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–24–0013]

RIN 0581–AE30

Price Discovery and Competition in Markets for Fed Cattle

AGENCY: Agricultural Marketing Service, Department of Agriculture.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The United States Department of Agriculture's (USDA or Department) Agricultural Marketing Service (AMS or Agency) is seeking advance comment on a proposal to amend the regulations under the Packers and Stockyards Act (P&S Act or Act). The purpose of this advance notice of proposed rulemaking (ANPR) is to solicit feedback on an identified set of regulatory options that AMS could employ to address concerns regarding price discovery and fairness in fed cattle markets. Information from public comments would inform AMS's approach to this topic, including any future regulatory changes.

DATES: Electronic or written comments must be submitted by December 10, 2024.

ADDRESSES: Comments can 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–24–0013, 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 advance notice of 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. A plain-language summary of this advance notice of proposed rule is available at *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.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

AMS seeks input from stakeholders about ways to improve price discovery and fair and competitive trading environments in fed cattle markets, many of which are concentrated markets. Those concentrated markets may have played a role in packers imposing fed cattle purchasing agreements on producers, commonly known as alternative marketing arrangements (AMAs), that use some method of calculating prices other than cash negotiated or ''spot'' pricing. Fed cattle AMAs have achieved a well-established position in the cattle industry, accounting for the majority of cattle traded. The vast majority of AMAs are formula pricing agreements that use an external benchmark price to establish a base price in the contract when determining the price a seller will receive. In formula contracts, which this ANPR focuses on, the base price is not known when the contract is signed, and it fluctuates in accordance with the benchmark. Aspects of the design of formula contracts have some adverse consequences—directly or in conjunction with certain trading practices—for producers and the markets in which they operate, and potentially for other packers seeking to compete for fed cattle in the market. It is possible that some of these adverse consequences could give rise to a violation of the Act or other antitrust laws.

This ANPR seeks comment on a range of options designed to ensure that base prices in formula pricing agreements are broadly representative of fair market conditions and are not vulnerable to unfair, deceptive, manipulative, unduly preferential, or anticompetitive practices that could cause prices to shift. The targeted options also seek to address obstacles that market participants face when engaging in price discovery and contributing to transparent markets. These options are further intended to mitigate the market design, trading practices, or preferences that underlie the complaints AMS has received over the years relating to aspects of formula pricing agreements and their impact on producers and the cattle markets.

AMS seeks comment on the experience of producers, packers, and other market participants in relation to the problems undergirding these complaints, as well as the effectiveness, workability, and economic impacts of several potential solutions identified. Relevant data, information, and opinions to explain those views are all welcome. This request for comment is principally focused on what could be done by AMS's Packers and Stockyards Division (PSD) under the authority of the Packers & Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*). AMS is also interested, however, in commenters' views on any other authorities that USDA could deploy. These could include efforts in connection with other authorities or offices of USDA—such as the Office of the Chief Economist (OCE)—which provide market-relevant information or analysis. Comments received in response to this ANPR will inform AMS's approach to regulating the Nation's fed cattle markets.

II. Background

A. Trading Practices in the Fed Cattle Industry

The United States' fed cattle industry involves multistage ownership, regional variability, and a variety of different contracting and trading practices. Careful attention to this range of factors is essential to successfully promoting fairer, more competitive markets for all producers. In this ANPR, the term ''fed cattle'' refers to cattle raised and fed for slaughter as beef or beef by-products; the term ''packer'' refers to the entities that purchase and then slaughter fed cattle for use as beef or other meat by-products. Currently, the fed cattle industry is characterized by a high degree of packer concentration and predominant use of formula pricing agreements to market fed cattle.

In the first half of the 20th century, producers sold cattle to packers at terminal stockyards. Sellers consigned cattle with one of the commission firms operating at the stockyard, which then negotiated the sale and collected a commission from the seller. Stockyards also served to aggregate livestock from widely dispersed areas. This centralization allowed packers to purchase the quantities necessary to operate their plants from one location, where the presence of many buyers together in one place likely improved competition because producers could sell to multiple, competing packers.

During the latter half of the 20th century, the cattle feeding industry emerged in the Plains states, near areas of feed production and weather conditions suitable for cattle feeding. Packing plants relocated to areas near the cattle feeders, and the industry shifted from terminal stockyards to decentralized marketing through local auctions [1] or, more commonly, a ''bid and ask'' system of direct negotiations between packers and cattle feeders (in other words, cash negotiations for live animals). In this cash or ''spot'' market, the price for cattle is negotiated between a fed cattle producer and a packer at the time of sale, in other words, ''on the spot.'' [2] In healthy trading markets with multiple buyers, packers must compete with one another to purchase cattle.

In the 1990s and early 2000s, the beef cattle industry began to move toward quality differentiation and ''value-based marketing,'' in which price premiums and discounts were applied for quality grade differences of harvested cattle using a ''grid'' matrix.[3] Under these arrangements, packers offer a different price for each individual head, which is determined post-slaughter by offering a base price plus a premium or discount for a number of carcass attributes such as quality grade, yield grade, and weight. Some even offer price premiums for certain production practices such as antibiotic-free feeding. These arrangements contrast with traditional cash negotiations or auction sales, where the buyer would bid a single price per pound for an entire lot. Eventually, these new arrangements came to be known as Alternative Marketing Arrangements (AMAs). See Figure 1, which contains a graphic showing various types of fed cattle marketing arrangements.

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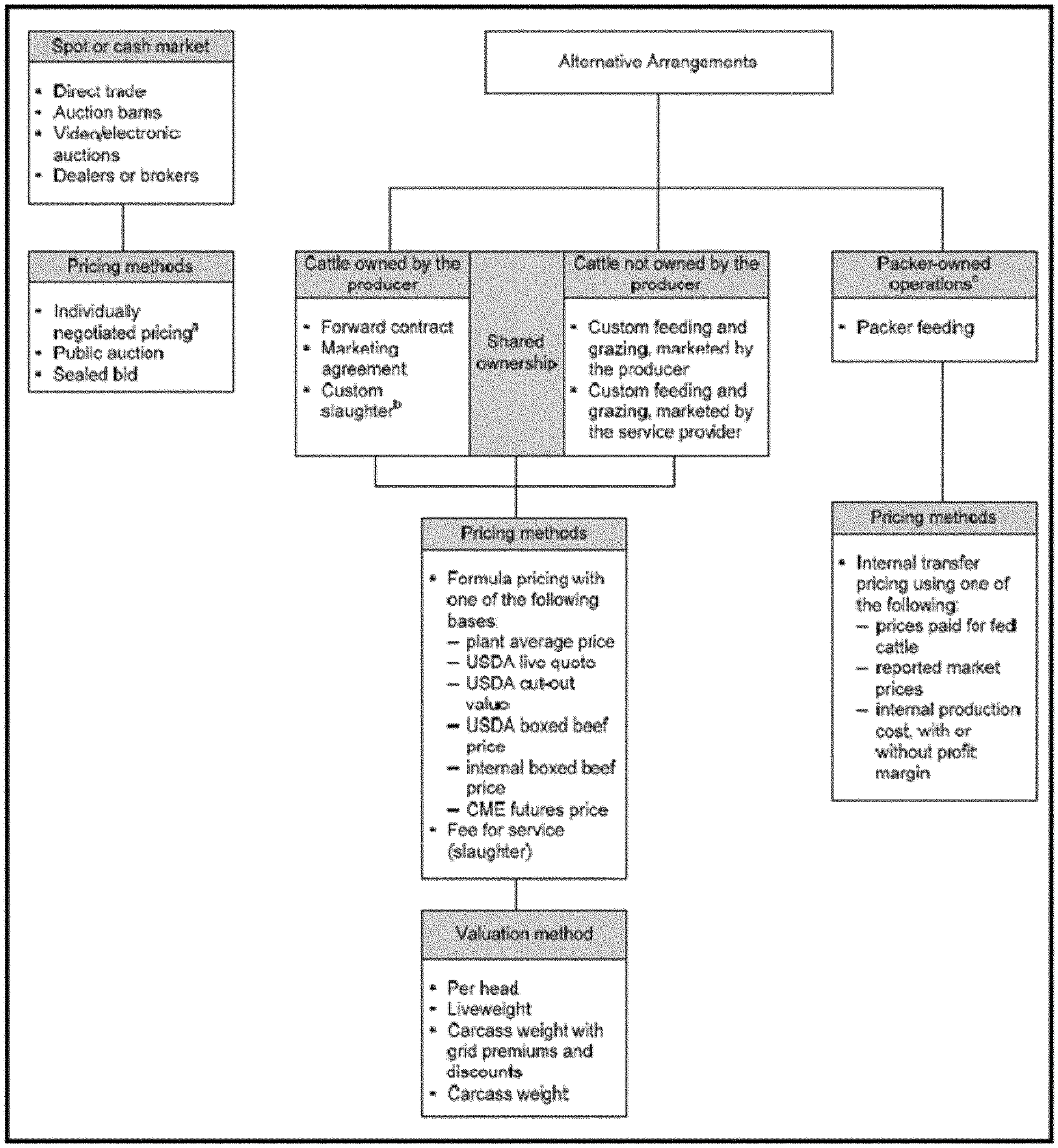
[1] Although they served as an important outlet for marketing fed cattle as terminal markets declined, local auctions now primarily market feeder and cull cattle. A relatively small number of fed cattle continue to be sold through live and video auctions.

[2] The spot market technically refers to all transactions in the physical commodity, as opposed to transactions for a derivative thereof, such as a future. Cash negotiated transactions can also be on a dressed basis, where payment is made based on the carcass weight rather than live weight.

[3] See Peel, Derrell S. ''How We Got Here: A Historical Perspective on Cattle and Beef Markets,'' in *The U.S. Beef Supply Chain: Issues and Challenges,* Ed. by B.L. Fisher et al., Texas A&M University, June 3–4, 2021.

Figure 1

Marketing Arrangements for Sale or Transfer of Feeder and Fed Cattle[4]



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Formula agreements are the most common AMAs. Formula prices are determined using a base or reference price, such as the reported live negotiated price from the cash or spot market for the week prior to delivery. Although not always made in writing, formula agreements commonly include an express or implied agreement to purchase all the producer's cattle. A ''grid'' of premiums and discounts is then applied to the base price.

Over the past 20 years, the use of formula agreements has increased relative to negotiated cash agreements, and around 2010, formula agreements became the dominant method of sale. As shown in Figure 2, in 2005, beef packers acquired roughly 55 percent of their cattle through cash negotiations and 30 percent through formula agreements. By March 2021, the same analysis found cash negotiations accounted for about 20 percent of cattle purchases, and formula agreements accounted for 65 percent. These statistics reflect the state of cattle marketing nationally; however, in three out of the country's five USDA-designated cattle procurement regions, the cash negotiated share is significantly lower than 20 percent, reaching as low as 12.5 percent of total cattle sales in the Kansas (KS) region, 8.3 percent in the Colorado (CO) region, and 2.6 percent in the Texas-Oklahoma-New Mexico (TX-

[4] Source: Muth, M.K., J. Del Roccili, M. Asher, J. Atwood, G. Brester, S.C. Cates, M.C. Coglati, S.A. Karns, S. Koontz, J. Lawrence, Y. Liu, J. Marsh, B. Martin, J. Schroeter, J. L. Taylor, and C. L. Viator. 2007. GIPSA Livestock and Meat Marketing Study, Volume 3: Fed Cattle and Beef Industries. Research Triangle Park, NC: RTI International for USDA Grain Inspection, Packers and Stockyards Administration. 1–16.

OK-NM) region. In contrast, the Iowa-Minnesota (IA-MN) region has reliably maintained cash-market procurement of 50 percent or more of marketed cattle, in part reflecting the prevalence of smaller ''farmer-feeders.'' Nebraska (NE) region's percentage has hovered between 30 and 40 percent. The higher prevalence of cash market transactions in IA-MN and NE may reflect a range of reasons, including producer preference for cash negotiated transactions, the size and number of sellers, and smaller lot sizes limiting the bargaining power of those producers in securing more favorable terms through AMAs.[5] These trends are discussed at greater length later in this ANPR, including in Figures 2 and 3 below.

Producers' views on formula agreement AMAs (hereinafter, AMAs refer to formula agreement AMAs unless otherwise noted) can vary widely, and sometimes sharply. Producers that use AMAs commonly note they generally offer convenience, cost-savings, and certainty, which is valuable in securing financing.[6] [7] Other producers, especially smaller producers commonly referred to as independents, more strongly value attributes in the cash market, such as the ability to negotiate on price with multiple packers in real time during a given week and to lock in that price at the time of sale, rather than relying on the application of a grid after slaughter. Independent producers have also expressed concern that the use of AMAs allows packers to avoid competition and exploit their market power and therefore broadly suppresses cattle prices. Some assert that packers engage in strategic behavior to control or manipulate the cash market for fed cattle, including going in and out of cash markets or otherwise changing their bidding practices, owing to the linkage between the AMA's base price and the underlying cash market.[8] Some also argue that the decline in demand for cash transactions reduces bidding in the cash market, which can adversely affect competition—a problem commonly referred to as ''captive supply.'' [9]

A critical factor underlying producer concerns around AMAs is the continuing market concentration in meat packing, which, at the regional level, has been both high and persistent. The DOJ Consent Decree of 1920, which secured a broad injunction enjoining dominant packers from consolidation and vertical integration, came to an end in 1981,[10] thus permitting packers to merge. Some additional vertical integration occurred during the 1980s between packers and feedlots, in part owing to deregulation of the P&S Act. However, in the 2000s the largest packers divested their feedlot operations. The question of closer relations between packers and feedlots today largely centers around questions of preferences in contractual terms, such as financing, risk-sharing, and profit-sharing. The AMS Cattle Contract Library (CCL) Pilot collects data on whether packers have financing, risk-sharing or profit-sharing terms.[11] Whether the CCL Pilot discloses terms would depend upon a confidentiality analysis. However, no such terms have been reported to AMS under the CCL Pilot, either at inception in January 2023 or to date as confirmed again this year.

