NATIONAL CHICKEN COUNCIL

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

September 6, 2022

Submitted electronically via regulations.gov

Bruce Summers
Administrator
Agricultural Marketing Service
United States Department of Agriculture

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

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

Dear Mr. Summers:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

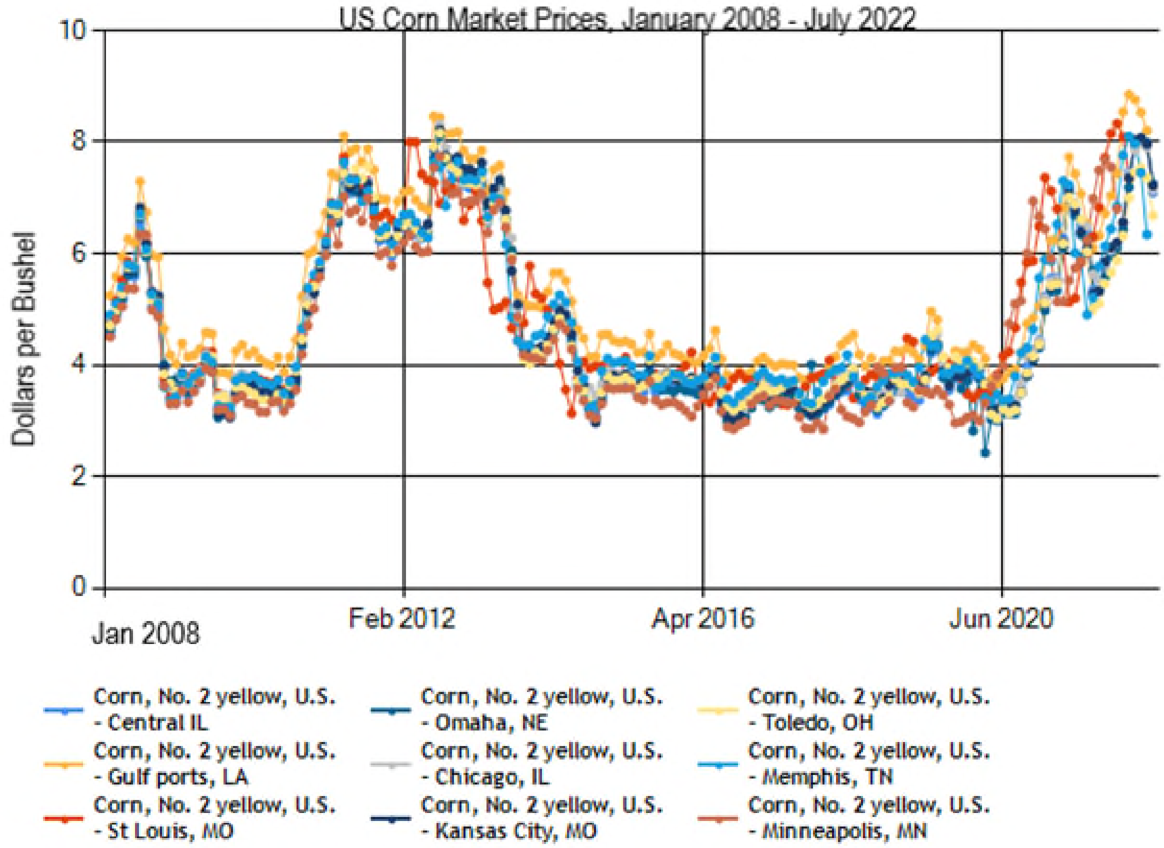

Figure 1, Corn Prices in U.S. Markets, January 2008 – July 2022.[4]

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

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

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

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

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

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

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

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

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

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

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

[6] *Id.* at 3.

[7] *Id.* at 5.

