address deceptive practices before the FTC Act did so, but it also includes many prohibitions that the FTC Act does not. In that breadth, there has been no real dispute that the P&S Act should prohibit at least as much as the FTC Act itself.[108] Thus, as the Ninth Circuit explained, ''section 202(a) should be read liberally enough to encompass the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission.'' [109] The FTC has long prosecuted collusive, coercive, predatory, restrictive, deceitful or exclusionary actions that tend to negatively affect competitive conditions as unfair methods of competition.[110] Moreover, USDA has regularly cited FTC precedent in interpreting the P&S Act.[111] As the Ninth Circuit has noted, ''While sec. 202 of the Packers and Stockyards Act may have been made broader than antecedent antitrust legislation in order to achieve its

[103] See 9 CFR 201.70; *Swift & Co. v. United States,* 393 F.2d 247 (7th Cir. 1968).

[104] A similar analysis would be if a group of packers conspire to force stockyards to sell on the basis of a ''subject'' sales terms—that is, granting the packer the right to refuse to honor the purchase after a delivery inspection at the packing plant rather than on the basis of an ''as is'' sales term—then that behavior is likely to interfere with the free exercise of decision making by market participants. See *De Jong Packing Co.* v. *U.S. Dep't of Agric.,* 618 F.2d 1329, 1337 (9th Cir. 1980).

[105] Restatement (Third) of Unfair Competition section 1 (1995).

[106] *See In Re: Arizona Livestock Auction, Inc.,* 55 Agric. Dec. 1121 (1996) (finding that injury to a cow did not result in any injury the Act was designed to prevent).

[107] 61 Cong. Rec. 1805–06.

[108] *Been* v. *O.K. Indus., Inc.,* 495 F.3d 1217, 1241 (10th Cir. 2007) (Hartz, J. concurring) (''[I]t would be somewhat surprising if 'unfair practices' under the PSA had a narrower meaning than 'unfair methods of competition' in the FTCA.'').

[109] *Armour and Company* v. *United States,* 402 F.2d 712 (7th Cir. 1968).

[110] *E.I. du Pont de Nemours & Co.* v. *F.T.C.,* 729 F.2d 128, 137 (2d Cir. 1984) (citing examples: *FTC* v. *Texaco, Inc.,* 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968); *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966); *FTC* v. *Beech-Nut Packing Co.,* 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1922), *FTC* v. *National Lead Co.,* 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957), *FTC* v. *Cement Institute,* 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 56 S.Ct. 1629, 80 L.Ed. 859 (1935), *FTC* v. *R.F. Keppel & Bro., Inc.,* 291 U.S. 304, 54 S.Ct. 423, 78 L.Ed. 814 (1934), *FTC* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953)).

[111] *Armour & Co.* v. *United States,* 402 F.2d 712, 722 (7th Cir. 1968); see also In Re: Ozark Cnty. Cattle Co., Inc., et. al., 49 Agric. Dec. 336 (1990); In Re: Corn State Meat Co., Inc.; et. al., 45 Agric. Dec. 995, 1012 (1986).

remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton Act and the [Federal] Trade Commission Act.'' [112]

Thus, AMS proposes § 201.308(c) to capture at least conduct that would violate the antitrust laws, conduct that would constitute an unfair method of competition under the FTC Act, and conduct that courts or administrative officers have held violates the P&S Act's unfairness prohibition. Practices that do violate the antitrust laws therefore are within the umbra of this rulemaking. So too is ''conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit,'' [113] and practices that ''not merely in their fruition, but also in their incipiency . . . could lead to . . . trade restraints and practices deemed undesirable.''

Conduct falls within proposed § 201.308(c) if it harms competition or has the tendency to negatively affect competitive conditions, impairs market participants' ability to compete, or reduces the likelihood of potential or nascent competition, notwithstanding that it may or may not yet have done so. If the practice is analyzed similarly to an antitrust violation, the Secretary will, where appropriate, consider any buyer- or seller-side anticompetitive effect on price (including the price paid to producers), output, quality, choice, innovation, bargaining power in the market for services or products, the imposition or presence of entry barriers, the imposition or presence of information asymmetries, the entrenching or extending of a dominant position, or the distortion of the competitive process, among other anticompetitive or competitively unfair effects.[114] In some cases, it is not necessary to measure the effect on competitive conditions expressly because the conduct, is a per se violation, or otherwise on its face tends to distort, impair, or frustrate the competitive process, including of price discovery. Moreover, section 202 of the P&S Act prohibits unfair competition in its incipiency, consistent with the FTC Act and the Clayton Act.

D. Evaluation of Potential Injury to the Market

Because the courts have been clear that behavior that is likely to harm competition violates the P&S Act, AMS proposes standards with respect to injuries that are likely to harm the market. Like other statutes, such as the FTC Act and the Clayton Act, the P&S Act prohibits competition harms in their incipiency.[115] The antitrust laws recognize a wide range of harms, which this proposed rule would fully encompass.[116] Because the Act is intended to protect the market from harm and protect producers and consumers from unfair practices, there does not need to be any proof that any harm to the market has yet occurred: only that the threat the Act is designed to prevent is *likely.*

Accordingly, AMS proposes standards in § 201.308(d) for the Secretary to consider when examining practices that likely pose a threat to the competitiveness of markets. These standards include (1) the extent to which the practice impedes or restricts the ability to participate in a market; tends to subvert the operation of competitive market forces; interferes with the free exercise of decision-making by market participants; violates traditional doctrines of law or equity; or has indicia of oppressiveness, such as evidence of anticompetitive intent or purpose or absence of an independent legitimate business reason for the conduct; and (2) the extent to which the practice tends to foreclose or impair the opportunities of market participants, reduces competition between rivals, limits choice, distorts or impedes the process of competition, or denies a market participant the full value of their products or services.

Thus, proposed § 201.308(d) addresses harms that are likely to threaten markets, including ''acts and practices which, when full blown would violate the Sherman Act and the Clayton Act.'' [117] These include several practices that have been directly found to constitute incipiency violations by the Federal courts or in FTC administrative proceedings, which the FTC details in full in its policy statement regarding the scope of unfair methods of competition under section 5 of the FTC Act.[118] The Secretary may also consider violations of other laws and equity. Thus, when considering harm to markets, the proposed rule allows the consideration of harm that is cognizable under laws that further policy goals concerning the structure of agricultural markets.[119] The proposed rule recognizes that regulatory enforcement may take into account policies such as increasing market diversity through new, beginning, and military veteran producers,[120] and increasing supply chain resiliency including through investing in new and expanded meat and poultry processing.[121] Moreover, USDA's

[112] *De Jong Packing Co.* v. *U.S. Dep't of Agric.,* 618 F.2d 1329, 1335 (9th Cir. 1980).

[113] *Ethyl,* 729 F.2d at 136–37.

[114] See, generally, Merger Guidelines, (2023), U.S. Department of Justice and Federal Trade Commission, *https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf;* FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, 9 (Nov. 10, 2022).

[115] *Daniels* v. *United States,* 242 F.2d 39, 42 (7th Cir. 1957) (''It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required.'').

[116] See, generally, Merger Guidelines, (2023), U.S. Department of Justice and Federal Trade Commission, *https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf;* FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, 9 (Nov. 10, 2022).

[117] *Fed. Trade Comm'n* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394–95 (1953) (noting that ''Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipiency] which, when full blown, would violate those Acts[,] . . . as well as to condemn as ' ''unfair methods of competition'' ' existing violations of them''); *Fed. Trade Comm'n* v. *Cement Institute,* 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate section 5); *Fed. Trade Comm'n* v. *R. F. Keppel & Bro., Inc.,* 291 U.S. 304, 310 (1934) (finding that unfair methods of competition not limited to those ''which are forbidden at common law or which are likely to grow into violations of the Sherman Act''); c.*f. Brown Shoe Co.* v. *United States,* 370 U.S. 294, 346 (1962) (finding section 7 of the Clayton Act also reflects the ''mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency'').

[118] FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under sec. 5 of the FTC Act, 9 (Nov. 10, 2022). See, *e.g., Yamaha Motor Co.* v. *Fed. Trade Comm'n,* 657 F.2d 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982) (side agreements collateral to an anticompetitive joint-venture agreement); In re Delta/AirTran Baggage Fee Antitrust Litig., 245 F.Supp. 2d 1343, 1369–70 (N.D. Ga. 2017), aff'd sub nom., *Siegel* v. *Delta Air Lines, Inc.,* 714 F. App'x 986 (11th Cir. 2018), and cert. denied, 139 S. Ct. 827 (2019) (invitations to collude); The Vons Co., FTC Complaints and Order, 1987–1993 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 23,200 (Aug. 7, 1992) (series of small acquisitions, none of which were illegal individually).

[119] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' chapter 4, *Washington Center for Equitable Growth,* May 5, 2022, *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[120] See, *e.g.,* ''How to Start a Farm: Beginning Farmers and Ranchers,'' available at *https://www.farmers.gov/your-business/beginning-farmers* (last accessed April 2024); Congressional Research Service, ''Farm Bill Primer: Beginning and Underserved Producers,'' May 2022, available at *https://crsreports.congress.gov/product/pdf/IF/IF12096/2.*

[121] See, *e.g.,* ''Agricultural Competition: A Plan in Support of Fair and Competitive Markets,'' USDA's Report to the White House Competition Council, May 2022 (last accessed June 2022), available at *https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf;* ''USDA Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience,'' available at *https://www.ams.usda.gov/supply-*

Continued

Judicial Officer has explained that section 202(a) of the P&S Act includes within its scope every trade practice which is an ''unfair method of competition'' under section 5 of the FTC Act or is otherwise prohibited by the Clayton Act or the Robinson-Patman Act.[122]

Among the factors the Secretary may consider when halting a practice prior to harm occurring are whether the practice offends public policy because it has indicia of oppressiveness, such as evidence of anticompetitive intent or purpose, or absence of an independent legitimate business reason for the conduct.

