



## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **9 CFR Part 201**

**[Document Number AMS-FTTP-18-0101]**

**RIN 0581-AD81**

### **Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** Comments are invited on the proposed establishment of a new regulation under the Packers and Stockyards Act, which protects fair trade, financial integrity, and competitive marketing for livestock, meat, and poultry. The proposed regulation would specify criteria the Secretary of Agriculture would consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of that Act. Establishment of these criteria is required by a provision of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill).

**DATES:** Comments on the proposed rule must be received by [Insert date 60-days after publication in the FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. All comments must be submitted through the Federal e-rulemaking portal at <http://www.regulations.gov> and should reference the document number and the date and page number of this issue of the *Federal Register*. All comments submitted in response to this proposed rule will be included in the record and will be made available to

the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** S. Brett Offutt, Chief Legal Officer/Policy Advisor; Packers and Stockyards Division, USDA AMS Fair Trade Practices Program; phone: 202-690-4355; or email: S.Brett.Offutt@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** Section 202(b) of the Packers and Stockyards Act, 1921 (the Act), as amended (7 U.S.C. 181 *et seq.*), specifies that it is unlawful for any packer, swine contractor, or live poultry dealer to either make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect. In administering this provision of the Act, the United States Secretary of Agriculture (Secretary) determines whether the conduct of regulated entities is considered a violation of the Act.

In the past, each determination has been analyzed using general principles in a case-by-case basis, exercising the regulatory flexibility Congress provided when it passed the Act. Provisions of the 2008 Farm Bill (Public Law 110-234) require the Secretary to promulgate regulations establishing criteria the Secretary would consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. *See* Sec. 11006(1). The Secretary originally delegated responsibility for establishing the required criteria to the Grain Inspection, Packers and Stockyards Administration (GIPSA), which subsequently merged with the Agricultural Marketing Service (AMS). AMS now administers the regulations under the Act and has undertaken this rulemaking. To meet the statutory requirement, AMS proposes adding a new § 201.211 to 9 CFR part 201 – Regulations Under the Packers and Stockyards Act (P&S

regulations), retaining the necessarily flexible framework for the Secretary's determinations, while providing criteria that supports the transparency of the Secretary's determinations. Accordingly, the regulated industry and the public will have a reference to the general framework that AMS will use to determine whether there is an unlawful preference or advantage under section 202(b) of the Act.

Proposed § 201.211 would require the Secretary to consider one or more of four specified criteria when determining whether any undue or unreasonable preference or advantage has been given or made to any particular person or locality in any respect in violation of section 202(b) of the Act. The Secretary would not be limited to considering only the four proposed criteria, but could also take other factors into consideration as appropriate on a case-by-case basis. We discuss each of the four proposed criteria later in this document.

A 60-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments received in response to this proposed rule by the date specified will be considered.

### *Background*

The Packers and Stockyards Division (PSD) of AMS's Fair Trade Practices Program oversees day-to-day administration of the P&S regulations and is called upon to investigate alleged violations of section 202(b) of the Act, many related to contractual dealings with livestock producers, swine production contract growers, and poultry growers. Other entities, including retailers and the public, can also be harmed by violations of section 202(b). Difficulty lies in determining whether particular instances

of preferences or advantages made or given to one or more persons or localities would be undue or unreasonable and violations of the Act.

As mentioned above, the 2008 Farm Bill directs the Secretary to establish criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. At the time the 2008 Farm Bill was enacted, what is now PSD operated within GIPSA. GIPSA undertook the responsibility for developing criteria for consideration. In June 2010, GIPSA published a proposed rule (75 FR 35338; June 22, 2010) that was never finalized, due to Congressional prohibitions included in the Consolidated Appropriations Acts for fiscal years 2012 through 2015, which disallowed any further work on the new criteria rulemaking. *See* Sec. 721, Pub. L. 112-55, November 18, 2011; Sec. 742, Pub. L. 113-6, March 26, 2013; Sec. 744, Pub. L. 113-76, January 17, 2014; and Sec. 731, Pub. L. 113-235, December 16, 2014. GIPSA resumed its efforts to promulgate the required criteria in December 2016 with publication of a second proposed rule (81 FR 92703; December 20, 2016), but decided to take no further action on that proposal (82 FR 48603; October 18, 2017).

The Secretary is issuing this NPRM to establish criteria to consider when determining whether a violation of section 202(b) of the Act has occurred as required by the 2008 Farm Bill. The proposed criteria would provide an analytical framework to evaluate whether a violation may have occurred. This proposed rule addresses a situation occasionally encountered in the industry, namely the need to determine whether a preference or advantage in a specific instance is undue or unreasonable. AMS intends the proposed new regulation to establish a framework for consideration of potential

violations of section 202(b) of the Act, to bring transparency to the Secretary's determination process for the industry.

*Proposed Provisions*

This proposed rule would establish criteria the Secretary would consider in determining whether an undue or unreasonable preference or advantage has been made or given in violation of the Act, and therefore establish an appropriate framework for analysis. It is not unusual for buyers or sellers of livestock or poultry to receive advantages. For example, as between two competing sellers, one may receive a better price from a buyer. The Act only prohibits those preferences or advantages that are undue or unreasonable. It follows that there are legitimate reasons for the existence of preferences or advantages that are not undue or unreasonable. Reasonable differences in contract terms may result from negotiations over particular interests between the parties. It is not the purpose of the Act to interfere with contract negotiations or to upset the traditional principles of freedom of contract. Nor does the Act statutorily create an entitlement to obtain the same type of contract offered to other producers or growers. However, greater clarity on the terms associated with grower contracts could increase transparency in the marketplace and reduce the claims of undue or unreasonable preference.

Under proposed § 201.211, the Secretary would consider one or more specific criteria when determining whether a packer, swine contractor, or live poultry producer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect. Proposed § 201.211 lists four criteria for consideration and would provide that the Secretary not be limited to consideration of those four criteria.

Under proposed § 201.211(a), the Secretary would consider whether the preference or advantage under consideration cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers. Under proposed § 201.211(b), the Secretary would consider whether the preference or advantage in question cannot be justified on the basis of meeting a competitor's prices. Under proposed § 201.211(c), the Secretary would consider whether the preference or advantage in question cannot be justified on the basis of meeting other terms offered by a competitor. Under proposed § 201.211(d), the Secretary would consider whether the preference or advantage in question cannot be justified as a reasonable business decision that would be customary in the industry.