Between 1980 and 1995, the percentage of fed cattle slaughtered by the four largest packers (the four-firm concentration ratio or CR4) rose from 35.7% to 79.3%.[12] In other words, by the mid-1990s the four largest packers in the fed cattle industry controlled of almost 80% of all fed cattle slaughtered in the U.S. Notably, national concentration levels mask the impacts at the regional level. While four packers may compete directly in national grocery chain markets, producers commonly have even fewer packers to transact with in their regional markets. Based on AMS's experience conducting investigations and monitoring markets, there are commonly only one or two buyers in some local geographic markets, and few sellers have the option of selling fed cattle to more than three or four packers. In Colorado, for example, AMS Market News cattle price reports are usually withheld because two packers account for most purchases and Market News guidelines require at least three packers to be active in the reporting period to disclose price data.

The Herfindahl-Hirschman Index (HHI) is a standard used to measure industry concentration,[13] and current U.S. Department of Justice and Federal Trade Commission Merger Guidelines state that ''markets with an HHI greater than 1,800 are highly concentrated.'' [14] At a national level, the HHI for fed cattle packing was 1,687 in 2021, but in some regional markets the HHI exceeded 3,000. Although the regional areas defined for Market News reporting do not perfectly define the extent of regional markets and may therefore overstate or understate concentration to some degree, these regional HHI measurements are nevertheless revealing of limited competition. Annual adjusted regional HHIs as of 2021 ranged between 2,200–2,400 in Kansas and Nebraska and over 3,200 in Texas-Oklahoma-New Mexico.[15]

In response to concerns that ongoing packer concentration and the rise of AMAs were negatively impacting transparency in the cash markets, Congress passed the Livestock Mandatory Reporting Act of 1999 (Pub. L. 106–78, title IX).[16] The law enhances

[5] The size of feedlots, which constitute the vast majority of cattle sales to packers, differs considerably by state. In Texas and Kansas, the average number of head that a feedlot sold in 2022 was 12,851 and 5,694, respectively. In contrast, the averages in Iowa and Minnesota were 441 and 237, respectively. National Agricultural Statistics Service, 2022 Census of Agriculture.

[6] Id.

[7] Kades Report at 24.

[8] See, for example, Giles Stockton, ''There is a Solution,'' 2017, *https://www.worc.org/cattle-market/;* Western Organization of Resource Councils (WORC), Petition for Rulemaking, 62 FR 1845 (1997); In addition, even packer leadership noted some of these concerns. See, *e.g.,* C. Robert Taylor, ''Harvested Cattle, Slaughtered Markets?'' (April 27, 2022) Available at *https://ssrn.com/abstract=4094924,* pgs. 25, 29 (quoting and citing Bob Peterson, CEO of IBP), *infra.*

[9] See, *e.g.,* Bill Bullard, ''Chronically Besieged: The U.S. Live Cattle Industry,'' Presented at Big Ag & Antitrust Conference, Thurman Arnold Project at Yale, Jan. 2021; U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops Exploring Competition in Agriculture, Livestock Industry Agenda, August 27, 2010, Fort Collins, Colorado, available at *https://www.justice.gov/archives/atr/event/ag-workshops-livestock-industry-agenda* (accessed 7/18/2024); C. Robert Taylor and David A. Domina, ''Restoring Economic Health to Beef Markets,'' Aug. 25, 2010, available at *https://www.dominalaw.com/documents/Restoring-Economic-Health-to-Beef-Markets.pdf.*

[10] *United States* v. *Swift & Co.,* No. 58 C 613, 1981 WL 2171, at *1 (N.D. Ill. Nov. 23, 1981); *see also* Aduddell, Robert M. and Louis P. Cain. ''Public Policy Toward 'The Greatest Trust in the World'.'' Business History Review, vol. 55 (1981), pp. 217–42.

[11] Authorized by the Consolidated Appropriations Act of 2022 (Pub. L. 117–103). Implementing rule, ''Cattle Contracts Library Pilot Program,'' 87 FR 74951 (December 7, 2022).

[12] Azzedine M. Azzam & Dale G. Anderson, USDA, Grain Inspection Packers and Stockyards Administration, Packers and Stockyards Statistical Report: 1995 Reporting Year, GIPSA 97–1, 1996, *https://www.ers.usda.gov/webdocs/publications/47232/17820_tb1874h_1_.pdf?v=0* (accessed 7/3/24).

[13] The HHI is calculated by summing the squares of the individual firms' market shares. PSD calculates the HHI of market concentration for packers from the individual packer's market shares based on Annual Commercial Slaughter totals. See Agricultural Marketing Service, USDA, *Packers and Stockyards Division: Annual Report 2021 & 2022,* pg. 14, *https://www.ams.usda.gov/sites/default/files/media/PackersandStockyards2021_2022ReporttoCongress.pdf.*

[14] Antitrust Division, U.S. Department of Justice, 2023 Merger Guidelines, December 18, 2023, *https://www.justice.gov/atr/2023-merger-guidelines* (last accessed 7/17/2024).

[15] Agricultural Marketing Service, USDA, ''Agricultural Competition: A Plan in Support of Fair and Competitive Markets,'' May 2022, p. 4, available at *https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.*

[16] See, for example, *Summary* in Congressional Research Service, ''Reauthorization of the Livestock Mandatory Reporting (LMR) Act in the 114th

transparency and accuracy in reporting by requiring covered packers to report all livestock and meat transactions to AMS, which then must compile the reports and make them publicly available, subject to appropriate confidentiality protections.[17] USDA implemented this statute by establishing the Livestock Mandatory Reporting (LMR) program (65 FR 75464, December 1, 2000; and 66 FR 8151, January 30, 2001 (postponing the rule's effective date)).[18] The LMR program provides weekly reports on ''livestock and meat price trends, contracting agreements, and supply and demand conditions.'' [19] The Regulatory Impact Analysis *Summary of Benefits* of the LMR implementing rule described how mandatory price reports would serve as benchmark prices (also called base prices or reference prices) for formula agreements, and thus enhance price discovery in the face of declining negotiated cash transactions in the cattle industry.[20]

Following the implementation of LMR and the associated increase in price transparency, packers widely adopted LMR-based reference prices as base prices in AMAs due to the widespread trust in LMR-based price reports. However, as more cattle were purchased under AMAs, the percentage of cattle purchased on the spot market declined, leaving the regional cash markets heavily used as AMA base price benchmarks with fewer spot transactions to draw from. (Note, different LMR reports will cover different transactions; some focus on a regional cash trade, while others show AMA transactions with various degrees of aggregation or confidentiality. All transactions are reported in some way, including AMA purchases). LMR has greatly expanded transparency in fed cattle markets overall, which is critical for all producers, but its authorities are not designed to address the use of LMR reports by market participants in contracts and the competitive impacts on the broader markets from doing so.

In the last two decades, the fed cattle market has become even more reliant on formula pricing agreements. In 2008, formula pricing agreements accounted for 34.4% of fed cattle purchases, while spot market transactions accounted for 50.5%.[21] By 2021, formula pricing agreements accounted for 61% of fed cattle procurement, while spot market (*i.e.,* cash negotiated live and dressed) transactions accounted for 19%.[22] This shift to formula pricing agreements varies by region, with relatively low usage in the Northern Midwest (which is more commonly characterized by smaller ''farmer-feeder'' operations where cash negotiated transactions still account for 40–50% of sales) and very high usage in Texas and Kansas (where larger ''corporate'' feedlots are the norm and cash negotiated transactions are as low as 6–10%). See Figure 2. Some regions, notably Texas and Kansas, saw the number of cattle transacted in the cash market approach zero in some weeks. See Figure 3.

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Congress.'' November 20, 2015, *https://crsreports.congress.gov/product/pdf/R/R44025/4,* last accessed 8/14/2024.

[17] The Secretary of Agriculture was directed to establish, among other things, a cattle marketing information program that would ''provide[s] information that can be readily understood by producers, packers and other market participants, including information with respect to the pricing, contracting for purchase, and supply and demand conditions for livestock, livestock production, and livestock products.'' (7 U.S.C. 1635 Purpose).

[18] The program is renewed periodically per statute. It was renewed most recently by the Consolidated Appropriations Act of 2024, which extended LMR authority to September 30, 2024 (Pub. L. 118–42).

[19] AMS Livestock Mandatory Reporting Background, *https://www.ams.usda.gov/rules-regulations/mmr/lmr/background#:~:text=On%20April%202%2C%202001%2C%20the%20USDA%E2%80%99s%20Agricultural%20Marketing,sales%20of%20livestock%20and%20livestock%20products%20to%20AMS* (accessed 7/3/24).

[20] 65 FR 75464, 75490 (December 1, 2000).

[21] 2012 Annual Report, Packers and Stockyards Program, pg. 39, *https://www.ams.usda.gov/sites/default/files/media/2012_psp_annual_report.pdf* (accessed 7/3/2024).

[22] Packers and Stockyards Division: Annual Report 2021 & 2022, p. 19, *https://www.ams.usda.gov/sites/default/files/media/PackersandStockyards2021_2022ReporttoCongress.pdf.*