This factor addresses a particular danger that Congress recognized when it wrote the P&S Act: abuse of the imbalance of power, and the creation of vertical relationships that would stifle competition. Congress expected the Secretary to address the power that the dominant, vertically-integrated packers and stockyards could exert in preventing a distant and less capitalized farmer or rancher from asserting their rights. This is the heart of oppressive conduct and is part of the market structure Congress expected the Secretary to regulate.

Moreover, this proposal extends to horizontal, vertical, and other market relationships because, historically, the Department has found that practices like certain vertical and horizontal information sharing are likely to harm competition, and therefore unfair practices prohibited by the P&S Act.[123] USDA regulations under the P&S Act (in part to address concerns relating to market agencies as regulated under title III of the Act) have also prohibited certain forms of vertical integration, common or interlocking ownership, financing, or management relationships owing to conflict of interest and impacts on market integrity and market access.[124]

To be clear, under section 202(a) of the P&S Act, if a practice is taken in good faith by normally fair methods, and not characterized by deception, bad faith, fraud, or oppression, then the practice is less likely to be unfair.[125] Accordingly, proposed § 201.308(d) provides that the Secretary may assess the extent to which the practice is collusive, coercive, predatory, restrictive, deceitful, or exclusionary and presents incipient threats to competition in determining whether the conduct tends to negatively impact competition by adversely affecting competitive market conditions.

E. Contracts

This rulemaking has no particular prohibition with respect to contracts. A breach of contract, however, is unfair under section 202 if it meets the criteria of proposed § 201.308(a) or (c). For decades the Department found, without controversy, that breaches of contract could result in harm to nonbreaching parties to the agreement or to the market or to both under the Act.[126]

To account for this, under proposed § 201.308(b) and (d) the Secretary may consider traditional doctrines of law and equity in determining whether there is any harm the Act was designed to prevent. Traditional common-law doctrines are fundamentally designed to ensure fairness in the functioning of the marketplace and support the normal and fair operation of market forces. In short, fair enforcement of contract, bans against unconscionable conduct, and prohibitions against deception, make a fair market work. Academics have rightly pointed out that violations of the P&S Act include practices that offend public policy as established ''by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness.'' [127]

The Department's position is that included in this set of practices are breaches of contract that are of regulatory concern. Recently, there are some courts that have claimed that Congress could not have intended breaches of contract to be violations of the P&S Act.[128] Read to an unlimited extent, that conclusion would be contrary to the plain language of the statute. Congress intended unfair practices to include breaches of contract, not only with the passage of the Act in 1921, but also with the passage of section 409 in 1976 and section 410 in 1987. By specifically prohibiting failures to make prompt payment under contract, Congress included among unfair practices the simplest form of a contractual breach.

As a matter of statutory construction, under section 312(a) of the Act it is unlawful for livestock dealers and market agencies to engage in any ''unjust, unjustly discriminatory, or deceptive practice or device''; section 309 of the Act gives any injured person the right to proceed in an administrative reparation hearing before the Secretary against a market agency or livestock dealer. Breach of contract is the basis for the overwhelming majority of reparations cases, as Congress intended.

USDA concluded that some breaches of contract violated the Act many decades prior to the Congressional passage of section 409; administrative findings that failure to pay was a violation of the Act were some of the earliest administrative decisions. The Department issued its first regulatory prohibition against late payment for livestock in 1964.[129] As the Department has held with respect to allegations of the breach of the duty of good faith in the operation of contract which led to underpayment:

> [A] violation of the payment requirements in 7 U.S.C. 228b–1(a) is also a prohibited ''unfair practice'' under 7 U.S.C. 192 . . . . The Packers and Stockyards Act contains no requirement that injury to competition or likelihood of injury to competition must be shown in order to prove a violation of 7 U.S.C. 228b–1(a); however, 7 U.S.C. 228b–1(b) specifically provides that a violation of 7 U.S.C. 228b–1(a) shall be considered an ''unfair practice'' under the Packers and Stockyards Act. Thus, a violation of 7 U.S.C. 228b–1(a) is a prohibited ''unfair practice'' under 7 U.S.C. 192 without regard to whether injury to competition or likelihood of injury to competition is shown.[130]

This rulemaking is not intended to change the Department's position on the Act's remedial purposes to protect market participants from unfair and deceptive practices. In general, refusal to honor contracts drives honest businesses from competition because competitors cannot compete in a market where the buyer with greater capital can capture the supply without paying for it, modify contract terms after delivery, or delay payment indefinitely to extract concessions from sellers. These proposed regulations, therefore, match USDA's ability to order packers and

chain (last accessed June 2024); ''Competition and Meat Supply Chain Investments: Highlighted Comments from the Request for Information (RFI),'' available at *https://www.usda.gov/sites/default/files/documents/Competition-RFI-Anecdotes-010322.pdf* (last accessed June 2024); FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain, available at *https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/* (last accessed June 2024).

[122] *In Re: ITT Cont'l Baking Co.,* 44 Agric. Dec. 748, 772 (1985); *see also* Stumo & O'Brien, *Antitrust Unfairness,* 8 Drake J. Agric. L. at 111.

[123] *See* 9 CFR 201.69 and 201.70.

[124] *See* 9 CFR 201.67.

[125] *C.f. Swift & Co.* v. *Wallace,* 105 F.2d 848, 856 (7th Cir. 1939).

[126] *See In re: Central California Livestock,* at 110. As explained above, cases *like Central California Livestock* are typical of the Department's findings with respect to harms to competition.

[127] Stumo & O'Brien, *Antitrust Unfairness* at 111.

[128] *See, e.g., Been* v. *O.K. Indus., Inc.,* 495 F.3d 1217, 1229 (10th Cir. 2007).

[129] 29 FR 1796, Feb. 6, 1964.

[130] *In Re: Tyson Farms, Inc.,* 71 Agric. Dec. 1160, 1164 (2012).

swine contractors to cease these breaches of contract and penalize packers and swine contractors to deter these behaviors and to protect the public from these harms.[131]

To be clear, this proposal would not make every commercial dispute into a P&S Act matter. Rather, this regulation proposes a specific framework under which claims—including ones involving a breach of contract—of unfair practices under the P&S Act would be analyzed.

F. Protected Parties

This proposed rule does not limit its protection against unfair conduct by regulated entities to enumerated individuals, like producers or consumers, because the Act protects anyone that suffers a violation of the P&S Act. Section 202(a) of the Act bans unfair practices in the entire market for livestock, meats, meat food products, livestock products in unmanufactured form, and live poultry. Further, P&S Act section 308(a) holds all regulated entities liable for any consequential damages to the persons injured: ''[i]f any person subject to this chapter violates any of the provisions of this chapter . . . he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.'' [132]

The Secretary has brought administrative cases under section 202(a) based on the full spectrum of market behaviors that have injured its participants. This has included practices that injured livestock sellers, livestock dealers, market agencies, stockyards, live poultry dealers, packers, retailers, and consumers.[133]

Thus, this proposed rule is intended to capture everyone that Congress intended to protect, which includes any person injured by a violation of section 202(a).

IV. Severability

This proposed regulation contains four provisions; the inclusion of each is intended to clarify the P&S Act, and thus strengthen the Act's protections against unfair treatment in agricultural markets. The proposed regulation provides guidance to market participants, regulated entities, presiding courts and USDA when determining whether specific conduct is unfair under section 202(a) of the P&S Act. Although each proposed provision serves to further these effects, the benefits this proposed rule seeks to provide would not be negated by the exclusion of one or more of its provisions as finalized.

For example, proposed § 201.308(a), ''Unfair practices with respect to market participants,'' would still function without proposed § 201.308(c), ''Unfair practices with respect to markets,'' and vice versa. The clarifying provisions of proposed § 201.308(b) and (d) are also severable. While AMS included all the provisions to clarify the term ''unfair'' under the Act, the purpose of the regulation is not lost if a court severs a provision of the rule as finalized. The remaining provisions would still function sensibly and inform the interpretation of the Act.

V. Request for Comments

AMS invites comments on this proposed rule. Comments submitted on or before August 27, 2024 will be considered. Comments should reference Docket No. AMS–FTPP–21–0046 and the date and page number of this issue of the **Federal Register**. AMS seeks comment on the following subjects:

1. Do the two tests described in this proposed rule appropriately guide enforcement of ''unfair practices'' under section 202(a) of the P&S Act?

2. What modifications to the proposed rule would be appropriate to meet the goals of the P&S Act?

3. Are the factors described in the proposed rule to contextualize the two tests appropriate? If not, are certain factors more appropriate to one or the other test?

4. What other relevant factors may be considered in addition to or instead of the current factors?

5. Should the Department add regulatory text to define legitimate business justifications? If so, who should bear the burden of proof and what constitutes a cognizable justification?

6. Should the rulemaking consider: (a) whether the method of competition is so facially unfair that business justifications should not be entertained; (b) whether the party claiming a business justification must show that the asserted justification for the method of competition is legally cognizable, non-pretextual, and narrowly tailored to bring about a benefit while limiting the harm to the competitive process and to market participants; or (c) whether the party claiming a justification must show that the claimed benefit occurs in the same market where harm is alleged?

7. Does the proposed rule appropriately define what behavior is ''reasonably avoidable''? Should this language be delineated more precisely or more broadly or in other ways, and if so, how?

8. Should AMS provide additional guidance around incipient harms to the market, and if so, should AMS draw from Clayton Act standards,[134] such as whether the effect ''may be substantially to lessen competition, or to tend to create a monopoly.'' [135]

9. What benefits would this proposed rule provide for producers or other persons?

10. What burdens would this proposed rule create for regulated entities?

11. What is your preferred way to measure countervailing benefits?

12. Should some things be categorically excluded from consideration as countervailing benefits, such as cross-market balancing?

13. How would you describe conduct that is oppressive?

14. How would this proposed rule affect competitive conditions in the livestock and poultry industries?

15. Should the proposed rule treat private causes of action differently from violations of section 202(a) of the Act when enforced by the Federal Government, and if so, how?

16. Would this proposed rule have any other effects on the market or market participants? If so, in what ways should they be addressed?

Comments can be submitted by either of the following methods:

Federal eRulemaking Portal: Go to *https://www.regulations.gov.* Enter AMS–FTPP–21–0046 in the Search field. Select the Documents tab, then

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[131] See section 203 of the P&S Act, which grants the Secretary the authority to order respondents to cease and desist and pay civil penalties (7 U.S.C. 193).