Historically, the Secretary has considered some of these criteria and other factors similar to these in determining whether or not to bring an enforcement action regarding an alleged violation of the Act. AMS has based its proposal on the experience of PSD, which has administered the Packers and Stockyards Act and regulations and understands what complaints are commonly made regarding compliance. AMS is proposing this list of criteria that the Secretary would consider, but it is also proposing that the Secretary have the flexibility to consider other criteria that may be relevant on a case-by-case basis. In doing so, AMS is attempting to strike a balance between the interests of all segments of the industry. On the one hand, AMS is charged with protecting producers, growers, retailers, and others, including the public, from potential harm resulting from undue or unreasonable preferences or advantages. On the other hand, AMS recognizes that among the numerous complaints examined in the past, many preferences and advantages made

or given to individuals or groups in the industry have been determined to be lawful, and relatively few have been determined to be undue or unreasonable.

Legitimate disparities in contract terms could be attributed to reasonable business negotiations between contracting parties. For example, price differences offered to different sellers could reflect differences in transportation costs to a slaughter facility or could reflect one producer's ability and willingness to supply livestock in the early morning hours to start the day's processing while others cannot. Disparate contract terms are not considered undue or unreasonable just because they are not identical.

For example, a live poultry dealer pays a premium to one poultry grower who agrees to use experimental vaccines, thus putting the grower at increased risk of financial loss if the vaccine proves to be unsuccessful and the birds die or do not grow well. Based on the criteria in proposed § 201.211, the apparent preference or advantage might be justified on the basis of the company saving the expense of testing the vaccines through other means, and the premium paid to the grower for providing the extra service of testing vaccines and for accepting greater financial risk might not be considered undue or unreasonable. In another example, a livestock packer pays higher prices later in the day or week after competitors have raised the market price. Based on the criteria in proposed § 201.211, the apparent preference or advantage might be justified as necessary to meet competitors' prices, and the higher price might not be considered undue or unreasonable. Finally, where a live poultry dealer's competitors have offered long term contracts to their growers, the poultry dealer finds that he must offer comparable terms to his growers in the same locality. Based on the criteria in proposed § 201.211, the apparent preference given to growers in that locality is unlikely to be considered undue or unreasonable.

because the difference in contract terms might be justified by the need to meet a competitor's other contract terms in that locality.

On the other hand, some preferences or advantages might be considered undue or unreasonable if they are so unfair that they would tend to restrain trade, creating such excessively favorable conditions for one or more persons that their competitors would have reduced chances of business success. For instance, premiums offered to one person or locality but not offered to other persons or localities similarly situated could constitute a violation of the Act. A livestock packer negotiating preferential live basis prices with only one favored livestock supplier and not with similarly situated suppliers, may be in violation of the Act. PSD would examine the proposed criteria and likely conclude that the packer cannot justify its actions on the basis of cost savings, meeting a competitor's prices, meeting other terms offered by a competitor, or as a reasonable business decision.

Under proposed § 201.211(a) through (c), the Secretary would consider whether preferences or advantages made or given to one or more persons are based on cost savings related to dealing with different producers, sellers, or growers, or the need to meet a competitor's prices or other contract terms. For example, a live poultry dealer offering a higher base price to a favored grower, but not to other growers in the same complex with the same housing types, may be in violation of the Act. The Secretary would consider the proposed criteria. Under criterion (a), there would be no cost savings in a higher base price. But under criteria (b) and (c), the Secretary would consider whether the higher base price meets a competitor's price or other terms. If the reason for giving the favored grower the higher price cannot be justified by meeting a competitor's

price or other terms, then the higher base price may be an undue or unreasonable preference or advantage.

Under proposed 201.211(d), the Secretary would consider whether the preference or advantage cannot be justified as a reasonable business decision that is customary in the industry. A packer, swine contractor, or live poultry dealer may have a legitimate business reason for treating some persons or groups more favorably than others. For example, it is customary in the cattle industry for the packer to pay freight expenses on live weight purchases, but not on carcass weight purchases. Based on the criteria in proposed § 201.211, it is unlikely that the apparent preference or advantage to live weight cattle sellers in that situation would be considered undue or unreasonable because it could be justified as a reasonable business decision that is customary in the industry. In another example, a live poultry dealer may pay a premium to growers who construct new poultry houses or update their houses with the latest technology. Based on the criteria in proposed § 201.211, such a premium might be justified as a reasonable business decision that would be customary in the industry, so it is unlikely that the Secretary would determine the preference or advantage to be undue or unreasonable.

Live poultry dealers, packers, and swine contractors should enter into contracts that do not discriminate, unless the differences are due to cost, meeting competitors prices, or normal industry standards. Preferences that are not grounded in ordinary business considerations may be based upon reasons of unjust advantage. AMS believes these criteria promote honest competition in the supply chain, instead of advantages that could result from bribery or other influences. Therefore, AMS focused on four criteria that promote honest competition: cost savings, meeting a competitor's prices, meeting

other terms offered by a competitor, and other reasonable business reasons for preference and advantages.

While the agency expects a short-term increase in the cost of review for livestock producers, poultry growers, and regulated entities in existing contracts, in the long-term, innovative contracts should be less costly to negotiate even when those contracts provide for preferences and advantages. Because this framework of criteria could be understood in the context of ordinary and customary business decisions, regulated entities may more easily review contracts for compliance with the Act.

By following a framework of criteria that promote fair dealing based in rational decision-making, AMS promotes protection for producers and localities that might be otherwise have been unable to obtain preferential contract terms or price advantages. This, therefore, should also improve the negotiating position of growers and producers.

AMS expects that adding the proposed criteria described above to the P&S regulations would provide a framework in which the Secretary can consider potential violations of the Act, help the industry understand what the Secretary would consider when evaluating violation claims, and fulfill the Congressional mandate to establish criteria for making determinations regarding potentially unacceptable conduct under the Act.

### **Required Impact Analyses**

*Executive Orders 12866, 13563, and 13771 and the Regulatory Impact Analysis*

AMS is issuing this rule in conformance with Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits,

including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

In the development of this proposed rule, AMS determined to take a different approach to developing the necessary criteria than previous rulemaking efforts. AMS determined that including the proposed criteria as part of the framework for consideration of preferences and advantages in buyer-seller contracts would best serve the needs of the industry and fulfill the 2008 Farm Bill mandate. AMS expects the proposed new regulation would bring transparency to considerations of potential violations of section 202(b) of the Act and certainty to industry members forging contracts related to the buying and selling of poultry and livestock. The proposed rule is not expected to provide any environmental, public health, or safety benefits.

This proposed rule has been determined to be significant for the purposes of Executive Order 12866 and therefore has been reviewed by OMB. This proposed rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

AMS is proposing a new § 201.211, which would provide four criteria in response to requirements of the 2008 Farm Bill for the Secretary of Agriculture to consider in determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct resulting in an undue preference or advantage to any particular person or locality in any respect in violation of section 202(b) of the Act. Based on its familiarity with the industry, PSD prepared an economic analysis of proposed § 201.211 as part of the

regulatory process. The economic analysis presents the cost-benefit analysis of proposed § 201.211. PSD then discusses the impact on small businesses.