Figure 2

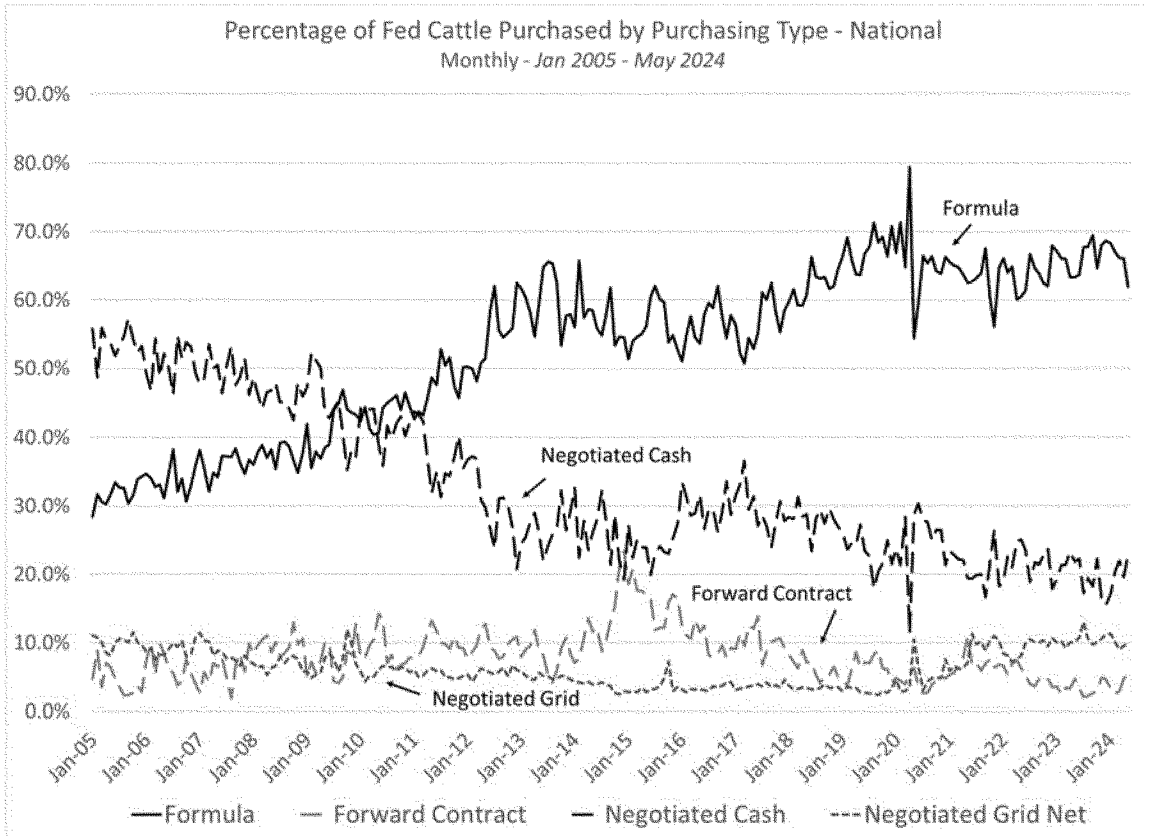
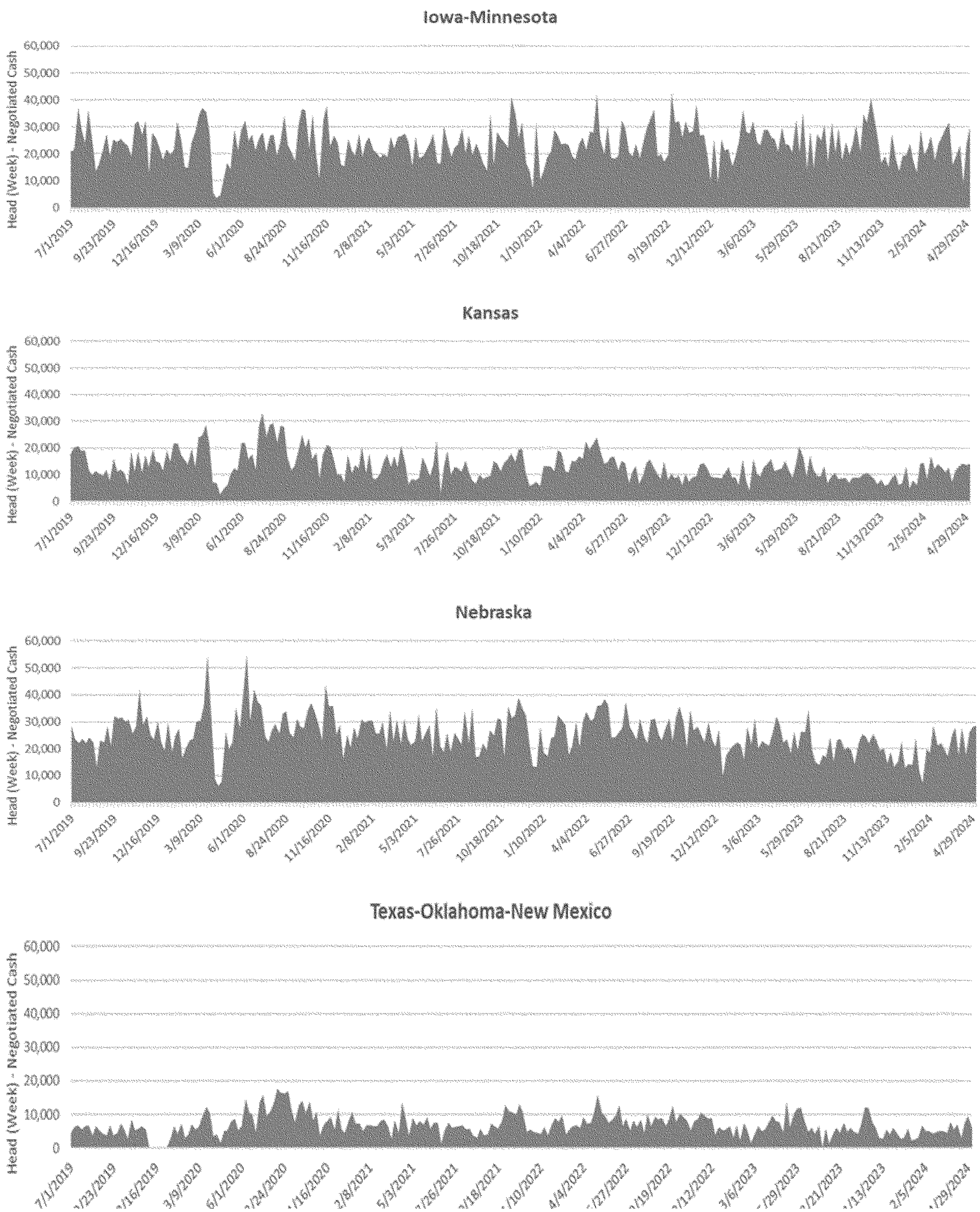

Percentage of Fed Cattle Purchased by Purchasing Type - National
Monthly - Jan 2005 - May 2024
90.0%
80.0%
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
Formula
Negotiated Cash
Forward Contract
Negotiated Grid
Jan-05
Jan-06
Jan-07
Jan-08
Jan-09
Jan-10
Jan-11
Jan-12
Jan-13
Jan-14
Jan-15
Jan-16
Jan-17
Jan-18
Jan-19
Jan-20
Jan-21
Jan-22
Jan-23
Jan-24
Formula
Forward Contract
Negotiated Cash
Negotiated Grid Net

Figure 3

Weekly Head Sold – Beef Type All Negotiated Methods – July 2019 – April 2024



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Although it varies from plant to plant and region to region, the cash market can now be considered a residual market [23] where packers fill in gaps in

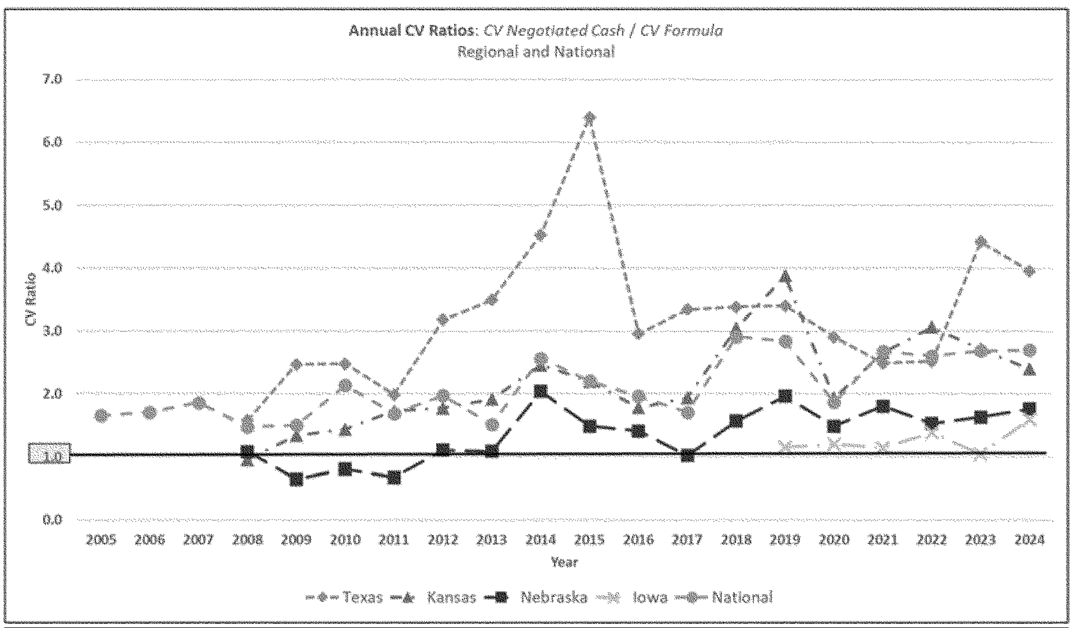
[23] Adjemian, Michael K., Tina L. Saitone, and Richard J. Sexton. 2016. ''A Framework to Analyze the Performance of Thinly Traded Agricultural Commodity Markets'' *Amer. J. Agr. Econ.* 98(2): 581–596; and Koontz, Steven R. 2015. ''Marketing Method Use in Trade of Fed Cattle: Causes and Consequences of Thinning Cash Markets and

Continued

their supply needs not otherwise served first by cattle purchased with AMAs. Thin markets—meaning those with few purchasers or limited trading volume or liquidity—have received attention from policymakers because of concerns that processing firms could depress farm-level prices below those that would prevail in a competitive market. Cash markets and, in particular, the regional cash negotiated live markets, continue to serve as the primary price discovery vehicle for all cattle traded. Data from USDA's CCL Pilot shows that more than 75% of contracts analyzed rely on an AMS Market News price report to determine the base price used in the contract.[24] Moreover, the CCL Pilot revealed that more than 90% of those contracts use one of three regional cash markets—negotiated cash purchases in Nebraska, Kansas, or Texas-Oklahoma-New Mexico—to price their cattle. These AMA contract base prices almost always use the reported average from the previous week's cash trade.

Those trading in the negotiated cash market—who are, generally, smaller producers without AMAs—generally absorb weekly fluctuations in packer demand. Cash markets are commonly viewed as a residual market, as packers usually prioritize AMA purchases to fill plant needs first. The relationship of the variation week-to-week in numbers of cattle purchased through negotiated cash and formula methods differs between regions. Notably, the difference in measured variation between the two markets is markedly lower in Iowa and Nebraska, and markedly higher in Texas-Oklahoma-New Mexico and in Kansas.[25] Figure 4 displays a ratio between the coefficients of variation (CV) calculated annually for number of cattle sold weekly through negotiated cash and formula purchase methods in each region as a measure of relative variability. A CV ratio equal to one indicates equal variability, and higher values of the ratio indicate greater variability of quantities purchased in the negotiated cash market relative to formulas. The figure shows that in recent years CV ratios have been consistently higher in the Kansas region and the Texas, Oklahoma, and New Mexico region where formula methods predominate. Although there could be reasons for the differences other than thin markets, the figure below is consistent with the idea that as regional negotiated cash markets become thinner, cash sellers in those markets face increasing volatility and uncertainty in marketing their cattle relative to those selling with a formula.

Figure 4



Source: Calculated from USDA-AMS Market News LMR Weekly Data. Coefficient of variation (CV = standard deviation divided by mean). CV Ratio = CV of Weekly Head Purchased of Negotiated Cash Divided by CV of Weekly Head Purchased Formula.

Additionally, AMA base prices established using cash negotiated market price reports simply reflect the quality or specification of cattle that were traded during the week in the reporting area. Most AMA formulas use prices that weight the average weekly prices by number of head but do not standardize or weight the cattle to a particular quality grade (for example, USDA Choice—Yield Grade 3, etc.). That is to say, the base price simply reflects the numerical average of the prices of whatever qualities of cattle appear in the market that week;

Potential Solutions'' Invited Paper American Applied Economics Association and Western Agricultural Economics Association Joint Annual Meeting, June 2015.

[24] *https://mymarketnews.ams.usda.gov/Cattle_Contract_Library* (accessed 7/3/2024). The CCL Pilot presents these base prices as ''options'' in the contract. About 11 percent small percent of contracts contain an CME Live Cattle Futures Market option for a base. Less than 10 percent have a negotiated option, while less than 4 percent have a ''top of the market'' option. Some contacts may use more than one option: for example, a contract may set out that a negotiated option is to be utilized when one or more of the LMR-reported base price region fails to hit a targeted volume of cash trade in the week.

[25] Taylor, C.R. ''Risk Shifting via Partial Vertical Integration: Beef Packers' Acquisition of Slaughter Cattle,'' November 2022, *https://ssrn.com/abstract=4276805*.

however, the value of cattle—and thus the prices—can vary greatly depending on quality.[26] The benchmarks, therefore, are vulnerable to fluctuation based on the different types of cattle sold in the market. It is commonly understood that different states reflect different qualities of quality, and that producers will seek to use base prices for regions that reflect their own cattle trading strategy. Yet the benchmark remains inherently vulnerable to changes in the quality that appear during a given week.

Tying the price of AMA cattle to the cash negotiated market price without a quality specification also creates unusual incentives that may distort cattle trading. The packer, for example, may seek to avoid cattle with higher quality specifications that would raise the price of its AMA formula cattle, or to underpay for such cattle. AMS has heard reports that packers may find other ways to trade that keep transactions out of the relevant region's cash market (and hence not affect the relevant AMA base price) for similar reasons.[27] These AMA base price benchmark practices contrast with the Chicago Mercantile Exchange's (CME's) Live Cattle Futures, which is tied to particular specifications for a lot of cattle. Cattle of all range of quality and type may still trade in the spot market at whatever value or premium that packers and producers agree upon, but the futures market is grounded in a clear, transparent basket of cattle for valuation and transparency purposes. AMS understands that packers will internally weight or standardize all purchases to a particular quality grade, usually USDA Choice—Yield Grade 3, so that the packer can measure its procurement efficiency even while permitting cattle quality to vary.

B. Longstanding Concerns and Market Shocks

For over 20 years, a range of producers have complained about the unfairness of the prices they are paid for fed cattle arising out of the relationship between AMAs and the regional cash markets that form their base price. Producers have highlighted adverse impacts on trading behavior, fewer and commonly lower bids on cattle, difficulty attempting to negotiate with packers, increased pricing and sales risk in the cash market overall, and packer pickup problems, among other concerns. Some producers assert a predatory pricing strategy to lock up the industry among only favored players. They also fear the loss of independence and further vertical integration as has occurred in other protein species. However, the boldest reform attempts to date have not met with success.

As early as 1996, the Western Organization of Resource Councils (WORC), a federation of grassroots organizations, submitted a petition to the Secretary of Agriculture to issue rules that would restrict the use of forward contracts and packer ownership of cattle, including a prohibition on the use of base prices that reference a future, as yet unknown, price.[28] WORC put forth this petition out of concern that forward contracts using formulas for the base price encourage manipulation of cash fed cattle markets to lower formula base prices. Also, the petition asserted that higher quality cattle are sold on a formula basis, even as the base price for such sales are set on the negotiated cash market, where cattle are lower quality. The petition asserted that the combination of incentives leads to lower fed cattle prices on negotiated cash markets and to lower formula prices than would be the case if cattle purchasing was conducted in a more competitive, open manner.