[132] 7 U.S.C. 209.

[133] *In re: Larry W. Peterman, d/b/a Meat Masters.,* 42 Agric. Dec. 1848, 1868 (1983) (injury to individual consumers); *In re: ITT Cont'l Baking Co.,* 44 Agric. Dec. 748, 772 (1985) (injury to competitors, packers and the retailer); *In re: Excel Corp.,* No. P. & S. Docket No. 99–0010., 2003 WL 205562 U.S.D.A. Jan. 30, 2003) (injury to producers); In Re: Empire Kosher Poultry, Inc., No. P & S Docket No. D–10–0109, 2010 WL 7088565 (U.S.D.A. July 20, 2010), *aff'd Empire Kosher Poultry, Inc.* v. *United States Dep't of Agric.,* 475 F. App'x 438, 444 (3d Cir. 2012) (injury to consumers).

[134] 15 U.S.C. 18.

[135] See, *e.g.,* Phila. Nat'l Bank, 374 U.S. at 363 (1963) (Stating that a merger resulting in a market share of 30% still ''presents a threat'' and causes ''undue concentration''). United States v. First Nat'l Bank of Lexington, 376 U.S. 665 (1964) (Stating that ''the elimination of significant competition between [merging parties]'' violates Section 1 of the Sherman Act: ''It [can be] enough that the two . . . compete[ ]. That their competition [is] not insubstantial and that the combination [would] put an end to it''). *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 229–30 (1993) (Stating that ''excessive concentration[ ] and the oligopolistic price coordination it portends may be the injury to competition the Act prohibits''). Marine Bancorporation, 418 U.S. at 623–624 (Suggesting that acquisition of ''perceived potential competition may substantially lessen competition or tend to create a monopoly'').

select the Comment button in the list of documents.

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

VI. Regulatory Analysis

A. Paperwork Reduction Act

Proposed § 201.308 defines how AMS evaluates unfair acts or practices and unfair methods of competition under section 202(a) the P&S Act. Proposed § 201.308 does not impose any information collection or recordkeeping requirements on any regulated entity or member of the public. Accordingly, approval by the Office of Management and Budget (OMB) is not required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

B. Executive Orders 12866, 13563, and 14094

AMS is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means.

This rulemaking has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been accordingly reviewed by the OMB. As a required part of the regulatory process, AMS prepared an economic analysis of the costs and benefits of proposed § 201.308.

C. Regulatory Impact Analysis

AMS proposes to establish § 201.308 to define how AMS evaluates unfair acts or practices and unfair methods of competition under section 202(a) the P&S Act. The term ''unfair'' has caused confusion and contention in the industry and in courts, and this rulemaking is intended mitigate both.

Paragraph (a) of proposed § 201.308 defines an unfair act or practice as one that causes or will likely cause substantial injury to a market participant, which the market participant could not reasonably avoid but is not justified by countervailing benefits to market participants or competition. Paragraph (b) includes factors the Secretary of Agriculture may consider in evaluating whether an unfair act or practice is likely to cause substantial injury. Factors include the extent to which an act or practice impedes or restricts the ability to participate in the market, the extent to which an act or practice subverts competitive market forces, the size of any potential injury, and the extent to which the act or practice interferes with free decision making.

Paragraph (c) of proposed § 201.308 defines an unfair practice with respect to markets as a practice that is collusive, coercive, predatory, restrictive, deceitful, or exclusionary method of competition that may negatively affect competitive conditions.

AMS intends for proposed § 201.308 to be consistent with the way USDA has interpreted section 202(a) of the Act for decades. The preamble for this rulemaking explains how USDA has defined ''unfair'' in past actions and how those actions are consistent with the interpretation of ''unfair'' in proposed § 201.308. Concerning USDA's interpretation and enforcement of ''unfair'' in section 202(a) of the Act, AMS does not expect proposed § 201.308 to change USDA's position on enforcement of section 202(a).

Proposed § 201.308 is made of two parts. Paragraphs (a) and (b) of proposed § 201.308 concern unfair practices with respect to market participants. Paragraphs (c) and (d) concern unfair practices with respect to markets. The two parts have some similarities, and some overlapping protections. Neither part requires that proof of completed or market wide harm to competition to find a violation of the Act. This is consistent with USDA's longstanding interpretation and enforcement of the Act, but it is not consistent with all Federal court decisions.

Proposed § 201.308 addresses unfairness. Unfairness is not an economic term, and it is not among the market failures that OMB has defined in Circular A–4. Some of the factors in proposed § 201.308 are intended to limit the exercise market power. But proposed § 201.308 also regulates practices unrelated to market power.

Exercise of market power has long been a problem in the meat packing industry. From the 1880s to 1920, a series of investigations found the largest meat packers controlling prices through a variety of methods. Those findings were much of the reason that Congress passed the Act in 1921.[136]

Market power in livestock, meat, and poultry markets has not gone away. Academic and government sponsored research has consistently found that meat packers have some measure of market power, especially as livestock buyers. Livestock and poultry markets are characterized by atomistic livestock producers and poultry growers numbering in the tens of thousands that deal with a much smaller number of downstream packers and poultry processors that may possess some oligopsonistic characteristics. Table 1 below lists four-firm concentration ratios for fed cattle, hogs, chickens, and turkeys for 2010 through 2019. The concentration ratios were relatively stable over this period. The fed cattle industry has been the most concentrated with four firms controlling between 83 and 85 percent for the entire period.

TABLE 1—FOUR-FIRM CONCENTRATION RATIO IN LIVESTOCK AND POULTRY SLAUGHTER *

Year	Fed cattle (%)	Hogs (%)	Chickens (%)	Turkeys (%)
2010	85	65	51	56
2011	85	64	52	55
2012	85	64	51	53
2013	85	64	54	53
2014	83	62	51	58
2015	85	66	51	57

[136] Azzam, Azzadine and Anderson, Dale. May 1996. ''Assessing Competition in Meatpacking, Economic History, Theory, and Evidence.'' USDA, GIPSA. *https://www.gipsa.usda.gov/psp/publication/con_tech%20report/rr96-6.pdf.*

TABLE 1—FOUR-FIRM CONCENTRATION RATIO IN LIVESTOCK AND POULTRY SLAUGHTER *—Continued

Year	Fed cattle (%)	Hogs (%)	Chickens (%)	Turkeys (%)
2016	84	66	50	57
2017	83	66	51	53
2018	84	70	54	55
2019	85	67	53	55

* U.S. Department of Agriculture, AMS Packers and Stockyards annual reports. Available at *https://www.ams.usda.gov/reports/psd-annual-reports* (last accessed 8/9/2022).

The nature of livestock production compounds the market power problems. When livestock, are ready for slaughter, whether they are cattle, hogs, or lambs, they must go to the packer within a few weeks, or the quality starts to decrease. As the quality of the livestock fades, producers pay the costs of continuing to feed livestock while the value decreases. As a result, livestock producers are relatively determined sellers who have a limited capacity to wait for market conditions to change.

Market power in livestock, meat, and poultry markets is a continuing problem that USDA has regulated through the Act since the 1920s. USDA has consistently established the rules and regulations necessary to maintain fair and competitive markets, including protecting producers from marketplace abuses and injuries they could not avoid. One example is § 201.70, which requires packers to conduct their livestock buying operations independently and in competition with other packers.[137] Proposed § 201.308 is another step in the ongoing regulation of competition in the livestock, meat, and poultry markets. Proposed § 201.308 is designed to mitigate market power and the implications of market power especially on producers. It would also address fair trade practices in the marketplace generally. Unlike many of the regulations under the Act, proposed § 201.308 does not place any specific requirements on packers, live poultry dealers, or swine contractors.

Instead, it is a method of evaluating acts, practices, and methods of competition to determine if they are violations of the Act. Proposed § 201.308 would be a new regulation, and USDA has not articulated the factors in proposed § 201.308 in enforcing violations of the Act in the past.

USDA has asserted that a violation of the Federal antitrust laws may also violate the Packers and Stockyards Act but that the Packers and Stockyards Act's prohibition on unfair practices incorporates trade practices beyond those covered by the Federal antitrust laws. AMS expects that proposed § 201.308 will improve its enforcement of the Act and make livestock, meat, and poultry markets more competitive.

[137] Source: 24 FR 3183, Apr. 24, 1959.

Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible regulatory alternatives and an explanation of why the planned regulatory action is preferable to the potential alternatives. Including proposed § 201.308, AMS considered four regulatory alternatives. The first alternative that AMS considered is to maintain the *status quo* and not propose the new rule. The second alternative that AMS considered is to propose § 201.308 as presented in this rulemaking. This second alternative is AMS's preferred alternative as will be explained below.

The third alternative that AMS considered is limiting the scope of proposed § 201.308 to contain only paragraphs (a) and (b) that concern unfair acts and practices of the currently proposed § 201.308. In other words, this limited scope alternative would limit the scope of the proposed regulation by eliminating paragraphs (c) and (d) which prohibit unfair practices with respect to markets.

AMS considered a fourth alternative of issuing a statement of general policy rather than a new regulation, but AMS chose to propose a regulation because it expects that a regulation will be more effective. Proceeding by regulation also affords all market participants an opportunity to give input on the proposed regulation. AMS did not estimate costs and benefits for a statement of general policy, but AMS estimated costs and benefits for proposed § 201.308 and for the limited scope alternative.

The proposed rule and the limited scope alternative have some similarities but proposed § 201.308 is more comprehensive. It would restrict unfair practices with respect to markets and individual market participants while the limited scope alternative would only restrict unfair practices with respect to market participants.

For either proposed § 201.308 or the limited scope alternative, AMS was not able to estimate indirect costs or indirect benefits that might accrue from the proposed rule. AMS was able to estimate direct costs associated with proposed § 201.308 and the limited scope alternative. Those costs are largely comprised of regulated entities reviewing their own practices for compliance with the new regulation. The cost of reviewing practices is expected to be similar whether regulated entities review for compliance with proposed § 201.308 or the limited scope alternative. AMS does not expect that regulated packers, live poultry dealers, or swine contracts will need to make costly immediate changes in their current practices as a result of the proposed rule's implementation because the proposed rule serves as a framework for agency analysis and enforcement to address problematic practices as they may arise, rather than as a mandate to ameliorate specifically identified practices at present.