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

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

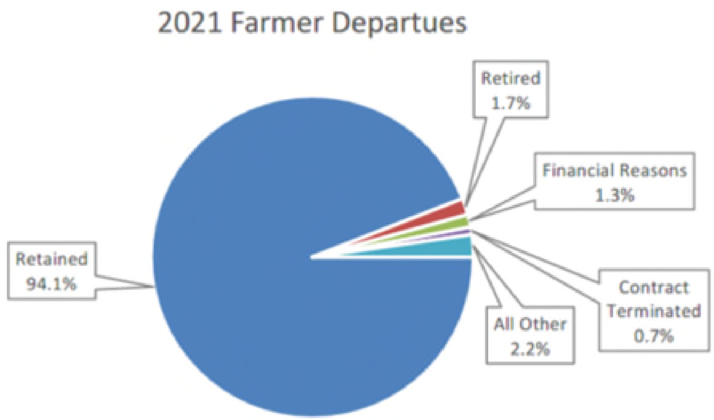

Figure 2, Reasons for Farmer Departures, 2021[9]

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

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

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9 *Id.*

10 *Id.* at 9.

11 *Id.* at 10.

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

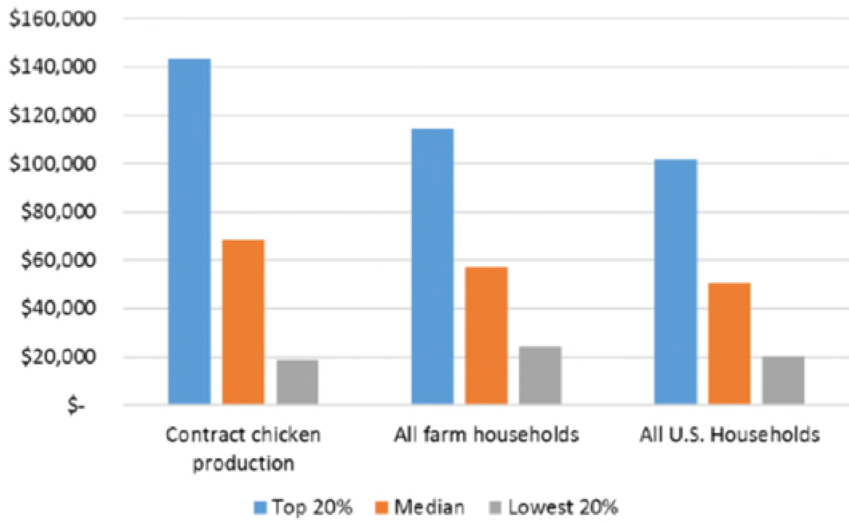

Figure 3, Income Variations Between Contract Chicken Production, All Farm Households, and All U.S. Households, 2011.[13]

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

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

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

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

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

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

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

14 *Id.* at 6.

15 *Id.* at 4.

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

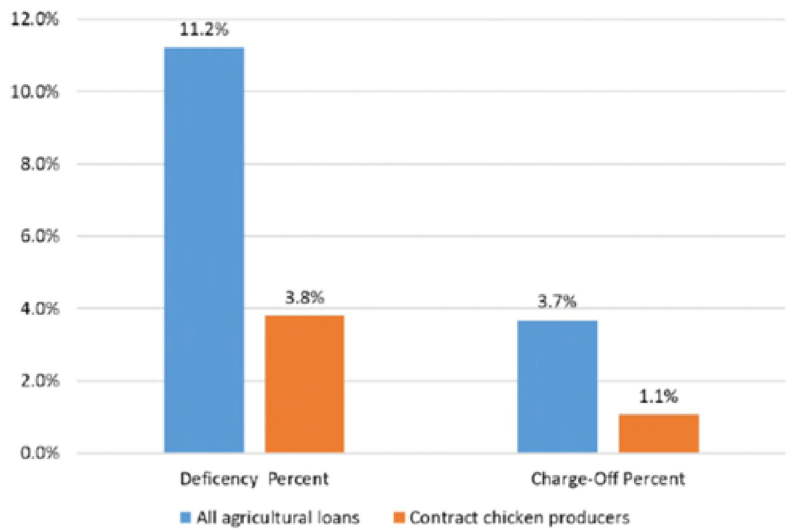

Figure 4, Default Rates for Contract Chicken Producers and All Agricultural Loans, 2015[17]

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

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

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

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16 *Id.* at 11.

17 *Id.* at 11.

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Mike Brown
President
National Chicken Council

Enclosures

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