This proposed rule is independent of previous rulemaking. PSD reviewed certain cost projections developed in conjunction with previous rulemaking in analyzing the regulatory impact of this proposed rule. All costs and benefits described in this economic analysis pertain to the language in this proposed rule.

### **Regulatory Impact Analysis**

The 2008 Farm Bill requires the Secretary of Agriculture to promulgate a regulation establishing criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b) of the Act. This rulemaking is to fulfill that requirement.

Responsibility for establishing the required criteria was originally delegated to the Grain Inspection, Packers and Stockyards Administration (GIPSA), which subsequently merged with AMS. AMS now administers the regulations under the Act and has undertaken this rulemaking.

For this economic analysis, PSD considered the impact of three alternatives for this proposed rule. PSD considered the impact of maintaining the status quo, the impact of adopting regulatory language that had been proposed in 2016, and the impact of adopting the current proposed language.

PSD considered the impact of taking no further action on a previous version of § 201.211 GIPSA<sup>1</sup> had proposed on December 20, 2016.<sup>2</sup> GIPSA subsequently provided

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<sup>1</sup> On November 14, 2017, Secretary of Agriculture, Sonny Perdue, issued a memorandum eliminating GIPSA as a standalone agency and transferred the regulatory authority for the Act to AMS. PSD has day-to-day oversight of the Packers and Stockyards activities in AMS.

<sup>2</sup> Federal Register, Volume 81, No. 244, pages 92703 – 92723.

notice in the Federal Register on October 18, 2017,<sup>3</sup> that it would take no further action on the 2016 proposed rule. Taking no action would result in no additional out-of-pocket costs to businesses in the livestock and poultry industries but would not fulfill the requirements of the 2008 Farm Bill.

AMS could have proposed the same regulatory language proposed as in the 2016 proposed rule. The 2016 proposed rule contained six criteria the Secretary would consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. To determine the impact of adopting the 2016 proposed rule, PSD looked to the estimated costs of the rule contained in the economic analysis discussed in detail in the notice of proposed rulemaking. The total first year costs of the proposed rule in 2016 were \$15.37 million.

This current rulemaking represents a different approach than previous rulemakings that would establish an analytical framework for considering whether a violation of section 202(b) of the Act has occurred. The proposed rule includes new criteria to bring transparency to the determination process for the industry. PSD estimates that the total first year costs of this proposed rule are \$9.67 million.

### ***Introduction***

As required by the 2008 Farm Bill, proposed § 201.211 specifies criteria the Secretary would consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b) of the Act. The proposed criteria provide a framework to analyze whether a particular person or locality receives an undue or unreasonable preference or advantage as compared to other similarly situated persons or localities. AMS expects the proposed four criteria would

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<sup>3</sup> Federal Register, Volume 82, No. 200, pages 48603 - 48604.

clarify the legal standard for the public and promote honest competition, fair dealing, and improve the negotiating position of growers and producers.

### *Cost-Benefit Analysis*

PSD has estimated the costs and benefits of the proposed rule assuming the final rule is published and effective in May 2020. The costs and benefits of the proposed rule are discussed in order below.

#### *A. Cost Estimation*

PSD believes that the costs of proposed § 201.211 would mostly consist of the direct costs of reviewing and, if necessary, re-writing marketing and production contracts to ensure that packers, swine contractors, and live poultry dealers are not providing an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower compared to other similarly situated person or localities. PSD also believes that proposed § 201.211 may lead to additional litigation costs to test court precedents relating to section 202(b) violations. In past cases, courts have considered whether a specific preference or advantage would be a violation of the Act if the preference or advantage did not harm competition. However, AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged.

Proposed § 201.211 does not impose any new requirements on regulated entities, but would serve as guidance for their compliance with section 202(b) of the Act. Since the proposed rule would clarify the Secretary's consideration of unlawful undue or unreasonable preferences or advantages, regulated entities should face less risk of violating the Act. Because of this reduced risk, and the fact that PSD does not expect court

precedents requiring the demonstration of harm or potential harm to competition to change, PSD does not expect the proposed rule to result in a decrease in the use of alternative marketing agreements<sup>4</sup> (AMAs), poultry tournament systems, or other incentive payment systems, or decreased economic efficiencies in the cattle, hog, and poultry industries. Additionally, PSD does not expect the proposed rule to inhibit the ability of regulated entities and producers and growers to develop and enter into mutually advantageous contracts.

To estimate costs, PSD divided costs into two major categories, direct and indirect costs. In addition, PSD expects there are two direct costs: administrative costs and litigation costs.

With respect to direct costs, administrative costs for regulated entities would include items such as review of marketing and production contracts, additional record keeping<sup>5</sup>, and all other associated administrative office work to demonstrate that they do not provide an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower compared to other similarly situated person or localities.

Litigation costs for the livestock and poultry industries would initially increase while precedent confirming decisions are established. However, since court precedents have generally required the demonstration of harm to competition, PSD expects the increased litigation costs would decline after initial court decisions. Once precedents are

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<sup>4</sup> AMAs are marketing contracts, where producers market their livestock to a packer under a verbal or written agreement. Pricing mechanisms vary across AMAs. Some rely on a spot market for at least one aspect of their prices, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock seller and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

<sup>5</sup> There are no additional mandatory record keeping requirements in the proposed rule. PSD expects that regulated entities may opt to keep additional records to justify advantages or preferences to demonstrate compliance with the proposed rule in case of a PSD investigation or private litigation action.

confirmed, PSD expects additional litigation to decline.

With respect to indirect costs, those costs include costs caused by changes in supply and/or demand and any resulting efficiency losses in the national markets for beef, pork, and chicken and the related input markets for cattle, hogs, and poultry resulting from the direct costs of the proposed rule.

*1. Direct Costs - Administrative Costs*

To estimate administrative costs of the proposed rule, PSD relied on its experience reviewing contracts and other business records commonly maintained in the livestock and poultry industries for compliance with the Act and regulations. PSD has data on the number of production contracts between swine production contract growers and swine contractors and poultry growers and live poultry dealers. PSD estimated the number of cattle marketing contracts between producers and packers based on the number of feedlots and the percentage of livestock procured under AMAs. PSD then multiplied hourly estimates of the administrative functions of reviewing and revising contracts by average hourly labor costs for administrative, management, and legal personnel to arrive at the total estimated administrative costs. PSD measured all costs in constant 2016 dollars in accordance with guidance on complying with EO 13771.<sup>6</sup>

Since packers, swine contractors, and live poultry dealers would likely choose to review their contracts as a precautionary measure to ensure that they are not engaging in conduct or action that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower, PSD estimates that the regulated entities would review each contract or each contract type once and would renegotiate any contracts that contain language that could

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<sup>6</sup> <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>

be considered a violation of section 202(b) of the Act.