With similar direct costs and uncertain indirect costs, AMS prefers the more comprehensive proposed § 201.308 over the limited scope alternative. It is more consistent with the administration's policy goals and more consistent with policies of other Federal agencies, such as the Federal Trade Commission.

Proposed Rule: Benefits

AMS expects that proposed § 201.308 will improve its regulation of livestock, meat, and poultry markets, making the markets more competitive and fairer. Applying a quantified dollar value to the improvement would be a difficult task. Because proposed § 201.308 is a method of evaluating acts, practices, and methods of competition, the value of any improvements would depend on many unknown factors.

AMS expects that benefits of proposed § 201.308 would accrue to livestock producers, poultry growers, and consumers. To the extent that predatory practices are prevented,

smaller packers, live poultry dealers, or swine contractors may benefit. Economic models of market power involve a deadweight loss to society as well transfers from producers, consumers, or both to the firms exerting market power. To the extent that proposed § 201.308 reduces acts, practices, and unfair methods that limit competition, society will benefit from the reduction in the deadweight loss, which is a loss to society due to a misallocation of resources. Livestock producers, poultry growers, consumers, competing packers, or all four might benefit from a reduction in the deadweight loss. Competition models also have a transfer component, in which income is transferred to firms exerting market power.

As an example of potential benefits from improving competition, AMS estimated economic gains in losses for a range of hypothetical changes in market power in cattle and beef markets. Estimated gains are not available for the other livestock, meat, and poultry markets. These values are not estimates of benefits of proposed § 201.308. They are only examples that indicate possible benefits of improving competitive conditions.

Table 2 presents the economic changes in packer market power for cattle associated with changing level of market competition, where baseline price and quantity information are for 2023 and are from USDA's November 2023 edition of World Agricultural Supply and Demand Estimates.[138] The economic model to estimate the economic impacts is from Hadechek, Ma, and Sexton as are all the model parameters except for the WASDE data.[139] The model assumes buyer and seller market power parameters falling in the range of 0 to 1. While these are not tied to a particular form of competition, a value of 0.15 would be what the Department of Justice and FTC regard as moderate firm concentration under their joint their 2023 Merger Guidelines and 0.30 would be well into the range that it considers as highly concentrated.[140] The value of 0.15 corresponds to a Hirschman-Herfindahl index (HHI) of approximately 1,500, and 0.3 corresponds to HHI value of approximately 2,500 to 3,300, which is well above the value of 1,800 that is considered highly concentrated market in the 2023 Merger Guidelines.[141] While the intent of this proposed rule is to lower incidence of practices that are harmful to competition, one cannot discount the possibility that litigation spurred by the proposed rule could deter entry or cause firms to leave the market and hinder innovative or even practices that make the market more competitive or more efficient.

The analysis in the table below holds seller market power fixed at 0.15 and has output under packer market power parameters of 0.15 in section A and 0.30 in section B. In both sections, results are provided for 1 and 3 percent decreases in the market power parameter for the beef packer. A 3 percent change in market power is likely on the high side given that USDA does not expect that packers, live poultry dealers or swine contractors will make large changes as a result of proposed § 201.308. With the assumed decreases and base levels of market power, production increases, retail prices decrease, and the producers' price of cattle increases with a decrease in market power. With a decrease in market power, gross returns to cattle producers increase and processor variable profits (*i.e.,* not including fixed costs) decrease. Total market benefits (the producer plus consumer surplus line) increase with a decrease in market power. When the packer market power parameter decreases by 3 percent, deadweight loss decreases $26 million and $54 million when the buyer market power parameter is 0.15 and 0.30, respectively.

To put some perspective of the size of the deadweight loss changes relative to the market value of cattle sold for slaughter, even their largest changes in table 2 are 0.18 percent the size of the forecasted value of cattle production for 2023 from USDA's November 2023 *World Agricultural Supply and Demand Estimate.*[142] Note that while the percent change in market power are in the same in parts A and B of the table, the economic impacts are larger in part B as the baseline level of market power is higher in there.

[138] Source: USDA, ''World Agricultural Supply and Demand Estimates,'' WASDE–642, November 9, 2023.

[139] Hadachek, Jeffrey, Meilin Ma, and Richard J. Sexton. 2023. ''Market Structure and Resilience of Food Supply Chains under Extreme Events.'' *American Journal of Agricultural Economics* 1–24. *https://doi.org/10.1111/ajae.12393.*

[140] Ibid.

[141] Ibid.

[142] USDA, ''World Agricultural Supply and Demand Estimates,'' WASDE–642, November 9, 2023.

TABLE 2—EXAMPLE OF ECONOMIC IMPACTS OF CHANGING MARKET POWER IN CATTLE AND BEEF MARKETS

Market response	Three percent decrease in market power	One percent decrease in market power
A. Base buyer power parameter = 0.15 Base seller power parameter = 0.15		
Change in seller market power	0.00%	0.00%
Change in production	0.09%	0.03%
Change in retail price	−0.09%	−0.03%
Change in farm price	0.09%	0.03%
Change in producer plus consumer surplus	0.17%	0.06%
Change in deadweight loss (million $)	−$26	−$9
Change in producer gross revenue (million $)	$55	$18
Change in producer gross revenue	0.18%	0.06%
Change in packer variable profits (million $)	−$66	−$22
Change in packer variable profits	−0.13%	−0.04%
B. Base buyer power parameter = 0.30 Base seller power parameter = 0.15		
Change in seller market power	0.00%	0.00%
Change in production	0.18%	0.06%
Change in retail price	−0.16%	−0.05%
Change in farm price	0.18%	0.06%
Change in producer plus consumer surplus	0.32%	0.11%
Change in deadweight loss (million $)	−$54	−$18
Change in producer gross revenue (million $)	$106	$35
Change in producer gross revenue	0.4%	0.1%
Change in packer variable profits (million $)	−$120	−$40
Change in packer variable profits	−0.24%	−0.08%

Proposed § 201.208 would apply to all livestock, meat, and poultry industries, including hogs and pork, sheep and lamb, and poultry. Although AMS is only providing an example for cattle and beef markets, AMS would also expect benefits from a more competitive market in each of the livestock, meat, and poultry industries. Sizes of the changes would be different due to differences in size and structure of other livestock, meat, and poultry markets, but potentially much larger than the expected direct costs associated to § 201.308.

Proposed Rule: Costs

Direct Administrative Costs of the Proposed Rule

AMS is not able to make quantified estimates of indirect costs or benefits associated with proposed § 201.308. However, AMS is able to estimate direct costs associated with proposed § 201.308. AMS expects that packers, swine contractors, and live poultry dealers will incur direct administrative costs of reviewing and learning the proposed rule, assessing any impacts on their business operations, and then reviewing marketing and production contracts to ensure compliance with proposed § 201.308. Direct administrative costs are estimated below for (1) firm level costs to learn and review the proposed rule and assess any impacts on their business operations; and (2) in contract level costs to review production and marketing contracts to ensure compliance with the proposed rule. AMS expects that the firm level and contract level costs are one-time costs to be incurred the first year the rule would be effective and that these costs will not be recurring costs. These estimates do not include any costs or benefits associated with changes in practices resulting from either firm level or contract level reviews.

Direct Firm Level Administrative Costs of the Proposed Rule

AMS expects that proposed § 201.308 will prompt packers, live poultry dealers, and swine contractors to incur one-time costs to first review and learn the rule and then assess any impacts on their business operations. Firm level costs are estimated as the total value of the time required to review and learn the proposed rule and to assess any impacts on their business operations.

AMS expects the direct administrative costs of complying with proposed § 201.308 will be relatively small. Proposed § 201.308 is consistent with long held USDA policy, although the position has not yet been established in regulations. Consequently, AMS expects packers, live poultry dealers, and swine contractors to make relatively few changes to their business operations and production and marketing contracts.

AMS estimated firm level administrative costs by identifying the regulated entity staff that will be involved in reviewing and learning the proposed rule, assessing any impacts on their business operations, estimating the respective time requirement for each regulated entity profession, and obtaining estimates of hourly costs for each profession. AMS expects most of the time at the firm level will come from meetings with company executives, their assistants, and legal staff to review the proposed rule and assess any impacts on their business operations. At the contract level, most firms maintain their production and marketing contracts in an electronic format and IT staff will be needed to provide access to all contracts in the contract review process. Managers, assistants, and legal staff will then review the contracts to ensure compliance with the proposed rule. Multiplying estimated hours required by estimated hourly costs will yield total costs by profession, which is then summed across professions to obtain total firm level administrative costs.

Firm level and contract level estimates of the amount of time required to review and learn the proposed rule, assess impacts on business operation, and to review contracts were provided by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in AMS's PSD conducting investigations and compliance reviews of regulated entities. AMS used data from the Bureau of Labor Statistics (BLS) Occupational

Employment and Wage Statistics, released in May 2022, for the time values in this analysis.[143] BLS estimated an average hourly wage for an administrative assistant salary in animal slaughtering and processing at $20.64 per hour. The average hourly wage for managers in animal slaughtering and processing is $61.24 per hour. The average hourly wage for IT system managers in animal slaughtering and processing is $66.07 per hour. The average hourly wage for lawyers in food manufacturing is $103.81 per hour. In applying the cost estimates, AMS marked-up the wages by 41.79 percent[144] to account for fringe benefits.

For firm level costs, AMS expects that on average, each poultry dealer, beef packer, pork packer, and swine contractor will spend 20 hours of administrative assistant time, 40 hours of management time, 5 hours of IT systems manager time, and 40 hours of legal time to learn the proposed rule and assess any impacts on their business operations.