Complaints about AMAs were central to many of the reforms that were considered during the 2008–2010 period, including both the 2008 Farm Bill's provision on ''undue preferences'' and subsequent efforts by USDA to write rules under the P&S Act in 2010.[29] More recently, in 2014, USDA's then Grain Inspection, Packers and Stockyards Administration (GIPSA) completed an investigation into complaints from cattle industry participants regarding possible anticompetitive behavior by the four largest packers, in part due to the packers' use of formula pricing agreements (which are referred to in the report as AMAs).[30] Complainants asserted to USDA that packers are able to lower prices in the cash market and thus impact prices paid under AMAs by (1) buying fewer cattle on a cash basis, which results in thinner volumes; (2) making unreasonably low bids (or bidding less aggressively, making ''take it or leave it'' short-term pressure bids); and (3) only offering market-based price bids once a lower market price is established. The investigation found that, ''on a week-to-week basis, higher levels of AMA procurement [as a percentage of slaughter capacity] were associated with lower negotiated cash prices.'' [31] This suggests that cash or spot market prices are more likely to be depressed in weeks when packers rely more heavily on AMA procurement to fill slaughter needs. Yet the report focused on AMAs as a whole, rather than on base price selection, and found that AMAs ''have significant economic benefits,'' including for packers, consumers, and fed cattle producers.'' [32] Reported benefits to packers included a reduction in transaction costs; benefits to consumers included improvement in beef quality, and benefits to cattle feeders, included a reduction in transaction costs, assurance of timely market access, and reduction in the price risk associated with raising and selling fed cattle. AMS does not, however, endorse cross-market balancing, as benefits and harms should only be considered within a market.

Smaller producers selling in the negotiated cash market have complained to USDA for many years about unfair practices leading to lower prices in the cash markets and so-called ''sweetheart deals'' in the form of AMAs, where the AMA-receiving producer secured pricing better than that secured in cash negotiated markets

[26] Note, previous academic studies have highlighted the potential value of augmenting the amount of information reported and collected on fed cattle premiums and discounts. Ted C. Schroeder, Brian K. Coffey, and Glynn T. Tonsor, ''Hedonic Modeling to Facilitate Price Reporting and Fed Cattle Market Transparency,'' Applied Economic Perspectives and Policy vol 45(3), Jan. 2022, p. 1716.

Sheppard G. Rogers, Ted C. Schroeder, Glynn T. Tonsor, and Brian K. Coffey, ''Describing Variation in Formula Base Prices for U.S. Fed Cattle: A Hedonic Approach,'' Journal of Agricultural and Applied Economics vol 55(1), Feb. 2023 p. 117.

[27] Types of transactions that are not included in Livestock Mandatory Reporting (LMR) include those for which confidentiality is not met (such as frequently occurs in the Colorado region), or information is not required to be submitted (such as auction purchases). See Livestock Mandatory Reporting Excluded Transaction Summaries: *https://www.ams.usda.gov/rules-regulations/mmr/lmr/excluded-transactions.*

[28] Petition submitted to USDA on October 8, 1996; published by USDA in the **Federal Register**, 62 FR 1845, January 14, 1997.

[29] See title XI of the Food, Conservation and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246); see also, U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops Exploring Competition in Agriculture, Livestock Industry Agenda, August 27, 2010, Fort Collins, Colorado, available at *https://www.justice.gov/archives/atr/event/ag-workshops-livestock-industry-agenda* (accessed 7/18/2024); see also 75 FR 35338, June 22, 2010; see also, *e.g.,* C. Robert Taylor and David A. Domina, ''Restoring Economic Health to Beef Markets,'' Aug. 25, 2010, available at *https://www.dominalaw.com/documents/Restoring-Economic-Health-to-Beef-Markets.pdf.*

[30] USDA, GIPSA, Packers and Stockyards Program, Western Regional Office, Investigation of Beef Packers' Use of Alternative Marketing Arrangements, July 2014, *https://www.r-calfusa.com/wp-content/uploads/2020/07/200721-2014-GIPSA-Investigation-of-Cattle-Market.pdf* (accessed 7/3/2024).

[31] Id., pg. i.

[32] Id., pg. ii.

for the same quality cattle.[33] Part of the concern from these producers is that they engage in the work of price discovery—the risks, the costs, the inability to place cattle, etc.—yet are not compensated for those costs and risks, as AMA formulas incorporate whatever the cash negotiated price is into the AMA.[34] Moreover, as revealed by the CCL Pilot, AMA contracts commonly pay adjustments above the base price, although the ultimate economics of the agreement depends upon the premiums and discounts. To the extent that packers seek to lower their procurement costs by only purchasing lower quality cattle within relevant markets, or through exercising softer bidding or other trading practices, producers selling in cash markets would also experience harms compared to AMA holders, who receive upwards adjustments in the base price beyond the LMR prices [35] along with quality bonuses based on the grid.

Concerns raised by producers regarding concentration and insufficient price discovery came to a head as a result of a series of market shocks in 2019 and 2020. The first arose following the closure of one processing plant, which, due to the plant's size, impacted the entire industry. On August 9, 2019, a beef packing plant in Holcomb, Kansas closed after extensive damage from a fire.[36] The plant was responsible for 5 to 6% of the Nation's beef processing capacity.[37] Though the plant's owner quickly transferred cattle to its other facilities,[38] an AMS investigation found significant economic impacts resulted from the fire. With respect to pricing, for the week ending August 24, 2019, the spread (the difference between the average price packers paid to cattle producers for fed cattle and the average price paid by wholesale beef buyers for USDA Choice grade beef) was $67.17, representing a 143% increase from the average spread between 2016 and 2018.[39] Though this eventually stabilized, the spread remained above 2016–2018 levels.[40] With respect to trading, AMS found that in the aftermath of this crisis, sales in the spot market decreased while formula trading increased: in the week after the fire, spot market trading decreased by 27%, while formula trading increased by 15,000 head of fed cattle.[41] This is significant because, as noted above in this ANPR's overview of the fed cattle industry, more than 75% of formula pricing agreements base the price paid for cattle on prices paid in the spot market. Therefore, the nature of the trading that is conducted in the spot market—for example, the number of packers competing against one another to bid on the price paid for cattle, whether those trades are public, and the quality of information disclosed publicly—heavily impacts the amount paid for cattle under formula pricing agreements. As AMAs are commonly exclusive with an express or implied obligation that the packer will take all of the producer's cattle, market shocks such as this more heavily impact trading in spot markets, leaving those producers unable to timely sell their cattle.

The COVID–19 pandemic also impacted pricing, trading, and the beef supply chain, but even more severely. By late March of 2020, slaughter rates fell as workers fell sick and plants closed, and consumer demand surged, shifting from restaurant demand to retail demand.[42] [43] [44] Fed cattle purchases declined, as did fed cattle prices.[45] An AMS investigation found that, ''[f]rom the beginning of April until the third week of May, the spread rose from approximately $66/cwt. to just over $279/cwt., an increase of approximately 323 percent . . . and the largest spread between the price of fed cattle and the price of boxed beef since the inception of Mandatory Price Reporting in 2001.'' [46] The investigation found that, although the spread fell in subsequent months, it remained high by historical standards. A year later, cattle producers were still suffering economically while packers profited as COVID–19 kept plants at reduced capacity for an extended period: in its July 2021 Congressional testimony, a cattle trade association reported that ''gross packer margin . . . exceeded $1,000 per head'' while fed cattle producers across the nation ''struggled to break even.'' [47] During this time, ''[o]n average, estimated returns for cattle producers were below cost of production.'' [48]

Cattle inventories continued to contract at the national level after 2021, and widespread drought conditions contributed to the beef cow herd reaching its lowest level in more than 60 years. Concurrent with herd contraction, cattle prices had recovered, reaching record highs during 2023 and 2024 and leading to estimated returns above cost of production for producers.

In response to the disruptions caused by COVID and the closed plant in Holcomb, Kansas, USDA has taken a wide range of measures to boost resiliency and competitiveness in the meat supply chain, including investing more than $1 billion into new local and regional meat processing capacity.[49] Yet, given the interdependent nature of the fed cattle industry and the continuing level of concentration in the beef industry, future packer crises may still have far-reaching pricing and trading impacts. AMS believes that regulatory consideration of trading market structures and practices must be part of any effort to increase the resiliency and competitiveness, as well as fairness, of the cattle pricing system

[33] See, *e.g.,* Bill Bullard, ''Chronically Besieged: The U.S. Live Cattle Industry,'' Presented at Big Ag & Antitrust Conference, Thurman Arnold Project at Yale, Jan. 2021; Bill Bullard, ''Under Siege: The U.S. Live Cattle Industry,'' S. Dakota L. Rev., 2013; 2010 GIPSA Hearings; Taylor, Legal and Economic Issues (supra).

[34] For more on the costs/risks and collective action problems associated with price discovery, see Darrell Peel, David Anderson, et al, ''Fed Cattle Price Discovery Issues and Considerations,'' Oklahoma State University Extension, (E–1053), Nov. 2020, available at *https://extension.okstate.edu/fact-sheets/print-publications/e/fed-cattle-price-discovery-issues-and-considerations-e-1053.pdf* and John D. Anderson, James L. Mitchell, and Andrew M. McKensie, ''Analysis of the Cattle Price Discovery and Transparency Act of 2021, University of Arkansas (FC–2022–001), Jan. 2022, available at *https://wordpressua.uark.edu/fryar-center/files/2023/02/CPDTA-analysis-01.18.22.pdf.*

[35] For the first half of 2024 34.2% of all contracts in the Cattle Contract Library Pilot dashboard received base price adjustments. During the same time frame, the average base price adjustment for contracts that used USDA Market News LMR data to determine a base price and applied quality premiums and discounts made an average base price adjustment of $1.10/cwt before quality premiums and discounts were applied.

[36] Michael Nepveux, American Farm Bureau Federation, ''Impacts of the Packing Plant Fire in Kansas,'' September 10, 2019, *https://www.fb.org/market-intel/impacts-of-the-packing-plant-fire-in-kansas* (accessed 7/5/2024).

[37] USDA, AMS, ''Boxed Beef & Fed Cattle Price Spread Investigation Report,'' July 22, 2020, *https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf* (accessed 7/5/2024).

[38] Nepveux, ''Impacts of the Packing Plant Fire in Kansas.''

[39] ''Boxed Beef & Fed Cattle Price Spread Investigation Report,'' pg. 3.

[40] Id. at pg. 5.

[41] Ibid.

[42] Kate Vaiknoras, et. al., USDA, ERS, ''COVID–19 Working Paper: COVID–19 and the U.S. Meat and Poultry Supply Chains,'' February 2022, *https://www.ers.usda.gov/webdocs/publications/103178/ap-098.pdf?v=8386.2* (accessed 7/5/2024).

[43] J.E. Hobbs, ''The Covid–19 pandemic and meat supply chains,'' Meat Sci, November 2021, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9761612/,* (accessed 7/5/2024).

[44] ''Boxed Beef & Fed Cattle Price Spread Investigation Report,'' pg. 9.

[45] Ibid.

[46] *Id.,* pg. 9.

[47] ''Beefing up Competition: Examining America's Food Supply Chain'': U.S. Senate Committee on the Judiciary (July 28, 2021) (Written Testimony of the Iowa Cattlemen's Association, *https://www.judiciary.senate.gov/imo/media/doc/Schaben%20-%20Testimony.pdf* (accessed 7/5/2024)).

[48] Ibid.

[49] AMS, ''Agricultural Competition,'' *supra.* See also *www.usda.gov/meat* (last accessed July 2024).

that undergirds our nation's meat supply.

An additional concern relates to when cattle sold on a liveweight basis are picked up. Feedlots typically sell their animals when they reach a weight that is considered ''finished,'' or ready for slaughter. In most cases, the packer schedules a subsequent time to pick up the purchased cattle, also known as ''calling for cattle.'' Feedlot sellers incur ongoing costs of feed, yardage, etc., for cattle from the time of sale until the buyer picks the animals up and takes them to the plant. Although a seven-day pickup window is often considered standard practice, sellers have reported packers waiting more than six weeks after purchase before picking up cattle.

In major cattle feeding regions, a seven-day pick-up time has been the accepted industry practice. After seven days have elapsed, it is common practice for sellers to ''weigh-up'' cattle, which means weighing them before putting them back on feed and shifting responsibility for all future costs of feed, yardage, death loss, etc., to the packer. Weighing-up cattle helps clearly determine the value of cattle that have been sold on a negotiated cash live weight basis. The packer owes the seller an amount equal to the negotiated price multiplied by weight at the time of the weighing-up. From that point forward, the packer must pay all future costs for animal maintenance, while also accruing the benefit of any weight gain that occurs after the weigh-up.[50] Notably, failure to pick up cattle in a timely manner adds, in the view of some producers, to the packer's ''captive supply'' of cattle that reduces demand for bidding in the cash market.