One may view this estimate as an upper bound to the direct cost of the proposed rule, as not every packer, swine contractor, or live poultry dealer would choose to conduct such a review. Some may choose to “wait and see” what effect, if any, the rule had on the industry, and if courts ruled on it in any way that would warrant such a review of their contracts.

Based on PSD’s experience, it developed estimates for regulated entities of the number of hours for attorneys and company managers to review and revise marketing and production contracts and for administrative staff to make changes, copy, and obtain signed copies of the contracts. For poultry contracts, PSD estimates that each unique contract type would require one hour of attorney time to review and rewrite a contract, two hours of company management time, and for each individual contract, one hour of administrative time, and one hour of additional record keeping time.<sup>7</sup> PSD estimates that each of the 93 live poultry dealers who report to PSD rely on 10 unique contract types on average. PSD data indicates that there are 24,101 individual poultry growing contracts. PSD estimates that each of the 237 hog packers has 10 marketing agreements. The 2017 Census of Agriculture (Ag. Census)<sup>8</sup> indicates that the universe of swine production contracts in the U.S. is 8,557. For hog production and marketing contracts, PSD estimates that each production contract and marketing agreement would require one-half hour of attorney time to review and rewrite a contract, one hour of company management time, one hour of administrative time, and one hour of additional record keeping time. For cattle processors, PSD estimates that each of the estimated 1,099 marketing

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<sup>7</sup> Again, there are no additional mandatory record keeping requirements in the proposed rule.

<sup>8</sup> [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf)

agreements would require one hour of attorney time to review and rewrite a contract, two hours of company management time, one hour of administrative time, and one hour of additional record keeping time.<sup>9</sup>

PSD multiplied estimated hours to conduct these administrative tasks by the average hourly wages for managers at \$62/hour, attorneys at \$84/hour, and administrative assistants at \$36/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for regulated entities.<sup>10</sup>

PSD recognizes that contract review costs would also be borne by livestock producers, swine production contract growers, and poultry growers. PSD estimates that each livestock producer, swine production contract grower, and poultry grower would, in its due course of business, spend one hour of time reviewing a contract or marketing agreement and would spend one-half hour of its attorney's time to review the contract. As with the regulated entities, one may view this estimate as an upper bound to the direct cost of the proposed rule, as not every producer or grower would choose to conduct such a review. Some may choose to "wait and see" what effect, if any, the rule had on the industry, and if courts ruled on it in any way that would warrant such a review of their contracts.

PSD multiplied one hour of livestock producer, swine production contract grower, and poultry grower management time and one-half hour of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at

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<sup>9</sup> Ibid.

<sup>10</sup> All salary costs are based on mean annual salaries for May 2018, adjusted for benefit costs, set to an hourly basis, and converted in to constant 2016 dollars. <http://www.bls.gov/oes/>. Accessed on April 9, 2019.

\$84/hour and managers at \$62/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. PSD then applied this cost to the estimated 1,099 cattle marketing contracts, 2,370 hog marketing contracts, 8,557 hog production contracts, and 24,101 poultry growing contracts that have been reported to PSD.

After determining the administrative costs to both the regulated entities and those they contract with, PSD added the administrative costs of the regulated entities and the livestock producers, swine production contract growers, and poultry growers together to arrive at the first-year total estimated administrative costs attributable to the regulation. A summary of the first-year total estimated administrative costs for proposed § 201.211 appear in the following table:

**Table 1: First-Year Administrative Costs**

<b>Regulation</b>	<b>Cattle (\$ Millions)</b>	<b>Hogs (\$ Millions)</b>	<b>Poultry (\$ Millions)</b>	<b>Total (\$ Millions)</b>
201.211	\$0.42	\$3.05	\$4.42	<b>\$7.89</b>

The first-year total administrative costs are \$7.89 million for proposed § 201.211, and include costs for cattle, hogs, and poultry because packers, swine contractors, live poultry dealers, livestock producers, swine production contract growers, and poultry growers would conduct administrative functions of contract review and record keeping in response to the regulation. The administrative costs are the highest for poultry, followed by hogs and cattle. This is due to the greater prevalence of contract growing

arrangements in the poultry industry.

## *2. Direct Costs - Litigation Costs*

In considering the costs of the rules it proposed in 2016, GIPSA performed an in-depth analysis of litigation costs expected as a result of the package of four proposed new regulations.<sup>11</sup> GIPSA estimated the total costs of litigating a case alleging violations of the P&S Act. The main costs are attorney fees to litigate a case in a court of law. The cost of litigating a case includes the costs to all parties including the respondent and the USDA in a case brought by the USDA and the costs of the plaintiff and the defendant in the case of private litigation.

To estimate litigation costs for the 2016 proposed rules, GIPSA examined the actual cases decided under the P&S Act from 1926 to 2014 as reported by the National Agricultural Law Center at the University of Arkansas.<sup>12</sup> The litigation costs estimated in the 2016 proposed rules are measured in constant 2016 dollars and are for regulated entities, producers, and growers. The 2016 analysis of litigation costs estimated that the interim final rule at § 201.3(a) was the primary source of litigation costs and that the litigation costs for all four proposed rules were counted under § 201.3(a).<sup>13</sup> The 2016 analysis split out the estimated litigation costs between sections 202(a) and 202(b).

The National Agricultural Law Center at the University of Arkansas has not reported any additional cases decided under the P&S Act since 2015. Since proposed § 201.211 would establish criteria for violations of section 202(b) and there has not been any new recent litigation reported by the National Agricultural Law Center at the

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<sup>11</sup> The four proposed rules were published on December 20, 2016, in Volume 81, No. 244 of the Federal Register.

<sup>12</sup> <http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards>.

<sup>13</sup> The USDA withdrew § 201.3(a) on October 18, 2017, in Volume 82, No. 200 of the Federal Register.

University of Arkansas, PSD used the estimated litigation costs associated with section 202(b) from the 2016 proposed rules as the starting point for this proposed rule.