For firm level costs, AMS estimated the number of regulated entities impacted, that is, the number of live poultry dealers, livestock packers, and swine contractors, from information PSD receives in its required forms. Live poultry dealers are currently required to file form PSD 3002, ''Annual Report of Live Poultry Dealers,'' OMB control number 0581–0308, with AMS. Ninety live poultry dealers filed annual reports with AMS for their 2021 fiscal year. Livestock packers are currently required to file form PSD 3004, ''Annual Report of Packers'' OMB control number 0581–0308, with AMS. Among other things, each packer reports the number of head of cattle or calves, hogs, and lamb, sheep, or goats that it processed. Three hundred sixty-five packers that processed cattle or calves, hogs, or lamb, sheep or goats filed reports or were due to file a report with AMS for their fiscal year 2021. Two hundred sixty-one were beef or veal packers, 196 were pork packers, and 139 were lamb, sheep, or goat packers.[145] The number of beef, pork, and lamb packers do not sum to 365 because many firms slaughtered more than one species of livestock. For instance, 345 packers slaughtered both beef and pork.

AMS estimated that on average, live poultry dealers that are regulated under the proposed rule will require 20 hours of administrative time at $29.27 per hour costing the industry $53,000[146]; 40 hours of management time at $86.83 per hour costing the industry $313,000[147]; 5 hours of IT systems managers' time at $93.68 per hour costing the industry $42,000[148]; and 40 hours of an attorney's time at $147.19 per hour costing the industry $530,000[149] for learning and reviewing the proposed rule and assessing any impacts on their business operations. The total cost for poultry dealers to learn and review the proposed rule is estimated to be $937,000.[150]

AMS utilized similar calculations to estimate the costs to packers and swine contractors, as shown in the table below. The estimated total costs will be $2.72 million[151] for beef packers, $8.93 million[152] for pork packers and swine contractors, and $1.45 million[153] for lamb packers. The cost to pork packers is an expected $2.04 million and $6.88 million to swine contractors. Total firm level costs across all entities totals $13.13 million.

TABLE 3—FIRM LEVEL, CONTRACT LEVEL AND TOTAL ADMINISTRATIVE COSTS IN THE PROPOSED § 201.308 ($ MILLIONS)—PREFERRED ALTERNATIVE

Cost	Live poultry dealers	Beef packers	Pork packers and swine contractors	Lamb packers *	Total cost **
Firm Level Administrative Costs	$0.94	$2.72	$8.93	$1.45	$14.03
Contract Level Administrative Costs	4.11	0.20	1.79	0.00	6.11
Total Administrative Costs in 2025	5.05	2.92	10.72	1.45	20.14
10-year PV at 3 percent	4.90	2.83	10.41	1.41	19.55
10-year PV at 7 percent	4.72	2.73	10.02	1.35	18.82
Annualized costs at 3 percent	0.57	0.33	1.22	0.16	2.29
Annualized costs at 7 percent	0.67	0.39	1.43	0.19	2.68

* Lamb contracts are structured differently and not counted here.
** Column and rows may not sum to total due to rounding.

[143] Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available *https://www.bls.gov/oes/special-requests/oesm22all.zip* (accessed 7/14/2023).

[144] U.S. Bureau of Labor Statistics, Employer Costs for Employee Compensation—March 2023, released June 16, 2023, USDL–23–1305, table 1, p. 4. *https://www.bls.gov/news.release/pdf/ecec.pdf* (accessed 7/14/2023).

[145] For brevity, all beef and veal packers will be collectively referred to as beef packers and all lamb, sheep, and goat packers will be collectively referred to as lamb packers.

[146] 90 live poultry dealers × $29.27 per hour × 20 hours = $52,686.

[147] 90 live poultry dealers × $86.83 per hour × 40 hours = $312,588.

[148] 90 live poultry dealers × $93.68 per hour × 5 hours = $42,156.

[149] 90 live poultry dealers × $147.19 per hour × 40 hours = $529,884.

[150] Firm level cost for live poultry dealers is the sum of costs across professions: $52,686 (administrative assistants) + $312,588 (managers) + $42,156 (IT system managers) + $529,884 (attorneys).

[151] Firm level cost for beef packers: (261 beef packers × $29.27 per hour for administrative assistants × 20 hours) + (261 beef packers × $86.83 per hour for managers × 40 hours) + (261 beef packers × $93.68 per hour for IT specialists × 5 hours) + (261 beef packers $147.19 per hour attorney time × 40 hours).

[152] Total firm level cost to pork markets: $2,041,262 (pork packers) + $6,884,051 (swine contractors) = $8,925,312. Firm level cost for pork packers: (196 pork packers × $29.27 per hour for administrative assistants × 20 hours) + (196 pork packers × $86.83 per hour for managers × 40 hours) + (196 pork packers × $93.68 per hour for IT specialists × 5 hours) + (196 pork packers $147.19 per hour attorney time × 40 hours). Firm level cost for swine contractors: (661 swine contractors × $29.27 per hour for administrative assistants × 20 hours) + (661 swine contractors × $86.83 per hour for managers × 40 hours) + (661 swine contractors × $93.68 per hour for IT specialists × 5 hours) + (661 swine contractors × $147.19 per hour attorney time × 40 hours).

[153] Firm level cost for lamb packers: (139 lamb packers × $29.27 per hour for administrative assistants × 20 hours) + (139 lamb packers × $86.83 per hour for managers × 40 hours) + (139 lamb packers × $93.68 per hour for IT specialists × 5 hours) + (139 lamb packers $147.19 per hour attorney time × 40 hours).

Direct Contract Level Administrative Costs of the Proposed Rule Preferred Alternative

This section estimates the costs associated with reviewing production and marketing contracts to ensure compliance with proposed § 201.308, after learning and reviewing the proposed rule and assessing any business impacts. The total cost to review contracts is estimated by multiplying the number of contracts in each industry by the estimated hours for regulated entity professionals to review the contracts and by the hourly cost of each profession.

AMS estimated that there are 23,047 broiler grower agreements, 8,094 swine production agreements,[154] 1,960 hog marketing agreements,[155] and 1,116 feedlot agreements.[156] AMS does not estimate sheep production or marketing agreements because they are structured differently than contracts for other species and would not need to be reviewed under this proposed rule.

The time requirement by each regulated entity professional to review production and marketing contracts would be less than the time requirement in learning and reviewing the proposed rule assessing any business impacts. AMS estimates that it will take 0.5 hours each for administrative assistants, managers, IT system managers, and attorneys to review the production and marketing contracts in the respective livestock and poultry industries.

The table above shows that the contract level administrative costs of reviewing the contracts are $4.11 million for poultry dealers,[157] $199,000 for beef packers,[158] $350,000 for pork packers,[159] and $1.44 million for swine contractors.[160] Lamb contracts are structured differently from other species' contracts, are mainly fixed-price contracts, and are not expected to be reviewed under this proposed rule. The total administrative cost of reviewing contracts is $6.11 million.[161]

Direct Firm Level and Contract Level Administrative Costs of the Proposed Rule Preferred Alternative

Total administrative industry costs are presented in the table above. The description of estimated firm level and contract level administrative costs were presented above. AMS expects that producers will not face any costs from the proposed rule. Firm level costs to learn the proposed rule and assess any impacts on business operations are estimated to be $14.03 million and the contract level costs to review production and marketing contracts are estimated to be $6.11 million, for a total estimated administrative cost of $20.14 million in the proposed rule. AMS expects that the firm level and contract level costs which comprise the total administrative industry costs are one-time costs to be incurred the first year the proposed rule would be effective and that these costs will not be recurring costs.

Litigation Costs—Preferred Alternative

AMS believes that proposed § 201.308 may possibly reduce litigation due to the clarity provided by the proposed rule as to the unfair practices with respect to market participants and markets that violate the Act. However, the proposed rule possibly increases litigation to the extent that AMS or producers are better able to identify unfair practices and thus may be more likely to seek relief in courts. AMS is uncertain as to which of these offsetting effects will dominate and to what extent. Therefore, AMS does not estimate litigation costs in this analysis.

Indirect Costs

AMS is unable to quantify any costs or benefits that would arise from changing business practices due to proposed § 201.308. If AMS's enforcement of proposed § 201.308 has the effect of improving competitive conditions in the markets, then the changing market conditions would likely result in a reduction in welfare for packers and live poultry dealers and an increase for producers and consumers. These would be costs to packers and live poultry dealers, and would be offset by gains for consumers, growers, and producers.

Changing competitive conditions could have production efficiency effects, which may or may not be larger than market power effects,[162] *e.g.,* decreasing market power could result in more smaller packers with higher production costs per unit. Hence, a full accounting of net benefits would involve analysis of demand and supply changes.

Costs and Benefits of the Limited Scope Alternative

The alternative is the same as the preferred alternative, with the exception that the alternative would limit the scope of the proposed rule to § 201.308(a) and (b). Section 201.308(c) and (d) from the preferred alternative would not be part of the limited scope alternative.

Proposed § 201.308(a) protects market participants from the type of unjustified acts or practices that produce unavoidable injury that cannot be justified by countervailing benefits to producers or to competition. Proposed § 201.308(b) provides criteria under which likely injuries must be halted before actual injury occurs.

Proposed § 201.308(a) defines unfair practices as those that injure market participants, while § 201.308(c) defines unfair practices as those that result in harms to the market. Both sections of the preferred alternative define ''unfair'' from slightly different vantage points. Combining these provisions results in a more comprehensive definition of the term ''unfair.''

While AMS believes the inclusion of both provisions fully define the meaning and applicability of the term ''unfair'' under the Act, AMS considered a regulatory alternative of severing § 201.308(a) and (b) from

[154] USDA, National Agricultural Statistics Service, ''2022 Census of Agriculture: United States Summary and State Data,'' issued February 2024, table 24.

[155] An estimated 10 marketing agreements per pork packing plant × 196 pork packers.

[156] 1,829 feedlots over 1,000 head (2022 Census of Agriculture, table 13) × an estimated 61% (the number of feedlots utilizing formula pricing).

[157] Total contract level costs for poultry dealers, $4,113,544 = (23,047 poultry dealer contracts × $29.27 per hour for administrative assistants × 0.50 hours) + (23,047 poultry dealer contracts × $86.83 per hour for managers × 0.50 hours) + (23,047 poultry dealer contracts × $93.68 per hour for IT specialists × 0.50 hours) + (23,047 poultry dealer contracts × $147.19 per hour attorney time × 0.50 hours).