C. Academic Review and Other Regulatory Models

There exists a relatively large body of empirical research into AMAs in livestock markets and fed cattle markets specifically. The presentation of some research here is necessarily exemplary of the available research and is not intended to reflect AMS's endorsement of conclusions or even the relative balance of the presentation, be it perceived as favorable or unfavorable to certain aspects of AMAs.

Early studies consistently found a small but significant negative correlation between fed cattle prices and the number of cattle purchased through AMAs from week to week. While these studies were unable to prove conclusively that this negative correlation was due to market power, the correlation has remained robust across time.[51 52] A recent study found a continued statistically significant negative correlation between spot fed cattle prices and AMAs, and empirically demonstrates that increases in AMAs may have contributed to an increase in the observed spread between the prices that packers pay for cattle from feedlots and the value of the beef they sell to retailers.[53]

A range of studies have explored the benefits of AMAs, almost always looking at them holistically. McDonald and McBride and several others have documented efficiency gains from contracting in livestock markets. In the 2007 GIPSA Meat and Livestock Marketing Study, Muth *et al.,* found benefits to packers, cattle producers, and consumers. Benefits to cattle producers were larger than any potential decrease in prices to producers, whether due to market power or otherwise. AMAs enable packers and feeders to make better use of their capacity, further reducing costs, and reducing risk for producers as they know they have a buyer for their cattle well in advance. AMS does not endorse the type of cross-market balancing that would seek to justify harms to smaller producers with benefits to larger producers. AMS does not express an opinion in this ANPR regarding whether the conclusions from these studies would still hold given significant market shifts over the last 17 years, even if attempting to balance harms and benefits to producers. Nor does AMS express an opinion on whether it would utilize the same methodology used in earlier studies.

Researchers have also explored how AMAs and grid pricing have changed risk and pricing signals between packers to producers.[54] AMAs use the grid to link pay premiums and discounts that are added to or subtracted from base prices directly to valued characteristics of fed beef cattle such as degree of marbling and yield of sellable meat.[55] AMAs are also used to encourage production of some process-verified cattle characteristics (including natural, organic, non-hormone treated, grass-fed, or age and source verification) that require increased coordination between beef producers and packer buyers. These pricing incentives are clearly laid out for producers in contracts and evaluated post-slaughter.[56] That is, in contrast to a simple live cash price paid before harvest as a single per pound rate for a group of cattle ''on the hoof,'' AMAs typically link payment to carcass performance after harvest (*e.g.,* yield and quality grade) and other value-added characteristics, including process verification. Accordingly, the risks that the packer bears in cash markets through its buyer agents' ability to identify and signal to producers the importance of particular quality characteristics are borne by producers in AMAs. In doing so, AMAs have been found to be more effective at passing price signals from consumers—as identified by the packer—up to

[50] In 2023, the National Cattlemen's Beef Association (NCBA) adopted a similar resolution in favor of adopting a 7-day standard for picking up cattle purchased on a negotiated cash basis, after which cattle would be weighed up and the buyer would be responsible for additional expenses. Policy handbook (p. 98) available at *https://www.ncba.org/Media/NCBAorg/Docs/2024-ncba-policy-book.pdf* (last accessed 7/18/2024).

[51] Examples include among others Emmett Elam. 1992. ''Cash Forward Contracting versus Hedging of Fed Cattle, and the Impact of Cash Contracting on Cash Prices'' *Journal of Agricultural and Resource Economics,* 17(1): 205–217.

Clement E. Ward, Stephen R. Koontz, and Ted C. Schroeder. 1998. ''Impacts from Captive Supplies on Fed Cattle Transaction Prices'' *Journal of Agricultural and Resource Economics* 23(2):494–514. Schroeter John R. and Azzeddine Azzam. 1999. ''Econometric analysis of fed cattle procurement in the Texas Panhandle'' Report to USDA, Grain Inspection Packers and Stockyards Administration. Ji, In Bae and Chanjin Chung. 2012. ''Causality Between Captive Supplies and Cash Market Prices in the U.S. Cattle Procurement Market'' Agricultural and Resource Economics Review, 41/3 (Dec. 2012) 340–350.

[52] See, *e.g.,* Garrido, F.G. and M. Kim, N.H. Miller, and M.C. Weinberg. ''Buyer Power in the Beef Packing Industry: An Update on Research in Progress,'' Report prepared for Washington Center for Equitable Growth, March 30, 2022; C. Robert Taylor, ''Harvested Cattle, Slaughtered Markets''; USDA, GIPSA, Packers and Stockyards Program, Western Regional Office, Investigation of Beef Packers' Use of Alternative Marketing Arrangements, July 2014, *https://www.r-calfusa.com/wp-content/uploads/2020/07/200721-2014-GIPSA-Investigation-of-Cattle-Market.pdf* (accessed 7/3/2024).

[53] Garrido, F., M. Kim, N.H. Miller, and M.C. Weinberg. ''Buyer Power in the Beef Packing Industry,'' January 2024, *https://www.nathanhmiller.org/cattlemarkets.pdf* (accessed 9/25/2024).

[54] Schroeder, T.C., B.K. Coffey, and G.T. Tonsor. ''Enhancing Supply Chain Coordination through Marketing Agreements: Incentives, Impacts, and Implications,'' in The U.S. Beef Supply Chain: Issues and Challenges: Proceedings of a Workshop on Cattle Markets, ed. by Fisher, B.L, J.L. Outlaw, and D.P. Anderson, Agricultural and Food Policy Center Texas A&M University, June 3–4, 2021, p. 81.

[55] See, for example, Ward, C.E., T.C. Schroeder, and D.M. Feuz, ''Grid Pricing of Fed Cattle: Base Prices and Premiums-Discounts,'' Oklahoma Cooperative Extension Service, AGEC–560, available at: *https://extension.okstate.edu/fact-sheets/print-publications/agec/grid-pricing-of-fed-cattle-base-prices-and-premiums-discounts-agec-560.pdf.*

[56] Some standard pricing incentives used in fed cattle contracts are reported in the Cattle Contract Library Pilot Program. For more information, please see *USDA AMS LPGMN Cattle Contracts Library—Explanatory Notes: https://www.ams.usda.gov/sites/default/files/media/CCL_ExplanatoryNotes.pdf.*

producers.[57] Negotiated grid transactions, in which a firm base price is negotiated between buyer and seller, also apply quality premiums and discounts to the prices paid for fed cattle based on actual carcass performance, but lack the vertical coordination aspect of AMAs and thus do not provide price incentives for process-verified characteristics such as organic or all natural that feeders need to know they will receive prior to feeding.

The above line of argument remains contested, however. Indeed, most lower quality cattle have historically been purchased through AMAs in the southern feeding regions, while in the northern feeding regions a larger proportion of cattle are higher quality and are much more likely to be purchased using negotiated methods.[58] Packer buyers are highly skilled at predicting how live cattle will grade out after slaughter as their job depends on it. They also are skilled at communicating to sellers what they are looking for in a pen of cattle. Moreover, negotiated grid transactions preserve the benefits of the grid while also retaining the advantages of a negotiated base price, although they lack the buyer commitment dimension of AMAs.

Nevertheless, as the number of cattle that packers purchased with AMAs became considerably larger than the spot negotiated market, academic focus shifted to the issue of thin negotiated markets. Market stakeholders also began to question whether spot market prices are representative of the value of fed cattle on the market, and thus cast doubt on the merits of using them as base prices in AMAs.[59] Carstensen (2022) and others have argued that the full extent of how buyer power influences the use of AMAs remains underappreciated in mainstream agricultural economic analysis.[60]

Economic research into price discovery in thin markets has, however, generally been skeptical of interventions that would set a floor number or percentage of fed cattle to be traded in spot markets each week. Koontz examined the role that different regions play in leading price discovery, as well as the relative thinness and thickness of the regional markets.[61] He also estimated high costs to the industry from proposed interventions that would impose a limit on AMA usage in fed cattle markets.[62] Peel *et al.* (2020) added that such steps to mandate negotiated trade could have the unintended effect of undermining the reliability of market price reporting by creating incentives for misrepresenting transaction types.[63] Adjemian *et al.* also suggested a floor percentage would not be beneficial. They also pointed out that thin markets tended to benefit large firms, so programs to aid small producers might be a good focus for regulatory agencies.[64] Dennis and Lubben (2022) surface potential factors and tradeoffs around the effectiveness of regional-based minimums.[65]

There is less available research on how benchmarks are used as base prices in marketing agreements. Cattle markets are not the only markets that employ benchmarked prices with manipulation concerns. Oil and financial markets are two examples of markets that rely on benchmarks, and both have seen large manipulation schemes.[66] In a game theory model, Hatfield and Lowery found that pegging prices in formula pricing agreements to spot market prices can facilitate collusion among packers and facilitate monopsonistic pricing. The authors suggest that these advantages could explain why packers have shifted toward the use of what they call spot-contracting (*i.e.,* the use of variable spot-market prices in formula pricing agreements).[67] Earlier theoretical work by Xia and Sexton and Davis found that use of ''top-of-the-market pricing'' (TOMP) arrangements in particular bears similarities to ''most-favored'' nation (MFN) clauses and that their use exhibits similar potential to facilitate coordination between competitors, as well as dampen competition and prices.[68] The structure of TOMP purchasing arrangements reduces packer incentives to buy cattle in the spot market. A more recent study by Garrido *et al.* also suggests more generally that referencing reported prices in marketing agreements distorts packer's incentives, reducing a packer's incentive to increase bids to procure more cattle.[69]

Policy discussions following from this research have tended to frame the problem as a zero-sum debate between the use of formula contracts and cash negotiated transactions.[70] Legislative proposals for mandatory minimum cash trading and voluntary industry proposals to address concerns around price discovery commonly focus on the numerical volume of spot, negotiated grid, or otherwise qualified trading.[71] However, it may be that it's not an either/or question, but rather how formula contracts are developed, and

[57] See, for example, Doumit, K.M. and T.C Schroeder, ''Fed Cattle and Beef Premiums and Discounts: Trends and Implications,'' Kansas State University Department of Agricultural Economics Extension Publication, 8/28/2023. Available at: *https://agmanager.info/livestock-meat/marketing-extension-bulletins/marketing-strategies-and-livestock-pricing/fed-cattle-0* (last accessed 10/1/2024).

[58] See, *e.g.,* Thayer, A.W., Benavidez, J.R., and Anderson D.P., ''Exploring the Impact of Fed Cattle Grade on Transaction Type,'' ASFMRA 2024 Journal, available at *https://higherlogicdownload.s3.amazonaws.com/ASFMRA/aeb240ec-5d8f-447f-80ff-3c90f13db621/UploadedImages/Journal/2024/Impact_of_Fed_Cattle_Grade.pdf;* Taylor, C.R. (2022) Harvested cattle, slaughtered markets? Available at: *http://dx.doi.org/10.2139/ssrn.4094924.*

[59] Fischer, B.L., and J.L. Outlaw. 2021. ''Introduction.'' *The U.S. Beef Supply Chain: Issues and Challenges.* B.L. Fischer, J.L. Outlaw, and D.P. Anderson, eds. College Station, TX: Agricultural and Food Policy Center, Texas A&M University.

[60] Carstensen, P.C., ''Dr. Pangloss as an Agricultural Economist: The Analytic Failures of 'The U.S. Beef Supply Chain: Issues and Challenges,' '' (2022), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049230.*

[61] Koontz, Stephen R. 2016, ''Price Discovery Research Project—Objective Measures Findings Summary,'' Colorado State University, 10, available at *https://webdoc.agsci.colostate.edu/koontz/thinmarkets/Price%20Discovery%20Objective%20Measures%20Report%202016-06.pdf.*

[62] Koontz, Stephen R. 2021. ''Another Look at Alternative Marketing Arrangement Use by the Cattle and Beef Industry.'' *The U.S. Beef Supply Chain: Issues and Challenges.* B.L. Fischer, J.L. Outlaw, and D.P. Anderson, eds. College Station, TX: Agricultural and Food Policy Center, Texas A&M University.

[63] Op Cit.

[64] Adjemian, M.K., W. Brorsen, W. Hahn, T. Saitone, and R. Sexton. 2016. ''Thinning Markets in U.S. Agriculture: What Are the Implications for Producers and Processors?'' ERS EIB number 148.

[65] Dennis, E.J. and Lubben, B.D., ''Regional Minimums in the U.S. Beef Complex,'' (2022), available at *https://cap.unl.edu/livestock/new-report-regional-minimums-us-beef-complex.*

[66] Gina-Gail S. Fletcher, ''Benchmark Regulation,'' 102 *Iowa Law Review* 1929–1982 (2017), *available at: https://scholarship.law.duke.edu/faculty_scholarship/4014*

[67] Hatfield, J.W. and R. Lowery. ''Facilitating Collusion with Spot-Price Contracting,'' University of Texas—Austin: McCombs School of Business, August 2, 2023. *https://ssrn.com/abstract=4529677* (accessed 7/5/2024).

[68] See, Davis, D. ''Does Top of the Market Pricing Facilitate Oligopsony Coordination?'' South Dakota State University Discussion Paper, August 9, 2000; see also Xia, T. and R.J. Sexton. ''The Competitive Implications of Top-of-the-Market and Related Contract-Pricing Clauses,'' *American Journal of Agricultural Economics* 92(4): 1181–1194, April 2010.