The 202(b) estimated litigation costs serve as an upper boundary of estimated costs since the estimates assumed that § 201.3(a) and § 201.211 would both be promulgated. PSD estimates that there would be additional litigation when § 201.211 becomes effective, even in the absence of § 201.3(a). Therefore, PSD uses the following 202(b) litigation costs estimates in Table 14 from the 2016 proposed rule as the estimated first-year litigation costs assuming the rule becomes effective in May 2020.<sup>14</sup>

**Table 2: Projected First-Year Litigation Costs**

<b>Section 202(b) of the Act</b>	<b>Cattle (\$ Millions)</b>	<b>Hog (\$ Millions)</b>	<b>Poultry (\$ Millions)</b>	<b>Total (\$ Millions)</b>
Total	\$0.24	\$0.04	\$1.49	<b>\$1.77</b>

PSD expects proposed § 201.211 would result in an additional \$1.77 million in litigation costs in the first full year after the rule becomes effective. Using the number of complaints PSD has received from industry participants as an indicator, PSD estimates that the majority of the litigation will be in the poultry industry. Most of the complaints concerning undue or unreasonable preferences that PSD has received since 2009 have come from the poultry industry.

### *3. Total Direct Costs*

The total first-year direct costs of proposed § 201.211 are the sum of administrative and litigation costs from above and are summarized in the following table.

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<sup>14</sup> Federal Register, Volume 81, No. 244, page 92580.

**Table 3: First Year Direct Costs<sup>15</sup>**

<b>Cost Type</b>	<b>Cattle (\$ Millions)</b>	<b>Hogs (\$ Millions)</b>	<b>Poultry (\$ Millions)</b>	<b>Total (\$ Millions)</b>
Admin Costs	\$0.42	\$3.05	\$4.42	<b>\$7.89</b>
Litigation Costs	\$0.24	\$0.04	\$1.49	<b>\$1.77</b>
<b>Total Direct Costs</b>	<b>\$0.66</b>	<b>\$3.09</b>	<b>\$5.91</b>	<b>\$9.67</b>

PSD estimates that the total direct costs of proposed § 201.211 to be \$9.67 million. As the above table shows, the costs are highest for the poultry industry, followed by hogs and cattle. The primary reason is the high utilization of growing contracts and the corresponding higher estimated administrative costs in the poultry industry. To put this direct cost in perspective, the actual impact on retail prices from these direct costs would be less than one one-hundredth of a cent.

#### *4. Indirect Costs*

PSD estimates that the indirect costs of proposed § 201.211 on the cattle, hog, and poultry industries are zero. For the purposes of this analysis, indirect costs are social welfare losses due to any potential price and output changes from the direct costs of proposed rule and in are addition to the direct costs (administrative and litigation costs) on regulated entities, producers, and growers who are directly impacted by the proposed rule. The economy will experience indirect costs, for example, if the proposed rule causes packers and live poultry dealers to reduce production, increasing the price of meat products and reducing the amount of meat consumed by consumers.

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<sup>15</sup> The detail in this table and other tables in this analysis may not add to the totals due to rounding.

As previously discussed, the regulation clarifies the Secretary’s consideration of whether a conduct or action constitutes an undue or unreasonable preference or advantage. PSD does not expect, therefore, that proposed § 201.211 would result in a decreased use of AMAs, use of poultry grower ranking systems or other incentive pay, reduced capital formation, inhibit development of new contracts, or decreased economic efficiencies in the livestock, meat and poultry industries. Accordingly, PSD does not project indirect costs resulting from decreases in AMAs, reduced capital, efficiency losses, or lost consumer and producer surplus. Indirect costs that could theoretically be anticipated are due to shifts in industry demand and supply curves resulting from the increases in industry direct costs attributable to the proposed rule. These shifts may result in quantity and price changes in the retail markets for beef, pork, and poultry, and the related input markets for cattle, hogs, and poultry. However, litigation costs are unrelated to the quantity of production—in other words, they are not marginal costs—so it is not appropriate to include them in the amount of a supply curve shift. Contract reviews and revisions are somewhat related to production quantity, but even they are less than fully compelling as a component of marginal cost. These nuances are not reflected in the assessment that follows, and thus it should be interpreted as a bounding exercise.

To calculate an upper bound on this type of indirect costs based on supply curves shifting, PSD modeled the impact of the increase in direct costs of implementing proposed § 201.211 in a Marketing Margins Model (MMM) framework.<sup>16</sup> The MMM allows for the estimation of changes in consumer and producer prices and quantities produced caused by changes in supply and demand in the retail markets for beef, pork,

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<sup>16</sup>The framework is explained in detail in Tomek, W.G. and K.L. Robinson “Agricultural Product Prices,” third edition, 1990, Cornell University Press.

and poultry and the input markets for cattle, hogs, and poultry.

PSD modeled – again, as a bounding exercise – the indirect costs as an inward (or upward) shift in the supply curves for beef, pork, and poultry. This has the effect of increasing the equilibrium prices and reducing the equilibrium quantity produced. This also has the effect of reducing the derived demand for cattle, hogs, and poultry, which causes a reduction in the equilibrium prices and quantity produced. Economic theory suggests that these shifts in the supply curves and derived demand curves will result in price and quantity impacts and potential dead weight losses to society<sup>17</sup>.

To estimate the output and input supply and demand curves for the MMM, PSD constructed linear supply and demand curves around equilibrium price and quantity points using price elasticities of supply and demand from the GIPSA Livestock Meat and Marketing Study and from USDA’s Economic Research Service.<sup>18</sup> With the supply curves established from this data, PSD then shifted the supply curves for beef, pork, and chicken up by the amount of the increase in direct costs for each industry. PSD calculated the new equilibrium prices and quantities in the input markets resulting from the decreases in derived demand that result from higher direct costs. This allows for the calculation of the indirect cost from the lower relative quantity produced at the relatively higher price when the industry’s direct costs increase.

The calculation of an upper bound on the price impacts from the increases in direct costs from proposed § 201.211 resulted in price increases of less than one one-

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<sup>17</sup> A dead weight loss is the cost to society of an inefficient allocation of resources in a market. Causes of deadweight losses can include market failures, such as market power or externalities, or an intervention by a non-market force, such as government regulation or taxation.

<sup>18</sup> RTI International “GIPSA Livestock Meat and Marketing Study” prepared for Grain Inspection, Packers and Stockyards Administration, 2007. ERS Price Elasticities: <http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx>

hundredth of a cent in retail prices for beef, pork, and poultry. This is because the increase in direct costs is very small in relation to total industry costs.<sup>19</sup> The result is that the price and quantity effects from the increases in direct costs are indistinguishable from zero and, therefore, PSD concludes that the indirect costs of proposed § 201.211 for each industry are also zero.

*5. Total Costs*

PSD added all direct costs to the indirect costs (equal to zero), to arrive at the estimated total first-year costs of proposed § 201.211. The total first-year costs are summarized in Table 4.