[158] Total contract level costs for beef packers, $199,134 = (1,116 beef packer contracts × $29.27 per hour for administrative assistants × 0.50 hours) + (1,116 beef packer contracts × $86.83 per hour for managers × 0.50 hours) + (1,116 beef packer contracts × $93.68 per hour for IT specialists × 0.50 hours) + (1,099 beef packer contracts × $147.19 per hour attorney time × 0.50 hours).

[159] Total contract level costs for pork packers, $349,833 = (1,960 pork packer contracts × $29.27 per hour for administrative assistants × 0.50 hours) + (1,960 pork packer contracts × $86.83 per hour for managers × 0.50 hours) + (1,960 pork packer contracts × $93.68 per hour for IT specialists × 0.50 hours) + (1,960 pork packer contracts × $147.19 per hour attorney time × 0.50 hours).

[160] Total contract level costs for swine contractor, $1,440,660 = (8,094 swine contractors contracts × $29.27 per hour for administrative assistants × 0.50 hours) + (8,094 swine contractors contracts × $86.83 per hour for managers × 0.50 hours) + (8,094 swine contractors contracts × $93.68 per hour for IT specialists × 0.50 hours) + (8,094 swine contractors contracts × $147.19 per hour attorney time × 0.50 hours).

[161] Total contract level costs, $6,107,170 = $4,113,544 million for poultry dealers + $199,134 for beef packers + $349,833 for pork packers + $1,440,660 for swine contractors.

[162] U.S. General Accountability Office, ''U.S. Agriculture: Retail Food Prices Grew Faster Than the Prices Farmers Received for Agricultural Commodities, but Economic Research Has Not Established That Concentration Has Affected These Trends,'' GAO–09–746R, June 2009.

§ 201.308(c) and (d) and eliminating § 201.308(c) and (d) as a viable regulatory alternative. A rule of that kind meets many of the policy goals for this rulemaking. What this regulatory alternative does not do is to define unfair practices as those that result in harm to the market. Thus, this regulatory alternative provides is less comprehensive compared to the preferred alternative.

In terms of the costs of complying with the limited scope alternative, the costs are similar, but slightly smaller than the preferred alternative. AMS expects that regulated entities will still need to spend time understanding the limited scope alternative, its impacts on its business operations, and will still need to review all contracts to ensure compliance with the proposed rule. Given the amount of overlap in defining the term ''unfair'' in the preferred alternative, AMS expects that regulated entities will need to spend 90 percent of the time to review the limited scope alternative, assess the impact of its businesses, and review contracts for compliance with the alternative rule.

AMS expects that under the limited scope alternative live poultry dealers, packers and swine contractors expend 90 percent of the time in firm level administrative costs in learning and reviewing the alternative rule and assessing any impacts on their business operations, and 90 percent of the time in reviewing contracts. The time requirement for administrative assistants is expected to be 18 hours, 36 hours for managers, 4.5 hours for IT systems support and 36 hours for attorneys. The time requirement of reviewing production and marketing contracts is expected to be 0.45 hours for each profession. It is expected that the respective regulated entities reviewing the rule and assessing business impacts will be the same as in the preferred alternative, and their respective hourly compensation will remain the same as in the preferred alternative. The number of live poultry dealers, packers and swine contractors will also remain the same as in the preferred alternative.

The estimated firm level costs will be $0.84 million for poultry dealers,[163] $2.45 million for beef packers,[164] and $8.03 million for pork packers and swine contractors,[165] and $1.30 million for lamb packers.[166] The firm level cost for pork packers is $1.84 million and $6.20 million for swine contractors. Total firm level costs across all entities total $12.63 million.[167]

TABLE 4—FIRM LEVEL, CONTRACT LEVEL AND TOTAL DIRECT COSTS FOR PROPOSED § 201.308 ($ MILLIONS)—LIMITED SCOPE ALTERNATIVE

Costs	Live poultry dealers	Beef packers	Pork packers and swine contractors	Lamb packers *	Total costs **
Firm level administrative costs	$0.84	$2.45	$8.03	$1.30	$12.63
Contract level administrative costs	3.70	0.18	1.62	0.00	5.50
Total administrative costs in 2025	4.55	2.63	9.65	1.30	18.12
10-year PV at 3 percent	4.41	2.55	9.37	1.26	17.59
10-year PV at 7 percent	4.25	2.45	9.02	1.22	16.94
Annualized costs at 3 percent	0.52	0.30	1.10	0.15	2.06
Annualized costs at 7 percent	0.60	0.35	1.28	0.17	2.41

* Lamb contracts are structured differently and thus not included here.
** Rows may not sum to Total Costs due to rounding.

The contract level administrative costs are also presented in the table above. AMS estimated that it will cost poultry dealers $3.70 million,[168] $0.18 million for beef packers,[169] $1.62 million for pork packers and swine contractors,[170] and no cost to lamb packers. It is expected that lamb packers will not incur a contract level administrative cost because production and marketing contracts are structured differently, and it is not expected that the contracts will be reviewed. The contract level cost for pork packers is $315,000 and $1.30 million for swine contractors. The total contract level administrative cost is expected to be $5.50 million.[171]

As shown in the table above, the 10-year PV costs at three percent for the proposed limited scope alternative is expected to be $17.59 million. The total cost to the poultry industry is expected to be $4.55 million, $2.62 million for beef packers, $9.65 million for pork packers and swine contractors, and $1.3 million for the lamb packers. The 10-year PV costs at seven percent for the proposed limited scope alternative is expected to be $16.94 million.

The benefits of the limited scope alternative are similar to the benefits of the preferred alternative, since both alternatives provide a definition of ''unfair'' acts and practices and may lead to more competitive livestock, meat, and poultry markets. AMS prefers to propose the alternative of § 201.308(a) through (d) because it offers a more comprehensive guide to market participants than the limited scope alternative.

D. Regulatory Flexibility Analysis

AMS proposes to establish § 201.308 to define how AMS evaluates unfair acts or practices and unfair methods of competition under section 202(a) the

[163] Poultry dealer firm level costs: $47,417 (administrative assistants) + $281,329 (managers) + $37,940 (IT support) + $476,896 (legal).

[164] Beef packer firm level costs: $137,510 (administrative assistants) + $815,855 (managers) + $110,027 (IT support) + $1,382,997 (legal).

[165] Pork packer firm level costs: $103,265 (administrative assistants) + $612,672 (managers) + $82,626 (IT support) + $1,038,573 (legal). Swine contractor firm level costs: $348,254 (administrative assistants) + $2,066,207 (managers) + $278,651 (IT support) + $3,502,533 (legal).

[166] Lamb packer firm level costs: $73,234 (administrative assistants) + $434,497 (managers) + $58,597 (IT support) + $736,539 (legal).

[167] Total firm level costs: $0.84 million (poultry dealers) + $2.45 million (beef packers) + $8.03 million (pork packers and swine contractors) + $1.30 (lamb packers) = $11.82 million (total).

[168] Poultry dealer contract level costs: $303,564 (administrative assistants) + $900,527 (managers) + $971,569 (IT support) + $1,526,530 (legal).

[169] Beef packer contract level costs: $14,695 (administrative assistants) + $43,594 (managers) + $47,033 (IT support) + $73,898 (legal).

[170] Pork packer firm level costs: $25,816 (administrative assistants) + $76,584 (managers) + $82,626 (IT support) + $129,822 (legal). Swine contractor firm level costs: $106,610 (administrative assistants) + $316,261 (managers) + $341,211 (IT support) + $536,110 (legal).

[171] Total contract level costs: $3.70 million (poultry dealers) + $0.18 million (beef packers) + $1.62 million (pork packers and swine contractors) = $5.50 million (total).

P&S Act. The term ''unfair'' has caused confusion and contention in the industry and in courts, and this rulemaking is intended mitigate both.

Proposed § 201.308 is made of four parts. Paragraphs (a) and (b) of proposed § 201.308 concern unfair acts or practices with respect to market participants. Paragraphs (c) and (d) concern unfair practices with respect to markets. Parts of both of these provisions relate to the likely harms the Act was designed to prevent; paragraph (b) helps define paragraph (a), and paragraph (d) helps define paragraph (c). No part, however, requires that proof of harm to competition to find a violation of the Act. This is consistent with USDA's interpretation and enforcement of the Act, but it is not consistent with all Federal court decisions.

Paragraph (a) of proposed § 201.308 defines an unfair act or practice as one that causes or will likely cause substantial injury to a market participant, which the market participant could not reasonably avoid and which the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to market participants or competition. Paragraph (b) includes factors the Secretary of Agriculture may consider when evaluating whether an unfair act or practice is likely to cause substantial injury. Factors include the extent to which an act or practice impedes or restricts the ability to participate in the market, the extent to which an act or practice subverts competitive market forces, the size any potential injury, and the extent to which the act or practice interferes with free decision making.

Paragraph (c) of proposed § 201.308 defines an unfair practice with respect to markets as a practice that is collusive, coercive, predatory, restrictive, deceitful, or exclusionary and that may negatively affect competitive conditions.

AMS intends for proposed § 201.308 to be consistent with the way USDA has interpreted section 202(a) of the Act for decades. The preamble for this rulemaking explains how USDA has defined ''unfair'' in past actions and how those actions are consistent with the interpretation of ''unfair'' in proposed § 201.308. Concerning USDA's interpretation and enforcement of ''unfair'' in section 202(a) of the Act, AMS does not expect proposed § 201.308 to change USDA's position on enforcement of section 202(a).