[69] Garrido, F., M. Kim, N.H. Miller, and M.C. Weinberg. ''Buyer Power in the Beef Packing Industry,'' January 2024, *https://www.nathanhmiller.org/cattlemarkets.pdf* (accessed 9/25/2024); Garrido, F. G and M. Kim, N.H. Miller, and M.C. Weinberg. ''Buyer Power in the Beef Packing Industry: An Update on Research in Progress,'' Report prepared for Washington Center for Equitable Growth, March 30, 2022.

[70] See, *e.g.* TAMU, *https://afpc.tamu.edu/research/publications/710/cattle.pdf.*

[71] See, *e.g.,* S. 4030 (117th Cong., 2021–2021); Letter from Marty Smith, President, National Cattlemen's Beef Association, to Fellow Cattle Producers, Oct. 15, 2020, available at *https://cdn.farmjournal.com/s3fs-public/inline-files/Letter%20from%20Marty%20to%20NCBA%20Membership%20-%20FINAL.pdf.*

thus in turn how they affect the cash negotiated market. The question, then, is whether the incentive structure can be appropriately shifted such that formula pricing arrangements facilitate rather than restrict price discovery and fair competition.

In financial and commodity trading markets, increasing attention has been paid in recent years to the regulation of benchmarks to ensure reliability and prevent manipulation of the benchmark or other forms of unfair or deceptive trading in relation to the benchmark.[72] The extraordinary manipulation of the London Interbank Offer Rate (LIBOR), which was the reference price for interest rates cases from 2015 and affected trillions of dollars of financial instruments, drove widespread interest in regulating benchmarks.[73] Among the reforms adopted by various regulators include changing which benchmarks are available for use in contracts.[74] Another tool deployed by financial regulators has been enhanced transparency in the underlying benchmark market, which in turn has enhanced the opportunity for standardization and improved price discovery in certain previously-thought bespoke and difficult to regulate markets. The most notable of these is the bond market, where the Financial Industry Regulatory Association (FINRA)'s Trade Reporting and Compliance Engine (TRACE) system immediately reports a handful of key characteristics for bond transactions, which allows investors and market participants to normalize pricing across diverse bond trading and, in effect, compare apples to oranges. In doing so, it dramatically reduced the fees that dealer banks could charge through opaque pricing, and improved trading efficiency and fairness for investors.[75] FINRA also confidentially reports scorecards to broker-dealers providing them information about their performance relative to peers, which has reduced markups that investors pay. Regulators have also long paid attention to trading incentives, pricing differences, and fairness concerns that may arise from the transparency differences between ''lit'' (reported) and ''dark'' (unreported) markets.[76]

Other industries have developed solutions to address complex pricing challenges, some of which may have the potential to inform development of new market price information and reporting products that would provide additional options and could be adopted as alternative benchmarks in the cattle industry. Levin and Milgrom (2010) discuss several ways in which concepts of ''standardization'' and ''conflation'' have been applied in the context of pricing a variety of diverse goods that include wheat, diamonds, radio spectrum, and internet advertising.[77]

In light of identified concerns about existing cattle industry benchmarks, application of ideas from other industries could prove useful. USDA, through a range of programs, regularly provides a wide array of useful market information and could continue to explore possibilities for developing additional price reports that provide valuable price discovery information to the industry. Expanded price discovery information from newly developed reports could create additional options that market participants could potentially use as benchmarks that improve price discovery and make the market more transparent. Other possibilities might include the production of reports that could function more similarly to the TRACE system, which immediately reports a handful of specific identified characteristics for every transaction on a national, anonymous basis.

This ANPR focuses on which benchmarks are appropriate for use as base prices in formula agreements, along with related trading practices and implications arising from the use of those benchmarks. As discussed below, the purpose of this ANPR is to solicit useful information that can be used to inform future rulemaking that could either change base price choices or otherwise regulate packer trading connected with the use of base prices.

III. Potential Options To Remove Barriers to Price Discovery and Improve the Fair Trading in Relation to Cattle Price Benchmarks

AMS seeks to identify regulatory changes for ''covered packers'' with respect to base price formation in formula contracts and related trading practices, transparency in price reporting, and information collection/market monitoring that could ameliorate these problems with minimal adverse consequences for industry stakeholders. ''Covered packer,'' means every packer slaughtering fed steers and heifers as defined in 7 U.S.C. 191(a) that has slaughtered five percent or more of the total fed cattle that were slaughtered nationally in the past five years. There are no covered packers that would be defined as small businesses by the Small Business Administration because all covered packers to which the ANPR applies have more than 1,150 employees. Through this ANPR, AMS seeks feedback on whether the following proposed interventions could mitigate the adverse consequences of AMAs without losing their benefits to covered packers.

A. General Regulatory Options

AMS is first requesting comment on several broader-based regulatory options that would each regulate covered packers' purchases of fed cattle from fed cattle producers. The general regulatory options can be considered individually or in combination with each other. The options may also have associated written documentation requirements (which are discussed in section III.D.). Commenters are invited to comment on whether one or more of the options would help remove barriers to price discovery or market transparency, improve the fair-trading environment in relation to cattle price benchmarks, or otherwise address concerns that producers and market participants may

[72] Gina-Gail S. Fletcher, ''Benchmark Regulation,'' 102 *Iowa Law Review* 1929–1982 (2017), available at: *https://scholarship.law.duke.edu/faculty_scholarship/4014;* Andrew Verstein, Benchmark Manipulation, 56 Boston College Law Review 215 (2015), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482021.*

[73] See, *e.g.,* Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR,'' available at *http://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation.*

[74] See, generally, Federal Reserve Board and Federal Reserve Bank of New York, ''Transition from LIBOR,'' available at *https://www.newyorkfed.org/arrc/sofr-transition;* Alternative Reference Rates Committee, ''ARRC Closing Report: Final Reflections on the Transition from LIBOR,'' Nov. 2023, available at *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2023/ARRC-Closing-Report.pdf.*

[75] Kumar Venkataraman, ''Market Transparency, Liquidity Externalities, and Institutional Trading Costs in Corporate Bonds,'' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=827984.* Also on FINRA's TRACE: *https://www.finra.org/filing-reporting/trace/trace-independent-academic-studies.*

[76] See, *e.g.,* Chair Gary Gensler, U.S. Securities and Exchange Commission, ''Market Structure and the Retail Investor:'' Remarks Before the Piper Sandler Global Exchange Conference,'' June 8, 2022, available at *https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-piper-sandler-global-exchange-conference-060822;* Commissioner Kara M. Stein, U.S. Securities and Exchange Commission, ''Market Structure in the 21st Century: Bringing Light to the Dark,'' Sept. 30, 2015, available at *https://www.sec.gov/newsroom/speeches-statements/stein-market-structure;* Commissioner Michael S. Piwowar, U.S. Securities and Exchange Commission, ''The Benefit of Hindsight and the Promise of Foresight: A Proposal for A Comprehensive Review of Equity Market Structure,'' Dec. 9, 2013, available at *https://www.sec.gov/newsroom/speeches-statements/2013-spch12013msp.*

[77] Jonathan Levin and Paul Milgrom, ''Online Advertising: Heterogeneity and Conflation in Market Design,'' *American Economic Review* vol. 100(2), May 2010, p. 603, available at *https://web.stanford.edu/~jdlevin/Papers/OnlineAds.pdf* last accessed 7/18/2024.

have with respect to fairness, preferences, competition, or other aspects of the markets, as well as the costs and benefits, obstacles, or other aspects of these options.

1. *Fair Trading in Relation to a Benchmark.* AMS is considering two options (options 1.a. and 1.b.) to address potentially problematic trading practices in relation to the use of a reported cattle benchmark in a base price formula (*i.e.,* when the covered packer uses a reported price as a base price in an AMA). The first option (1.a.) would provide broader, more flexible coverage, and enforcement would heavily depend upon AMS's ability to identify challenges based on the potential documentation requirements set forth in section III.D. below. In the second option (1.b.) described below, AMS would identify more specific practices of concern, thus providing less flexibility but also potentially enhancing enforceability.

Option 1.a. In the first option, AMS would require covered packers that utilize a benchmark in their base price to design and operate their cattle buying operations in such a way that ensures a fair-trading environment in spot cattle markets affected by the benchmark price used in formula pricing agreements. In determining whether regulated entities are in compliance, the Secretary would consider:

i. The extent to which the markets on which a formula pricing agreement is based are robustly competitive.

ii. The reliability of base prices in formula pricing agreements to reflect the competitive market value of fed cattle, their sensitivity to other factors, and the risks of manipulation.

iii. The extent to which the packer has identified and mitigated any risks stemming from the use of the base price in a formula pricing agreement to fair trading practices in relevant fed cattle markets.

Option 1.b. In the second option, AMS would prohibit covered packers from manipulating cattle benchmark prices through one of the following specifically defined means. AMS notes that enforcement of these options present significant evidentiary challenges, but includes them for the purposes of eliciting public comment around their value, workability, and alternatives:

i. Targeting its bidding in the cash market toward lower-value specifications of cattle and avoiding higher-value specifications of cattle, as a practice and pattern without a reasonable business justification. Such a practice may be used to distort base prices used in formula pricing agreements as most purchases in the cash market would, likely, be for lower-value specifications of cattle within the given market, leading to lower benchmark prices in AMAs than would be the case in a fully competitive market. Targeting would be identified through enhanced monitoring of markets, complaints, and investigations.

ii. Structuring a transaction with the purpose of it being included or excluded from a benchmark price in an AMA, thus preventing that transaction's price from influencing the ordinary supply and demand in the benchmark market.

iii. Holding out or failing to purchase cattle in specific reporting areas for the purpose of reducing or otherwise changing a reported benchmark price.[78]

iv. Using top-of-the-market pricing (TOMP) formulas in which a formula contract base price in a formula pricing agreement is based on the top price reported in the negotiated cash market.[79]

v. Manipulating internal records in any way that affects a price, standard, or threshold referenced in a pricing agreement for cattle or beef.

2. *Exclusivity.* AMS is considering a provision that would discourage a covered packer from requiring exclusivity of a producer in an AMA when it utilizes a spot price cattle benchmark. Whether crafted as a prohibition, a presumption, or through an incentive structure, the packer could not threaten to withdraw an AMA or otherwise prevent a producer in an AMA from selling or seeking to sell a substantial amount of cattle to another packer outside of the AMA, such as through utilizing competitive price discovery tools like cattle exchanges or auctions. The purpose would be to limit both express or implied contractual requirements for exclusivity, as well as informal exclusivity such as threatening or refusing to buy cattle or offering a lower price. The approach could include a requirement for contractual disclosure of the minimum number of cattle that the AMA-holding producer can, of right, market or sell to another packer in the benchmark market. A presumption of compliance could also encourage certain practices; for example, 20 percent for general cash negotiated trade or 15 percent if a competitive price discovery tool such as a cattle exchange or auction were selected. The producer would not be required to exercise the option, or could opt to take a hybrid approach, for example, by utilizing exchange trading to set a base price but maintaining access to a producer's specialized AMA grid with a packer through exchange trading options available today. AMS notes that producer participation in exchange trading could depend upon support for the exchange's costs, such as through a market-making fee.

AMS is also considering other tools to reduce exclusivity as a barrier to competition between packers bidding on cattle. P&S Act non-discrimination principles may suggest that any producer be offered an AMA or pricing available under an AMA when the producer is able to meet the AMA's terms and conditions, absent a legitimate business justification. Such an approach could potentially be paired with a compliance presumption where the packer engaged in competitive and open exchange trading for a certain portion of their AMA cattle.

3. *Relative Variation Among Cash and Formula Purchases.* AMS is considering prohibiting covered packers from engaging in a pattern of cattle trading in the negotiated benchmark market such that the percentage variation in week-to-week purchases in the benchmark cash market is substantially greater rate than the percentage variation in quantity purchased week-to-week under the formula pricing agreement, absent legitimate business justification—for example, if the packer certified the lack of availability in the benchmark market of the cattle at a given quality level or specification. Such an approach should make AMA contracts bear more of the risk of quantity volatility when relying on the cash market for price discovery purposes. This prohibition could be paired with a presumptively permissible minimum use of a cattle exchange or auction.

4. *Packer Pick-up and Captive Supply.* AMS is considering a provision requiring covered packers to fully compensate sellers for all maintenance costs of the cattle if they fail to pick up cattle purchased in a negotiated transaction during the time period negotiated with the seller or within seven days if not specified in negotiations.

[78] A small number of packers account for most fed cattle negotiated cash transactions, and spot market prices have a significant impact on formula pricing agreements. Given these facts, strategic behavior by covered packers has the potential to impact fed cattle prices for both negotiated cash transactions and AMA transactions.

[79] TOMP links the price paid under the formula contract directly to the highest price paid on a one-to-one basis, which has been shown to create adverse market incentives and put downward pressure on market prices. See Xia and Sexton, op. cit.