**Table 4: Total First Year Costs**

<b>Cost Type</b>	<b>Cattle (\$ Millions)</b>	<b>Hogs (\$ Millions)</b>	<b>Poultry (\$ Millions)</b>	<b>Total (\$ Millions)</b>
Admin Costs	\$0.42	\$3.05	\$4.42	<b>\$7.89</b>
Litigation Costs	\$0.24	\$0.04	\$1.49	<b>\$1.77</b>
Total Direct Costs	\$0.66	\$3.09	\$5.91	<b>\$9.67</b>
Total Indirect Costs	\$0.00	\$0.00	\$0.00	<b>\$0.00</b>
<b>Total Costs</b>	<b>\$0.66</b>	<b>\$3.09</b>	<b>\$5.91</b>	<b>\$9.67</b>

PSD estimates that the total costs would be \$9.67 million in the first year of implementation.

*6. Ten-Year Total Costs*

To arrive at the estimated ten-year administrative costs of proposed § 201.211,

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<sup>19</sup> The \$9.67 million increase in total industry costs from proposed § 201.211 is only 0.0043 percent of direct industry costs of approximately \$223 billion for the beef, pork, and poultry industries.

PSD estimates that in each of the first five years, 20 percent of all contracts will either expire and need to be renewed each year or new marketing and production contracts will be put in place each year. While PSD expects the costs of reviewing and revising, if necessary, each contract would remain constant in the first five years, it expects the administrative costs would be lower after the first year because the direct administrative costs of reviewing and revising contracts would only apply to the 20 percent of expiring contracts or new contracts. PSD estimates that in the second five years, the direct administrative costs of reviewing and revising contracts would decrease by 50 percent per year as the contracts would already reflect language modifications, if any, necessitated by implementation of the regulation. PSD estimates that after ten years, the direct administrative costs would return to where they would have been absent the rule, and the additional administrative costs associated with the rule would remain at \$0 after ten years.

In estimating the estimated ten-year litigation costs of proposed § 201.211, PSD expects the litigation costs to be constant for the first five years while courts are setting precedents for the interpretation of § 201.211. PSD expects that case law with respect to the regulation would be settled after five years and by then, industry participants would know how PSD would enforce the regulation and how courts would interpret the regulation. The effect of courts establishing precedents is that litigation costs would decline after five years as the livestock and poultry industries understand how the courts interpret the regulation.

To arrive at the estimated ten-year litigation costs of proposed § 201.211, PSD estimates that litigation costs for the first five years would occur at the same rate and at

the same cost as in the first full year of the rule ending in May 2021. In the sixth through tenth years, PSD estimates that additional litigation costs would decrease each year and return to where they would have been absent the rule in the tenth year after the rule is effective and remain at \$0 after 10 years. PSD estimates this decrease in litigation costs to be linear with the same decrease in costs each year.

The ten-year total costs of proposed § 201.211 appear in the table below.<sup>20</sup>

**Table 5: Ten-Year Total Costs - Years Ended May<sup>21</sup>**

<b>Year</b>	<b>Administrative (\$Millions)</b>	<b>Litigation (\$ Millions)</b>	<b>Total Direct (\$ Millions)</b>
2021	\$7.89	\$1.77	\$9.67
2022	\$1.58	\$1.77	\$3.35
2023	\$1.58	\$1.77	\$3.35
2024	\$1.58	\$1.77	\$3.35
2025	\$1.58	\$1.77	\$3.35
2026	\$0.79	\$1.48	\$2.27
2027	\$0.39	\$1.18	\$1.58
2028	\$0.20	\$0.89	\$1.08
2029	\$0.10	\$0.59	\$0.69
2030	\$0.05	\$0.30	\$0.35
<b>Totals</b>	<b>\$15.74</b>	<b>\$13.31</b>	<b>\$29.05</b>

<sup>20</sup> As discussed above, PSD expects total administrative and litigation costs to return to where they would have been absent the rule and the additional costs associated with the rule would remain at \$0 after ten years.

<sup>21</sup> PSD uses May 2021 as the end of the first year after the proposed rule would be in effect for analytical purposes only. The date the proposed rule becomes final is not known.

Based on the analysis, PSD expects the ten-year total costs would be \$29.05 million.

*7. Present Value of Ten-Year Total Costs*

The total costs of proposed § 201.211 in the table above show that the costs are highest in the first year, decline to a constant and significantly lower level over the next four years, and then gradually decrease again over the subsequent five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that would be used to pay the costs in the future could be invested today and earn interest until the time period in which the costs are incurred.

To account for the time value of money, the costs of the regulation to be incurred in the future are discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the present value (PV) of total costs. PSD relied on both a three percent and seven percent discount rate as discussed in Circular A-4.<sup>22</sup> PSD measured all costs using constant 2016 dollars.

PSD calculated the PV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate and the PVs appear in the following table.

**Table 6: PV of Ten-Year Total Costs**

<b>Discount Rate</b>	<b>(\$ Millions)</b>
3 Percent	\$26.31
7 Percent	\$23.33

PSD expects the PV of the ten-year total costs would be \$26.31 million at a three percent discount rate and \$23.33 million at a seven percent discount rate.

<sup>22</sup> [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf)

8. *Annualized Costs*

PSD annualized the PV of the ten-year total costs (referred to as annualized costs) of proposed § 201.211 using both a three percent and seven percent discount rate as required by Circular A-4 and the results appear in the following table.<sup>23</sup>

**Table 7: Ten-Year Annualized Costs**

<b>Discount Rate</b>	<b>(\$ Millions)</b>
3 Percent	\$3.08
7 Percent	\$3.32

PSD expects the annualized costs of § 201.211 would be \$3.08 million at a three percent discount rate and \$3.32 million at a seven percent discount rate.

PSD also annualized the PV of the ten-year total costs into perpetuity of proposed § 201.211 using both a three percent and seven percent discount rate following the guidance on complying with EO 13771 and the results appear in the following table.<sup>24</sup>

**Table 8: Annualized Costs into Perpetuity**

<b>Discount Rate</b>	<b>(\$ Millions)</b>
3 Percent	\$0.69
7 Percent	\$1.21

PSD expects the costs of § 201.211 annualized into perpetuity would be \$0.69 million at a three percent discount rate and \$1.21 million at a seven percent discount rate. Based on the costs in Table 8 and in accordance with guidance on complying with EO

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<sup>23</sup> Ibid.

<sup>24</sup> <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

13771, the single primary estimate of the costs of this proposed rule is \$1.21 million, the total costs annualized in perpetuity using a 7 percent discount rate.

*B. Benefits*

PSD was unable to quantify the benefits of § 201.211. However, proposed § 201.211 contains several provisions that PSD expects would improve economic efficiencies in the regulated markets for cattle, hogs, and poultry and reduce market failures. Regulations that increase the amount of relevant information available to market participants, protect private property rights, and foster competition improve economic efficiencies and generate benefits for consumers and producers.