Addressing the exercise of market power is one purpose of proposed § 201.308, although it potentially addresses other issues concerning ''unfairness'' under the Act as well. Market power has been a problem in the meat packing industry since the invention of refrigerated rail cars enabled Chicago packers to process western livestock and ship the carcasses east at costs lower than eastern packers could achieve. From the 1880s to 1920, a series of investigations found the largest meat packers controlling prices through a variety of methods. Those findings were much of the reason that Congress passed the Act in 1921.[172]

Market power in livestock, meat, and poultry markets is a continuing problem that USDA has regulated through the Act since the 1920s. USDA has consistently established the rules and regulations necessary to maintain fair and competitive markets, including protecting producers from marketplace abuses and harms they could not avoid. One example is § 201.70, which requires packers to conduct their livestock buying operations independently and in competition with other packers.[173] Proposed § 201.308 is another step in the ongoing regulation of competition in the livestock, meat, and poultry markets. Proposed § 201.308 is designed to mitigate market power and the implications of market power especially on producers. It would also address fair trade practices in the marketplace generally. Unlike many of the regulations under the Act, proposed § 201.308 does not place any specific requirements on packers, live poultry dealers, or swine contractors.

Instead, it provides a framework for evaluating acts, practices, and methods of competition to determine if they are violations of the Act. Proposed § 201.308 would be a new regulation, and USDA has not articulated the factors in proposed § 201.308 as such in enforcing violations of the Act in the past. However, the preamble to the rulemaking explains that past enforcement actions under the Act have been consistent with the factors in proposed § 201.308.

While proposed § 201.308 is consistent with actions that USDA has taken in the past, it is less clear what different acts or practices may violate proposed § 201.308 that USDA would not have been considered violations without the proposed rule. USDA has asserted that a violation of the Federal antitrust laws may also violate the Packers and Stockyards Act, but that the Packers and Stockyards Act's prohibition on unfair practices incorporates trade practices beyond those covered by the Federal antitrust laws. AMS expects that proposed § 201.308 will improve its enforcement of the Act and make livestock, meat, and poultry markets fairer and more competitive. AMS estimated administrative costs of proposed § 201.308 in two parts, firm level and contract level. In firm level costs, AMS expects that each small packer, swine contractor, and live poultry dealer would need to review and learn the proposed rule and to assess any impacts on their business operations. In contract level costs, AMS expects that small entities would review production and marketing contracts to ensure compliance with the proposed rule.

Defining Small Businesses

The SBA defines small businesses by their North American Industry Classification System Codes (NAICS).[174] Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees. Meat packers, including, beef, veal, pork, lamb, and goat packers, NAICS 311611, are small businesses if they have fewer than 1,000 employees. Swine contractors, NAICS 112210, are considered small if their sales are less than $1 million annually.

AMS maintains data on live poultry dealers from the annual reports these firms file with AMS. Currently, 90 live poultry dealers would be subject to the regulation. Fifty-five of the live poultry dealers will be small businesses according to the SBA standard.

Most packers will be small businesses, although large packers are responsible for most meat production. According to the SBA standard, there are 255 small beef packers, 185 small pork packers, and 139 small lamb packers. All lamb packers are considered small.

AMS does not have similar records for swine contractors because they are not required to register with AMS or provide annual reports. Table 24 of the 2022 United States Department of Agriculture (USDA) Census of Agriculture [175] indicated that there were

[172] Azzam, Azzadine and Anderson, Dale, May 1996, ''Assessing Competition in Meatpacking, Economic History, Theory, and Evidence,'' USDA, GIPSA, *https://www.gipsa.usda.gov/psp/publication/con_tech%20report/rr96-6.pdf.*

[173] Source: 24 FR 3183, Apr. 24, 1959.

[174] U.S. Small Business Administration. Table of Small Business Size Standards Matched to North American Industry Classification System Codes. Effective August 19, 2019. ''The SBA Issues a Final Rule to Adopt NAICS 2017 for Small Business Size (last accessed 8/9/2022).'' Available at *https://www.sba.gov/article/2018/feb/27/sba-issues-final-rule-adopt-naics-2017-small-business-size-standards.*

[175] USDA, National Agricultural Statistics Service, ''2022 Census of Agriculture: United States Summary and State Data,'' issued February 2024, table 24.

661 swine contractors in 2022. The Census of Agriculture table has categories for the number of head that swine contractors sold, but not the value of the head sold. AMS expects that the 461 swine contractors that sold 5,000 head of hogs or more were large businesses, and the 194 contractors that sold less than 5,000 head were small businesses.

Direct Firm Administrative Costs of the Proposed Rule to Small Businesses

As shown in the table below, the firm level cost for small poultry dealers is $573,000,[176] $2.66 million for small beef packers,[177] $1.93 million for small pork packers,[178] $1.12 million for small swine contractors,[179] and $1.45 million for small lamb packers. The total firm level cost for small firms from the proposed rule is $7.73 million.[180]

TABLE 5—TOTAL ADMINISTRATIVE COSTS IN THE PROPOSED § 201.308 TO SMALL BUSINESSES

Cost	Live poultry dealer	Beef packer	Pork packer and swine contractor	Lamb packer*	Total cost**
Firm Level Administrative Costs	573,000	2,656,000	3,062,003	1,448,000	7,738,000
Contract Level Administrative Costs	131,000	35,000	168,000	0	334,000
Total Administrative Costs in 2025	704,000	2,690,000	3,230,000	1,448,000	8,072,000
10-year PV at 3 percent	683,000	2,612,000	3,136,000	1,405,000	7,837,000
10-year PV at 7 percent	658,000	2,514,000	3,019,000	1,353,000	7,544,000
Annualized costs at 3 percent	80,000	306,000	368,000	165,000	919,000
Annualized costs at 7 percent	94,000	358,000	430,000	193,000	1,074,000

* Lamb contracts are structured differently and not counted here.
** Rows may not sum to Total Costs due to rounding.

AMS estimated the small business contract level costs by estimating small businesses' share (the market share) of all businesses contract level costs. The percent of poultry growing arrangements held by small businesses is 3.2 percent, the percent of production contracts held by small swine contractors is 8.9 percent, the portion of hog marketing agreements with small firms is 11.3 percent, and the percent of cattle feedlot agreements with small businesses is 17.4 percent. Contract level administrative costs are not estimated for lamb packers because these contracts are structured differently than for other species, and lamb packers are not expected to revise contracts under the proposed rule.

Contract level costs for small poultry dealers are $131,000,[181] $35,000 for small beef packers,[182] $40,000 for small pork packers,[183] and $127,000 for small swine contractors.[184] The total contract level costs for small firms from the proposed rule are $334,000.[185]

The following table compares the average per entity first-year costs of proposed § 201.308 to the average revenue per establishment for all regulated small businesses. First-year costs are appropriate for a threshold analysis because all expected costs occur in the first year.

TABLE 6—COMPARISON OF AVERAGE COSTS PER ENTITY TO AVERAGE REVENUES PER ENTITY FOR SMALL BUSINESSES

Cost	Poultry dealers	Beef packers	Pork packers	Swine contractors	Lamb packers
First year costs	$13,000	$11,000	$11,000	$13,000	$10,000
10-year PV—3.00%	$12,000	$10,000	$11,000	$13,000	$10,000
10-year PV—7.00%	$12,000	$10,000	$10,000	$12,000	$10,000
Annualized—3.00%	$1,000	$1,000	$1,000	$1,000	$1,000
Annualized—7.00%	$2,000	$1,000	$1,000	$2,000	$1,000
Average net sales	52,888,000	80,173,000	36,781,000	486,000	23,623,000
First year cost as % of net sales	0.02%	0.01%	0.03%	2.66%	0.04%
Annualized—7.00% as % of net sales	0.00%	0.00%	0.00%	0.35%	0.01%

Average first-year costs as a percent of revenues are small, ranging from 0.01 percent for beef packers to 2.66 percent for swine contractors. Costs are highest for swine contractors because average revenues for swine contractors are considerably smaller than average revenues for packers and live poultry dealers.

Alternative Regulation

AMS considered an alternative to proposed § 201.308. The alternative would be the same as the preferred alternative, with the exception that the alternative would limit the scope of the rule to § 201.308(a) and (b). Section 201.308(c) and (d) from the proposed rule would not be part of the alternative. AMS expects that the direct costs associated with this limited scope alternative will be similar to the costs associated with the currently proposed

[176] Firm level cost for poultry growing arrangements with small firms = 3.2 percent × $937,314.

[177] Firm level cost for small beef packers = 17.4 percent × $2,718,211.

[178] Firm level cost for small pork packers = 11.3 percent × $2,041,262.

[179] Firm level cost for small swine contractors = 8.9 percent × $5,988,395.

[180] Total firm level costs across small firms in livestock and poultry industries, $7,738,048 = $572,803 (live poultry dealer) + $2,655,723 (beef packer) + $1,926,701 (pork packer) + $1,135,191 (swine contractors) + $1,447,629 (lamb packer).

[181] Contract level cost for poultry growing arrangements with small firms = 3.2 percent × $4,113,544.

[182] Contract level cost for small beef packers = 17.4 percent × $196,098.

[183] Contract level cost for small pork packers = 11.3 percent × $349,833.

[184] Contract level cost for small swine contractors = 8.9 percent × $1,527,298.

[185] Total contract level costs across small firms in livestock and poultry industries, $334,001 = $131,186 (poultry dealers) + $34,180 (beef packer) + $39,531 (pork packers) + $135,929 (swine contractors).

§ 201.308. AMS also expects that regulated packers, live poultry dealers, and swine contractors would need to review their business practices and their marketing and production contracts with livestock producers as well as their production contracts with live poultry dealers. They might be able to spend a little less time on this review because there would only be about half as much new regulation to learn and comprehend.

AMS still expects that regulated packers, live poultry dealers, and swine contractors would need still need to spend about 90 percent of the time to review the alternative as they needed to review the proposed regulation. All of the direct administrative costs were due to the time required for regulation packers, live poultry dealers, and swine contractors to review the regulation. As a consequence, AMS's estimate of the administrative costs for the alternative are 90 percent of the costs for proposed rule. The table below is as summary of expected direct cost associated with this limited scope alternative.

Direct costs associated with the limited scope alternative are not much different than the direct costs associated with proposed § 201.308. Similarly, to the proposed rule, all costs occur in the first year. Also like the proposed rule, costs are not likely significant for packers or live poultry dealers. However, for swine contractors, costs are expected to be more than 2 percent of net sales for the first year the alternative would be effective. For each of the remaining years, cost to swine contractors would not likely be significant.