B. Specific Base Price Regulatory Options

AMS is concerned that competitive market conditions within USDA reporting regions may cause certain regional negotiated cash fed cattle prices to be unreliable benchmarks for formula contracts, and that the design of certain AMS reports are not appropriate for use as benchmarks in formula pricing arrangements. As noted above in section II., some regional cash markets are thinly traded with high levels of local packer concentration. Additionally, the use of benchmarks that do not have quality specifications may leave those markets vulnerable to gaming or create obstacles for producers seeking to sell higher quality cattle. To the extent that the use of different benchmarks in formulas (such as the use of quality-specific reports) and different approaches to trading (such as exchanges) can ''thicken'' the market (*i.e.,* make it more competitive and comparable across different cattle types), the robustness of price discovery would be enhanced.

AMS is requesting comment on several options for regulating the use of regionally reported prices as base prices in formula pricing agreements. Regional prices could only account for more than 50 percent of the value of any formula if one of four conditions is met (options 1, 2, 3, or 4 below). The purpose of the provision would be to utilize benchmark options that offer incrementally greater market thickness and resiliency to external shocks which could otherwise undermine the reliability of using the existing regional average negotiated cash prices as a benchmark.

One way that regional price information could be incorporated as the predominant value in formulas would be if new price series or indices could be developed which were deemed suitable for that purpose. USDA seeks comment on the feasibility and value to the industry of developing and publishing additional market price information made available by publishing new reports under its existing authority. To the extent that industry stakeholders would find this information useful, and that it would mitigate fairness concerns, new price reporting could provide additional options for industry benchmarks.

The specific base price interventions listed below can be considered individually or in combination with each other. The interventions may also have associated written documentation requirements (which are discussed in section III.D. below). Commenters are invited to comment on the costs and benefits, obstacles, or other aspects of these options. Note that section III.C. below provides a list of benchmarks that may mitigate fairness concerns. Comment is also requested on the list of benchmarks. The following approaches could be utilized to offer incremental improvements to regional price benchmarking:

1. The regional benchmark could reflect all cattle sold on a negotiated cash basis in the relevant market as standardized to a single quality specification. The standardized benchmark would represent a ''par lot.'' For example, a benchmark could report all fed cattle sales transactions in a given regional market adjusted to a par lot defined as live weight basis, steers, 70 percent choice, Yield Grade 3. Individual sales would continue to transact at whatever value the parties agree given the attributes (quality, yield, other premiums/discounts, etc.) of the particular cattle transacted. Only the benchmark would mathematically translate those actual prices into prices as if the transactions were the par lot, for the purposes of thickening the market for the standard par lot. Again, cattle trade at their own negotiated price. Only the reporting adjusts it so that there is more robust price discovery on an apples-to-apples basis.

This mathematical adjustment could via be a third-party developed reference price, a USDA-developed reference price, or it could be based on publicly available information that the packer utilizes to construct its base price formula. The development of the standardized regional benchmark price may require USDA to collect information from packers that it does not currently collect, and this may require changes to USDA information collection forms or separate rulemaking. AMS acknowledges concerns may still exist regarding price discovery and manipulation risks and invites comment on whether there is a minimum level of trade that should serve as a floor in the market before the region could be used as a benchmark even under this approach.

2. The regional benchmark could be a comprehensive fed cattle reported price, which if reported would include negotiated spot transactions comprised of reported negotiated cash live, negotiated cash dressed, and negotiated grid net transactions. This is not currently reported on a regional basis, but AMS Market News is currently looking into whether it has sufficient information to begin reporting regional comprehensive reports in the near future. AMS recognizes that this approach offers less benefits to price discovery than option 1. above but seeks comment on it given the greater feasibility of operationalizing it.

3. The benchmark could be the five-area regional average reported by AMS Market News at a particular quality grade specification, such as within five or ten percentage point range for Choice grade. AMS recognizes that this approach offers less benefits to price discovery than option 1. above and that packers may retain an ability to place downward pressure on the cash market given that the five-area regional average reflects a composite of local market trading practices. However, AMS seeks comment on this option given the greater feasibility of operationalizing it over other options.

4. Regional cattle prices from a cattle exchange or auction would be standardized to a particular quality grade specification and meet sufficient standards of oversight and competitive trading.

C. Presumptively Permissible Base Price Options

Under any of the specific regulatory options described in section III.B. above, a range of benchmarks would still be presumptively permissible to determine the predominant value of the base price in a formula price agreement. A first set of possible alternative benchmarks could consist of existing market price reports or indices that may be less vulnerable to manipulation or strategic trading choices that have unintended adverse consequences on other producers due in part to the ''thickness'' of the markets and/or the specificity of the market. These alternative benchmarks include super-regional USDA-reported negotiated cash prices (*i.e.,* the 5-Area Average or National Report) that are ''thicker'' market indices because they aggregate reported transactions from multiple regions.

Possible benchmark alternatives could also include several proxies for negotiated cash prices. Live cattle futures contracts are derivatives for which fed cattle are the underlying asset, and economic research has consistently shown a connection and flow of information between fed cattle prices and live cattle futures. Moreover, the live cattle futures contract contains specifications relating to the cattle which ground the value of trading in the contract. AMS acknowledges concerns from some producers relating to the potential influence of packers in the futures market. AMS invites comment on whether there are ways to mitigate those concerns, such as with a condition relating to stricter position limits. AMS also acknowledges that futures contracts are likely to converge with cash prices as delivery approaches, and accordingly, they could suffer from the same substantive manipulation and/or pay suppression as formulary contracts. AMS invites comment on potential solutions to mitigate these concerns.

Other possible benchmarks include indices based on fed cattle input costs (*e.g.,* corn or other inputs) or on downstream output prices for boxed beef. Commenters are invited to comment on the costs and benefits, unintended consequences, risks of manipulation, or other aspects of these options. USDA also seeks comment on how additional existing publicly available market information may also be useful for developing reliable and robust alternative fed cattle contracting benchmarks.

A covered packer could be permitted to use any of the following indices to comprise 50% or more of the base price in a pricing agreement:

1. Regional benchmarks reflecting all cattle purchases on a negotiated basis standardized to a single benchmark quality.
2. AMS Regional Comprehensive fed cattle reported price.
3. 5-Area Average Reported Cattle Prices at a particular quality grade specification (such as within 5 or 10 percentage point range for Choice grade).
4. Boxed Beef Prices.
5. Live Cattle Prices (including live cattle futures prices imputed to different quality specifications).
6. Corn or Other Input Prices.
7. Cattle prices from cattle exchange or auction that meet sufficient standards of oversight and competitive trading.

D. Written Documentation Options

AMS is requesting comment on several potential written documentation requirements for covered packers to allow AMS to determine compliance with the above ANPR options. Commenters can consider the options individually or in combination with each other. Commenters are invited to comment on the costs and benefits, obstacles, or other aspects of these options.

1. *Packer Market Fairness, Price Discovery, and Access Plan.* Covered packers could be required to develop, maintain, and execute a written plan describing their approach to fed cattle price discovery and market access for all sellers, particularly small and mid-sized feeders and producers, in any market which serves as a benchmark in a pricing agreement of the packer or in any market which materially influences or is materially affected by price discovery in the benchmark market (the Covered Markets). The plans for each calendar year would be provided confidentially to AMS–PSD on an annual basis by the end of January of that year (*e.g.,* a 2025 plan must be submitted by January 31, 2025). Under this option, plans would have to include written processes for:

a. *Price Discovery.* How the covered packer structures market participation and procurement methods in a manner that contributes to price discovery in the Covered Markets. In particular, the plan should describe how the packer strives to facilitate and encourage price discovery in markets where benchmark prices are determined for fed cattle pricing agreements by the packer. The packer's plan for contributing to price discovery might also include voluntarily reporting of additional market pricing information (beyond existing mandatory price reporting requirements) that contributes to price discovery. Such participation could include, but is not limited to, cash negotiated trade, negotiated grid trade, exchange and auction trade, and market-making contributions to a relevant institution such as a cattle exchange in lieu of price discovery. The covered packer would have to explain its analysis relating to Covered Markets.

b. *Market Access.* Describe purchasing strategies and actions to be taken by the covered packer for the purpose of ensuring reasonable market access for sellers. This could include plans for purchasing fed cattle from small feeders, engaging in price discovery mechanisms such as exchange trading, or paying market making contributions to support exchange trading by others. Such strategies and actions should be reasonably designed to mitigate excessive risk of non-placement of cattle or sales below full value by market participants in the benchmark markets used in pricing agreements (*i.e.,* who are taking/absorbing the risk/cost of price discovery).

c. *Base Prices.* For each fed cattle pricing agreement involving a reported market price or any other reference to a value that is expected to change during the term of the agreement, report the pricing agreement describing how the packer will determine final payment for cattle. The report should clearly identify all prices and values in sufficient detail to reproduce the amount paid.

d. *Market Participation.*

i. Describe purchasing strategies and actions to be taken by the covered packer for the purpose of ensuring reasonably consistent and non-manipulative participation in benchmark markets used in the packer's pricing agreements with respect to quantity and quality purchased of fed cattle.

ii. Provide a target and range for relative coefficients of variation (CV) on weekly quantities of fed cattle procured using spot and formula methods in the benchmark markets of pricing agreements as a measure of risk transfer (specifics of calculations to follow). If those targets were not hit, explain the business justification for why not. AMS also invites comment on the relative value of the CV, and whether other metrics would be more appropriate to identify changes or differences in market access risk.

e. *Fed Cattle Supply and Demand Disruptions.* Explain how the covered packer will maintain adequate price discovery and market participation in benchmark markets used in pricing agreements during periods of significant market disruptions in the supply and/or demand for fed cattle (would include human pandemics, drought, animal disease outbreaks, emergent animal health issues, lengthy plant shutdowns, labor strikes, other beef packing and supply disruptions, events that trigger force majeure in contracts, etc.).

f. *Pickup Practices.*

i. Covered packers would need to describe all policies and procedures for circumstances in which pickup or delivery of negotiated cattle extends beyond seven days or the scheduled (negotiated) number of days after the cattle are traded.

ii. The policies and procedures would need to include when ownership of the cattle will be transferred to the packer and how the packer determines timing, amount, and payment for assuming all expenses of the cattle, including feed, yardage, and death loss.

iii. Policies and procedures would need to describe how the packer will fully compensate fed cattle sellers when pickup exceeds seven days or the time period (number of days) that was negotiated. This should include separate policies and procedures for cattle that are sold on a live weight basis or on a carcass weight basis.

2. *Packer Compliance Report.* Covered packers would be required to confidentially report on an annual basis to AMS:

a. The actions the covered packer undertook to fulfill each component of their Packer Market Fairness, Price Discovery, and Access Plan. The report would be due to AMS by the end of January for the previous year (*e.g.,* a report on compliance for 2025 must be submitted by January 31, 2026). The compliance report would be required beginning with the calendar year after the rule implementing the requirement for the plan becomes effective.

b. Each purchase transaction for which cattle were not picked up within seven calendar days or the scheduled (negotiated) number of days and the reason for delayed pickup, measures taken to shorten the pickup time, and how the packer compensated the seller for the delay in pickup.

3. *Internal Review.* The covered packer's CEO would need to review and certify approval of each annual plan and compliance report.

IV. Request for Public Comments

AMS seeks comment on the proposals discussed in this ANPR. Commenters are invited to comment on whether any or all of the proposals would address concerns about the fair functioning of the cattle markets, as well as the costs and benefits, obstacles, and other options commenters want AMS to consider. Commenters may consider each section individually or may consider the ideas together. In addition to inviting general comments, AMS has prepared a list of specific questions. Commenters may answer all, some, or none of these questions as they see fit.

A. General Regulatory Options

1. In what ways does the use of regional price reports as benchmarks in formula contracts influence those regional markets, including the manner or extent of buyer (packer) participation or cattle procurement in the negotiated or spot markets within those same reporting regions?

2. Does the use of regional negotiated price reports as formula contract benchmarks adversely affect buyer demand in negotiated markets? If yes, how? Are these adverse effects stronger for cattle of any particular grade, class, type, etc., or in any specific regions? What could be preferred alternative prices to use as formula contract benchmarks? How should AMS determine whether prices used as benchmarks are competitive or reliable?

3. To what extent would the general regulatory options described in section III.A. above—addressing practices related to fair trading in relation to a benchmark, exclusivity, relative variation among cash and formula purchases, and packer pickup—be useful for clarifying the most problematic purchasing activities that are known or believed to adversely affect fed cattle markets and sellers?

4. Are there other problematic purchasing activities or conduct that are known or believed to adversely affect fed cattle markets and sellers that are not addressed by the regulatory options described above? If so, what regulatory options are needed to address such issues?

5. Please provide feedback regarding the prevalence of practices addressed in this ANPR or any other related practices as observed by market participants. What actions, specifically, would be most appropriate and effective for AMS to address concerns about potential manipulation or distortion of market prices?

6. Please comment on the effect of market power and industry concentration on producers in regional fed cattle markets. What, if any, relationship does increasing packer concentration have on the use of particular fed cattle pricing methods and prices paid to packers? How has concentration affected the resilience of the regional markets and their ability to respond to market shocks?