Proposed § 201.211 would increase the amount of relevant information available to market participants and offset any potential abuse of buyer-side market power by clearly stating to all contracting parties the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage in violation of 202(b) of the Act.

The regulation would also reduce the risk of violating section 202(b) because it would clarify the criteria that the Secretary will consider in determining whether the conduct or action in the livestock and poultry industries constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. Other benefits of clarifying the criteria may include: reducing litigation risk; decreasing contracting costs; promoting competitiveness and fairness in contracting; and providing protections for livestock producers, swine production contract growers, and poultry growers.

Benefits to the livestock and poultry industries and the cattle, hog, and poultry

markets would also arise from improving parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers. The improvement in parity would come when contracting parties negotiate new contracts and when they review and renegotiate any existing contract terms that contain language that could be considered a violation of section 202(b) of the Act.

Since the regulation would increase the amount of relevant information by clarifying what might be considered an undue or unreasonable preference, it would increase parity in negotiating contracts, and thereby reduce the ability to abuse buyer-side market power with the resulting welfare losses.<sup>25</sup> Establishing parity of negotiating power in contracts promotes fairness and equity and is consistent with PSD's mission to protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.<sup>26</sup>

### *C. Cost-Benefit Summary*

PSD expects the ten-year annualized costs of § 201.211 would be \$3.08 million at a three percent discount rate and \$3.32 million at a seven percent discount rate and the costs annualized into perpetuity to be \$0.69 million at a three percent discount rate and \$1.21 million at a seven percent discount rate. PSD expects the costs would be highest for the poultry industry due to its extensive use of poultry growing contracts, followed by the hog industry and the cattle industry, respectively.

PSD was unable to quantify the benefits of the proposed regulation, but they

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<sup>25</sup> Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in "Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey" selected paper American Agri. Economics Assn. meeting Orlando, Florida, July 27-29, 2008.

<sup>26</sup> See additional discussion in Steven Y. Wu and James MacDonald (2015) "Economics of Agricultural Contract Grower Protection Legislation," *Choices* 30(3): 1 -6.

explained numerous qualitative benefits that would protect livestock producers, swine production contract growers, and poultry growers, promote fairness and equity in contracting, increase economic efficiencies, and reduce the negative effects of market failures throughout the entire livestock and poultry value chain. The primary benefit of proposed § 201.211 would be reduced occurrences of undue or unreasonable preferences or advantages and increased economic efficiencies in the marketplace. This benefit of additional enforcement of the Act would accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

#### *Regulatory Flexibility Analysis*

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).<sup>27</sup> SBA considers broiler and turkey producers / growers and swine contractors, NAICS codes 112320, 112330, and 112210 respectively, to be small businesses if sales are less than \$1,000,000 per year. Cattle feeders are considered small if they have less than \$8 million in sales per year. Beef and pork packers, NAICS 311611, are small businesses if they have fewer than 1,000 employees.

The Packers and Stockyards Act regulates live poultry dealers, which is a group similar but not identical to the NAICS category for poultry processors. Poultry processors, NAICS 311611, are considered small business if they have fewer than 1,250 employees. PSD applied SBA's definition for small poultry processors to live poultry dealers as the best standard available, and considers live poultry dealers with fewer than

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<sup>27</sup> U.S. Small Business Administration. *Table of Small Business Size Standards Matched to North American Industry Classification System Codes. effective August 19, 2019.*  
[https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards\\_Effective%20Aug%2019%2C%202019.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf)

1,250 employees to be small businesses.

PSD maintains data on live poultry dealers from the annual reports these firms file with PSD. Currently, 93 live poultry dealers would be subject to the proposed regulation. Seventy-Four of the live poultry dealers would be small businesses according to the SBA standard. Although there were many more small businesses than large, small business produced only about 6.5 percent of the poultry in the United States in 2017.

Live poultry dealers classified as large businesses are responsible for about 93.5 percent of the poultry contracts. Assuming that small businesses would bear 6.5 percent of the costs, in the first year the regulation is effective, \$222,687<sup>28</sup> would fall on live poultry dealers classified as small businesses. This amounts to average estimated costs for each small live poultry dealer of \$3,009.

As of February 2019, PSD records identified 381 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 381 beef and pork packers, 172 processed both cattle and hogs, 144 processed cattle but not hogs, and 65 processed hogs but not cattle.

PSD estimates that small businesses accounted for 23.1 percent of the cattle and 19.2 percent of the hogs slaughtered in 2017. If the costs of implementing proposed § 201.211 are proportional to the number of head processed, then in first full year the regulation would be effective, PSD estimates that \$126,501<sup>29</sup> in additional costs would fall on beef packers classified as small businesses. This amounts to estimated costs of \$407 for each small beef packer.

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<sup>28</sup> Estimated cost to live poultry dealers of \$3,412,301 x 6.52 percent of firms that are small businesses = \$222,687.

<sup>29</sup> Estimated cost to beef packers of \$547,643 x 23.1 percent of firms that are small businesses = \$126,501.

In total, \$81,603<sup>30</sup> in additional first-year costs would be expected to fall on pork packers classified as small businesses, and \$30,863<sup>31</sup> would fall on swine contractors classified as small businesses. This amounts to average estimated costs for each small pork packer of \$356, and average estimated costs for each small swine contractor of \$286 in the first year the regulation would be effective. To the extent that smaller beef and pork packers rely on AMA purchases less than large packers, the estimates might tend to overstate costs.

Ten-year annualized costs discounted at a three percent rate would be \$61,097 for the cattle and beef industry, \$32,463 for the hog and pork industry, and \$119,271 for the poultry industry. This amounts to annualized costs of \$196 for each beef packer, \$103 for each pork packer, \$82 for each swine contractor, and \$1,612 for each live poultry dealer that is a small business. The total annualized costs for regulated small businesses would be \$212,830.

Ten-year annualized costs at a seven percent discount rate would be \$64,458 for the regulated cattle and beef industry, \$35,416 for the regulated hog and pork industry, and \$125,696 for the poultry industry. This amounts to ten-year annualized costs of \$207 for each beef packer, \$112 for each pork packer, \$90 for each swine contractor, and \$1,699 for each live poultry dealer that is a small business. The total ten-year annualized costs at 7 percent for regulated small businesses would be \$225,570.

The table below lists the estimated additional costs associated with the proposed regulation in the first year. It also lists annualized costs discounted at three percent and

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<sup>30</sup> Estimated cost to hogs and pork of \$1,959,550 x 19.2 percent of slaughter in small businesses x 21.7 percent of costs attributed to packers = \$81,603.