TABLE 7—COMPARISON OF AVERAGE COSTS PER ENTITY TO AVERAGE REVENUES PER ENTITY FOR SMALL BUSINESSES—LIMITED SCOPE ALTERNATIVE

Cost	Poultry processor	Beef packer	Pork packer	Swine contractors	Sheep, lamb, and goat packer
First year costs	$12,000	$9,000	$10,000	$12,000	$9,000
10-year PV—3.00%	$11,000	$9,000	$9,000	$11,000	$9,000
10-year PV—7.00%	$11,000	$9,000	$9,000	$11,000	$9,000
Annualized—3.00%	$1,000	$1,000	$1,000	$1,000	$1,000
Annualized—7.00%	$2,000	$1,000	$1,000	$2,000	$1,000
Average net sales	52,888,000	80,173,000	36,781,000	486,000	23,623,000
First year cost as % of net sales	0.02%	0.01%	0.03%	2.37%	0.04%
Annualized—7.00% as % of net sales	0.00%	0.00%	0.00%	0.31%	0.01%

AMS prefers to propose the alternative of § 201.308(a) through (d) because it offers more comprehensive protection to livestock producers and contract growers than the limited scope alternative. Direct costs to regulated entities would likely be smaller with the limited scope alternative, but they would not be much smaller.

AMS was not able to quantify indirect costs or benefits associated with proposed § 201.308 or with the limited scope alternative. To the extent that either alternative would improve the competitive environment in livestock, meat, or poultry markets, the regulation would likely result in reduced welfare to meat packers, and live poultry dealers and increased welfare to livestock producers and contract growers. Even small improvements in the market could cause benefits that are much larger than the direct costs estimated for either proposed § 201.308 or the limited scope alternative.

The proposed rule may have the effect of reducing deadweight losses. To the extent that packers, live poultry dealers, or swine contractors transfer surpluses to growers and producers due to improved competition caused by proposed § 201.308 or the alternative, AMS will consider the regulation a success.

Small businesses are typically not associated with market power or practices that restrict competition, but in small markets the largest firms can be small businesses. In the lamb industry, for example, the largest packer is a small business.

AMS expects that the direct costs associated with proposed § 201.308 would be significant for a substantial number of swine contractors. AMS was not able to quantify costs associated with changes to the level of competition in the regulated markets, but changes could result in significant costs to substantial numbers of packers, live poultry dealers, and swine contractors. However, these costs, which are actually transfers in surplus, are the intended purpose of the regulation. AMS acknowledges that individual businesses may have relevant data to supplement our analysis. AMS encourages small stakeholders to submit any relevant comments and data during the comment period.

E. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult with Indian Tribes on a government-to-government basis on policies that have Tribal implications. This includes regulations, legislative comments or proposed legislation, and other policy statements or actions. Consultation is required when such policies have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or the distribution of power and responsibilities between the Federal Government and Indian Tribes. The following is a summary of activity to date.

AMS engaged in a Tribal Consultation in conjunction with a previous proposed rule also under the Act (''Inclusive Competition and Market Integrity Under the Packers and Stockyards Act,'' 87 FR 60010) on January 19, 2023, in person in Tulsa, Oklahoma, and virtually. AMS received multiple Tribal comments from that Consultation, many of which were specific to and considered in that rulemaking. In that consultation, Tribes raised legal concerns with respect to the jurisdiction of the AMS enforcement of the P&S Act. Tribes commented that the P&S Act does not apply to Tribes and Tribal entities. Those comments raise a legal issue of statutory interpretation, but these concerns are not directly implicated by this proposed rule. Additionally, the proposed rule would provide a framework for AMS analysis of unfair practices and does not mandate specific changes to particularly identified practices. Therefore, other than the legal issue AMS does not find that this rulemaking carries substantial direct Tribal implications.

AMS recognizes and supports the Secretary's desire to incorporate Tribal

and Indigenous perspectives, remove barriers, and encourage Tribal self-determination principles in USDA programs, including hearing and understanding Tribal views on legal authorities and cost implications as facts and circumstances develop. If a Tribe requests additional consultation, AMS will work with USDA's Office of Tribal Relations to ensure meaningful consultation is provided in accordance with Executive Order 13175.

F. Executive Order 12988—Civil Justice Reform

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

G. Civil Rights Impact Analysis

AMS has considered the potential civil rights implications of this proposed rule on members of protected groups to ensure that no person or group would be adversely or disproportionately at risk or discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, or protected genetic information. This proposed rule does not contain any requirements related to eligibility, benefits, or services that would have the purpose or effect of excluding, limiting, or otherwise disadvantaging any individual, group, or class of persons on one or more prohibited bases.

In its review, AMS conducted a Civil Rights Impact Analysis, which resulted in a finding that Asian, and Native Hawaiians or Other Pacific Islanders could be disproportionately impacted by this proposed rule, insofar as fewer farmers in those groups participate in livestock and poultry production than would be expected by their representation among U.S. farmers in general and, therefore, are less likely to benefit from the enhanced protections provided by this proposed rule. Other impacted farmers, including men, women, Hispanics, Whites, Black/African Americans, and American Indians would not be disproportionately impacted by this proposed rule.

The effects of this proposed regulation would fall on slaughtering packers, swine contractors and live poultry dealers. The primary beneficiaries of proposed § 201.308 would include farmers, feedlot owners, swine production contract growers, and poultry growers. These producers and growers are those most likely harmed by unfair and deceptive practices resulting from the actions or conduct of firms subject to the P&S Act.

Protected groups would see minimal, if any, direct or indirect costs because of the implementation or enforcement of the new regulation. Although the required analysis indicates a disproportionate impact for Asian, and Native Hawaiians or Other Pacific Islanders, because the new regulation would impact all industry participants equally, no individual or group would likely be adversely impacted.

H. E-Government Act

USDA is committed to complying with the E-Government Act by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

I. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions of State, local, and Tribal governments, or the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more (adjusted for inflation) in any 1 year for State, local or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rulemaking. This proposed rule contains no Federal mandates, as defined in title II of UMRA, for State, local, and Tribal governments, or the private sector. Therefore, this proposed rule is not subject to the requirements of sections 202 and 205 of UMRA.

List of Subjects in 9 CFR Part 201

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

For the reasons set forth in the preamble, AMS proposes to amend 9 CFR part 201 as follows:

PART 201—ADMINISTERING THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Add § 201.308 to read as follows:

§ 201.308 Unfair practices and devices.

(a) *Unfair practices with respect to market participants.* An act by a regulated entity with respect to one or more market participants is an unfair practice for the purposes of section 202(a) of the Packers and Stockyards Act, 1921 as amended and supplemented (7 U.S.C. 192(a)) if the act causes or is likely to cause substantial injury to one or more market participants, which the participant or participants cannot reasonably avoid, and which the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury.

(b) *Standards with respect to market participants.* When assessing whether a practice under paragraph (a) of this section causes or is likely to cause substantial injury, and therefore the Secretary must halt the practice, the Secretary may consider:

(1) The extent to which the practice may impede or restrict the ability to participate in a market, interfere with the free exercise of decision-making by market participants, tend to subvert the operation of competitive market forces, deny a covered producer the full value of their products or services, or violates traditional doctrines of law or equity.

(2) The potential magnitude of the injury. An injury may be substantial if it causes significant harm to one market participant or if it imposes a small harm to many market participants.

(3) The extent to which the producer would have to take unreasonable steps to avoid injury. An injury is not reasonably avoidable solely because the practice has been disclosed. A market participant is not required to take unreasonable steps, such as exiting the market or making unreasonable additional investments or efforts, to avoid the harm.

(c) *Unfair practices with respect to markets.* A practice is unfair for the purposes of section 202(a) of the Packers Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 192(a)) if it is a collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition that may negatively affect competitive conditions.

(d) *Standards with respect to markets.* When assessing whether a practice poses or is likely to pose a threat to markets under paragraph (c) of this section, and therefore the Secretary must halt the practice, the Secretary may consider the following:

(1) The extent to which the practice impedes or restricts the ability to participate in a market, tends to subvert the operation of competitive market forces, interferes with the free exercise of decision-making by market participants, violates traditional doctrines of law or equity, or has indicia of oppressiveness, such as evidence of anticompetitive intent or purpose, or absence of an independent legitimate business reason for the conduct.

(2) The extent to which the practice tends to foreclose or impair the opportunities of market participants, reduces competition between rivals, limits choice, distorts or impedes the process of competition, or denies a market participant the full value of their products or services.

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–14042 Filed 6–27–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1695; Project Identifier AD–2023–00783–E]

RIN 2120–AA64

Airworthiness Directives; Lycoming Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Lycoming Engines (Lycoming) model engines that have a certain connecting rod assemblies installed. This proposed AD was prompted by several reports of connecting rod failures, which resulted in uncontained engine failure and in-flight shutdowns (IFSDs). This proposed AD would require repetitive oil inspections for bronze metal particulates and, if found, additional inspections of the connecting rod bushings for damage, proper fit, movement, and wear, and replacement if necessary. As terminating action to the connecting rod bushing inspections, this proposed AD would require replacement of the connecting rod bushings with parts eligible for installation. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by August 12, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–1695; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference

- For service information, contact Lycoming Engines, 652 Oliver Street, Williamsport, PA 17701; phone: (800) 258–3279; website: *lycoming.com/contact/knowledge-base/publications.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: James Delisio, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (516) 228–7321; email: *james.delisio@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–1695; Project Identifier AD–2023–00783–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to James Delisio, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received five reports of uncontained engine failures and IFSDs due to failed connecting rods on various models of Lycoming reciprocating engines that were overhauled or repaired using any replacement part listed in Table 2 of Lycoming Mandatory Service Bulletin (MSB) No. 632B, dated August 4, 2017 (MSB 632B), which was shipped from Lycoming during the dates listed in Table 2 of MSB 632B. As a result, the FAA issued AD 2017–16–11, Amendment 39–18988 (82 FR 37296, August 10, 2017) (AD 2017–16–11), which required an inspection of connecting rods and replacement of affected connecting rod small end bushings.

Since the FAA issued AD 2017–16–11, a manufacturer investigation determined that affected connecting rod small end bushings may be installed on