7. The DOJ Consent Decree expired in 1981. Were there specific protections or prohibitions in the Consent Decree that would have particular value in today's market? If so, which ones?

8. Top of the Market Pricing (TOMP) refers to pricing agreements that set a formula contract base price based on the top price reported in the negotiated cash market. Please comment about any effects of TOMP on sellers or buyer behavior. Should TOMP be prohibited as a method of base price determination?

9. Formula agreement AMAs may include a wide variety of written, verbal, or implied agreements or expectations between fed cattle buyers and sellers which can differ in the degree to which they limit the seller's (feeders or producers) marketing options. Please provide comment about the extent to which these AMAs constrain marketing options for sellers. Do these AMAs commonly require sellers to deliver all cattle they produce to a single packer (exclusivity)? Are sellers under these AMAs prevented from using other selling methods for some cattle, including cattle exchanges, auctions, or negotiations with other packers?

10. When cattle are purchased through negotiated transactions, there is often some agreement between the parties regarding the time period (number of days) within which the buyer will pick up the cattle and/or compensate the seller for maintenance costs. AMS seeks comment and information about the frequency with which buyers fail to pick up cattle within an agreed-upon time frame. In such cases, are buyers adequately compensated? What is the extent of the problem, and should AMS consider additional regulation to address it? What would be an appropriate requirement for prompt buyer pickup and seller reimbursement?

11. Do large changes in the numbers of fed cattle that packers purchase each week in the negotiated spot market create undue risk for sellers in those markets? If yes, what percentage change from the previous week do you consider large? Does widespread procurement of cattle through formula pricing agreements cause negotiated markets to be more volatile?

12. What would be an appropriate minimum level of use of a cattle exchange or auction by a packer buyer to qualify for a safe harbor provision in a prohibition against relative variation in quantity purchased week-to-week in the benchmark market changing at a substantially greater rate than the relative variation in quantity purchased week-to-week under the pricing agreement?

13. What motivates sellers to market cattle in the negotiated (cash or spot) market rather than through a formula pricing agreement or other type of AMA?

14. To what extent are formula pricing agreements or other AMAs available to small and medium-sized feedlot sellers and what are their reasons for choosing whether or not to use them? What rules could AMS develop to ensure non-discriminatory access?

15. How do those producer motivations differ by relative size and region, and to what extent to prices in one region follow (or otherwise affect) trading the occurs in another region?

16. How, specifically, do sellers and buyers determine the method by which base prices are determined for formula pricing agreements? To what extent does the buyer and the seller influence the choice of base price? What base price sources (*e.g.,* USDA regional price reports, live cattle futures, etc.) do sellers and buyers prefer? What specific factors and considerations are important to sellers and buyers when choosing a base price?

17. Please describe views that AMS should consider relating to compliance burdens with any of the options presented, generally above or specifically below. Is the definition of ''covered packer'', which limits certain interventions to larger packers, an appropriate approach to limiting compliance burdens on the industry?

18. To what extent, if at all, would these general regulatory options address other pervasive avenues for manipulation of cattle prices and how

should USDA address any alternative forms of manipulation?

19. Is it necessary and effective for AMS to restrict the proportional use of formula pricing agreements relative to cash trading? If so, under what conditions, and what proportion is necessary and effective and why? Should the level of market concentration be considered in this determination, and why?

20. Does the timing of price setting (after contract formation but on a future price) increases the risk of manipulation of cash markets or other harms?

21. Do specific types of AMAs create more problems than others and should AMS limit the use of some types of contractual provisions in AMAs?

B. Specific Base Price Regulatory Options

1. Please comment about the use of USDA regional price reports (for example, weekly negotiated live or dressed cash steer price for a particular region) as benchmarks (also called base prices or reference prices) in fed cattle formulas. To what extent do available prices accurately reflect competitive market conditions in time periods (*i.e.,* each week) and in regions? Do buyers or sellers have any concerns or evidence that low weekly trading volumes (*i.e.,* few cattle and/or transactions) or small numbers of market participants distort benchmarks based on regional price reports that are used as base prices in formula contracts? If yes, what weekly trading volumes (number of transactions or number of cattle) and/or number of market participants do you consider low?

2. Please comment on the value of using USDA prices based on specific reporting regions rather than more aggregated reports (*i.e.,* 5-Area Average or National Report) as the basis for formula contract benchmarks. Is a prohibition on using more than 50% of a regional price for a base price in a formula agreement appropriate? If not, is there level of partial use that would be appropriate?

3. What problems would buyers and/or sellers encounter if regional prices were no longer available for use as benchmarks to establish base prices in formula contracts? Would no longer using regional benchmarks mitigate some of the market power dynamics between increasingly consolidated packers and producers?

4. Should a contract benchmark be based on a reported price for cattle with specific characteristics (*e.g.,* steers 65–80% choice or 55% prime) or for more general categories (*e.g.,* total of all classes and all grades)?

5. AMS has historically published a National Weekly Fed Cattle Comprehensive report that reports composite net prices paid for cattle purchased using all purchasing methods. Recently, AMS expanded this to include a new Regional Weekly Comprehensive Purchase Type report that provides a composite price for all beef type cattle purchased (including live and dressed basis, FOB and delivered, steers, heifers, and mixed, etc.) for negotiated methods only (negotiated cash and negotiated grid net) and for combined negotiated and formula methods. Please comment on the value of this additional regional market information. Could these Comprehensive regional price series provide a useful alternative formula contract benchmark if currently used regional negotiated cash prices were no longer available?

6. Could alternative compensation structures restore competition and negotiation in cattle payment structures while maintaining the benefits of AMAs? For example, could negotiated grid sales, where the value of the cattle is assessed after slaughter and feeder compensated based on the actual quality of cattle sold, adequately take into account certification and grading?

7. To what extent does benchmarking with respect to live cattle futures solve the problem of suppressed benchmark inputs? How can such a futures benchmark be regulated to prevent manipulation? For example, should a future rulemaking forbid purchasing cattle after the close of mandatory reporting or the exchange day on Friday afternoon, to end the practice of paying certain feedlots a higher price without contribution to the week's average price or to futures prices to which formula and forward contracts are tied?

8. To what extent does pegging benchmarks to inputs (*e.g.,* feed) or outputs (*e.g.,* wholesale boxed beef) mitigate fairness concerns related to packer spread and manipulation of benchmarks?

9. What would be the challenge of requiring that all formula contracts contain a firm negotiated base price that can be equated to a specific dollar amount when the contract is entered into? How could such a contract implement quality adjustments or otherwise contain the efficiency benefits of AMAs without reliance on spot benchmark?

10. Please comment on how information disclosures might address the concerns identified herein.

11. To what extent could nondiscrimination principles be applied to mitigate exclusivity that obstructed price discovery, competition, and market access?

12. Should AMS incentivize exchange trading as a mechanism to enhance price discovery? If so, how should this be done?

13. Formula cattle selling arrangements enable packers to effectively secure a ''captive supply'' of cattle by establishing future commitments for future delivery and thereby reduce the need to purchase cattle on the cash market. Please comment on whether and how such arrangements might harm competition or distort fed cattle markets.

14. To what extent would the policy options outlined in this ANPR solve problems related to market power and lack of sufficient price discovery? If there are still gaps, what additional reforms would be necessary to ensure a fair-trading environment for all cattle producers?

C. Presumptively Permissible Base Price Options

1. Is the potential prohibition of regional negotiated cash price benchmarks based on the predominant use (largest component of value, presumptively 50 percent) appropriate? If not, what approach would be most effective and why? Are there additional conditions that would help ensure regionally negotiated cash price benchmarks are sufficiently thick, based on competitive conditions, and not prone to packer manipulation?

2. What criteria, specifically, would be appropriate for AMS to consider when evaluating whether a fed cattle benchmark would serve the needs of industry stakeholders and could function effectively as a means of establishing base prices for formula contracts?

3. What criteria should be applied when evaluating whether reported prices from, for example, a cattle exchange, auction, or negotiated market could appropriately be used as formula contract benchmarks (*i.e.,* to set base prices)? Should it be based on market thickness with consideration for numbers of cattle or transactions? What other factors should be considered?

4. AMS is seeking comment from industry stakeholders about the desirability and feasibility of undertaking proactive efforts to develop new price information and market reporting which, if useful to the industry, could provide additional options for adoption as fed cattle benchmark alternatives. These efforts would seek to develop robust benchmark alternatives that are designed with the realities and

challenges of thinning markets in mind, especially at the regional level. Development could use certain advanced modeling techniques for aggregating and reporting market information. Such models may have the potential to incorporate valuable information related to premiums and discounts paid for fed cattle characteristics. Or, tailored alternative benchmark reports could be designed to enable market participants to develop their own models based on certain consistent widely reported transaction-specific information, as is the case under the FINRA's TRACE System for bonds.

5. What risks might exist during any transition away from the use of existing benchmarks, and in what ways could they be mitigated? Are certain external regulatory regimes valuable for USDA to learn from in this regard, such as how financial regulators handled the transition away from LIBOR, how FINRA implemented the TRACE System, or other models from financial or commodity trading markets?

D. Written Documentation Options

1. Should AMS require covered packers to submit annual documentation to AMS describing how the packer plans to conduct market activities in a fair manner, participate in price discovery for fed cattle, and ensure market access for small and medium-sized feeders?

2. Please comment on how packers should plan to structure market participation and procurement methods to contribute to market price discovery. Provide specific details about actions packers should take to achieve these goals and any market information or data that could be provided to the industry on a voluntary basis to improve market transparency.

3. What role should exchange trading play in considerations of price discovery? For example, for a covered packer to count as contributing to price discovery, would it be useful to establish a presumptive requirement that no less than a certain percentage (*e.g.,* 15% or 30%) of cattle be either exchanged or auction purchased or paid as a market-making fee to the exchange or auction to cover the risks and costs of other producers in those transparent, competitive pricing venues?

4. Please discuss specific problems that feedlot sellers experience with market access and actions that packers could take to improve market access, especially for small and medium-sized producers. For example, would enhanced access to exchange trading be effective in supporting market access, and could a market-making fee system that supported smaller producers be helpful—for example, from packers that chose to make contributing to such fee one part of their contribution to price discovery under their plan?

5. Please comment about specific concerns related to packer purchasing behavior during periods of supply and demand disruption (*i.e.,* pandemics, disease outbreaks, production disruptions, etc.). What are the important elements of packer plans for maintaining adequate price discovery and market participation during these times?

6. Were AMS to require packers to report to PSD all pricing agreements that describe how base prices are determined for all cattle procured by the packer, describe any specific information or data that should be required for this documentation or otherwise associated to make this documentation more useful for AMS to monitor the market. Should AMS consider any other appropriate documentation requirements of covered packers?

7. In what ways could it be appropriate and useful for AMS to make aspects of the information from these documentation reports available to the public, subject to confidentiality protections? Which ones and why? Would a firm-specific approach, as opposed to an aggregated approach, ever be appropriate for public disclosure?

8. Would it be appropriate and useful for AMS to score or rank covered packers based on their contribution to price discovery, potentially similarly to how FINRA scores broker-dealers on certain metrics? [80] If so, what metrics would be appropriate for the scoring: cash trade and exchange trading purchases, purchases from smaller producers, or other factors? Should any deductions be taken, such as the use of TOMP contracts or delayed packer pickup? Should scoring be dynamic, such that improvements from year to year are recognized? Would any scoring or ranking be most appropriate and useful if provided confidentially to covered packers, or should any ranking be made available publicly?

V. Conclusions and Next Steps

Given the background, key regulatory challenges, and options for consideration outlined in this ANPR, AMS is seeking comment on potential and preferred paths forward. Comments received in response to this ANPR will inform AMS's approach to regulating the Nation's fed cattle markets. Substantive, well-reasoned, constructive comments, including comments that provide data to support views (for example, are based on industry surveys), will assist in identifying if there are unforeseen challenges or viable alternatives before the Agency moves forward. Comments generally in support or opposition to options identified in this ANPR will assist AMS in identifying the acceptability of the presented options in the absence of other alternatives.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

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[80] See, *e.g.,* FINRA, ''Firm Summary Scorecard,'' available at *https://www.finra.org/compliance-tools/report-center/equity/firm-summary-scorecard* (last accessed Aug. 2024); ''TRACE Quality of Market Report Cards—Treasuries,'' available at *https://www.finra.org/compliance-tools/report-center/trace/quality-of-markets-treasuries* (last accessed Aug. 2024).

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303 and 337

RIN 3064–AF99

Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions; Extension of Comment Period

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: On August 23, 2024, the FDIC published in the **Federal Register** a proposed rule that would make revisions to its regulations relating to the brokered deposit restrictions that apply to less than well-capitalized insured depository institutions. The proposed rule provided for a 60-day comment period, which closes on October 22, 2024. The FDIC has determined that an extension of the comment period until November 21, 2024, is appropriate. This action will allow interested parties additional time to analyze the proposal and prepare comments.

DATES: The comment period for the document that published at 89 FR 68244 (August 23, 2024) is extended. Comments must be received on or before November 21, 2024.

ADDRESSES: You may submit comments on this document using any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/*