<sup>31</sup> Estimated cost to hogs and pork of \$1,959,550 x 2.01 percent of contracted hogs produced by swine contractors that are small businesses x 78.3 percent of costs attributed to contractors = \$30,863.

seven percent discount rates, and annualized PV of costs extended into perpetuity discounted at three and seven percent.

**Table 9. Estimated Industry Total Costs to Regulated Small Businesses**

<b>Estimate Type</b>	<b>Beef Packers (\$)</b>	<b>Pork Packers and Swine Contractors (\$)</b>	<b>Poultry Processors (\$)</b>	<b>Total (\$)</b>
First-Year Costs	126,501	112,466	222,687	461,653
10 years Annualized at 3 Percent	61,097	32,463	119,271	212,830
10 years Annualized at 7 Percent	64,458	35,416	125,696	225,570
Annualized Total Cost into Perpetuity Discounted at 3 Percent	13,720	7,290	26,784	47,794
Annualized Total Cost into Perpetuity Discounted at 7 Percent	23,492	12,907	45,810	82,209

In considering the impact on small businesses, PSD considered the average costs and revenues of each regulated small business impacted by proposed § 201.211. The number of small businesses impacted, by NAICS code, as well as the costs per entity in the first-year, ten-year annualized costs per entity at both the three percent and seven percent discount rates, and annualized PV of the total costs extended into perpetuity discounted at three and seven percent appear in the following table.

**Table 10. Per Entity Costs to Regulated Small Businesses**

<b>NAICS</b>	<b>No. of Small Businesses</b>	<b>First Year (\$)</b>	<b>Ten-Year Annualized Costs-3 % (\$)</b>	<b>Ten-Year Annualized Costs-7 % (\$)</b>	<b>Perpetuity 3% (\$)</b>	<b>Perpetuity 7% (\$)</b>
112210 - Swine Contractor	108	286	82	90	19	33
311615 – Poultry Processor	74	3,009	1,612	1,699	362	619
311611 – Beef Packer	311	407	196	207	44	76
311611 – Pork Packer	229	356	103	112	23	41

The following table compares the average per entity first-year and annualized costs of proposed § 201.211 to the average revenue per establishment for all regulated small businesses in the same NAICS code. The annualized costs are slightly higher at the seven percent rate than at the three percent rate, so only the seven percent rate is included in the table as the more conservative estimate.

**Table 11. Comparison of Per Entity Cost to Revenues for Regulated Small Businesses**

<b>NAICS</b>	<b>Average Revenue Per Establishment (\$)</b>	<b>First-Year Cost as Percent of Revenue</b>	<b>Ten-Year Annualized Cost as Percent of Revenue</b>	<b>Annualized Cost to Perpetuity as Percent of Revenue</b>
112210 - Swine Contractor	485,860	0.06%	0.02%	0.007%
311615 – Poultry Processor	13,842,548	0.02%	0.01%	0.004%
311611 – Beef Packer	6,882,205	0.01%	0.00%	0.001%
311611 – Pork Packer	6,882,205	0.01%	0.00%	0.001%

The revenue figures in the above table come from U.S. Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.<sup>32</sup> Ag. Census data have the number of head sold by size classes for farms that sold their own hogs and pigs in 2017 and that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. To estimate average revenue per establishment, PSD used the estimated average value per head for sales of all swine operations and the production values for firms in the Ag. Census size classes for swine contractors. The results in Table

<sup>32</sup> [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/)

11 demonstrate, the costs of proposed § 201.211 as a percent of revenue are less than one percent.<sup>33</sup>

Although the Packers and Stockyards Act does not regulate livestock producers or poultry growers, PSD recognizes that they will also incur contract review costs. PSD estimates that each livestock producer and poultry grower would, in its due course of business, spend one hour of time reviewing a contract or marketing agreement and would spend one-half hour of its attorney's time to review the contract. As with the regulated entities, one may view this estimate as an upper bound to the direct cost of the proposed rule, as not every producer or grower would choose to conduct such a review. Some may choose to "wait and see" what effect, if any, the rule had on the industry, and if courts ruled on it in any way that would warrant such a review of their contracts.

PSD multiplied one hour of livestock producer, swine production contract grower, and poultry grower management time and one-half hour of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at \$84/hour and managers at \$62/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. The result is that each small livestock producer and each small poultry that sells livestock or raises poultry on a contract is expected to bear \$104 in first year costs, \$23 in ten year annualized costs discounted at 3 percent, \$25 in ten year annualized costs discounted at 7 percent, and \$9 discounted into perpetuity at 7 percent. Table 12 lists expected costs to livestock producers and poultry growers that are small businesses.

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<sup>33</sup> There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

**Table 12. Total Costs to Unregulated Small Businesses**

<b>Estimate Type</b>	<b>Cattle Feeders (\$)</b>	<b>Hog Producers (\$)</b>	<b>Poultry Growers (\$)</b>	<b>Total (\$)</b>
First-Year Costs	111,866	459,707	2,501,106	3,072,679
10 years Annualized at 3 Percent	24,274	99,754	542,727	666,755
10 years Annualized at 7 Percent	26,917	110,614	601,812	739,342
Annualized Total Cost into Perpetuity Discounted at 3 Percent	5,451	22,401	121,876	149,728
Annualized Total Cost into Perpetuity Discounted at 7 Percent	9,810	40,313	219,329	269,452

The Ag. Census indicates there were 575 farms that sold hogs or pigs in 2017 and identified themselves as contractors or integrators. About 19 percent of swine contractors had sales of less than \$1,000,000 in 2017 and would have been classified as small businesses. These small businesses accounted for only 2 percent of the hogs produced under production contracts.

Additionally, there were 8,557 swine producers in 2017 with swine contracts, and about 41 percent of these producers would have been classified as small businesses. PSD estimated an additional 2,370 pork producers had marketing agreements with pork packers. If 41 percent are small businesses, then 4,480 hog producers could incur contract review costs. PSD estimated as many as 1,099 cattle feeders had marketing

agreements or contracts that could need adjustment due to the proposed rule. If 98 percent are small businesses, 1,078 could bear costs of reviewing contracts. Table 13 compares cost to revenues for producer unregulated producers that are small businesses.

PSD records indicated poultry processors had 24,101 poultry production contracts in effect in 2017. The 24,101 poultry growers holding the other end of the contracts are almost all small businesses by SBA’s definitions.

**Table 13. Comparison of Total Cost to Revenues for Unregulated Small Businesses**

<b>NAICS</b>	<b>Number of Small Businesses</b>	<b>Average Revenue (\$)</b>	<b>First-Year Cost as Percent of Revenue</b>	<b>Ten-Year Annualized Cost as Percent of Revenue</b>	<b>Annualized Cost to Perpetuity as Percent of Revenue</b>
112212 - Cattle Feeders	1,078	305,229	0.03%	0.01%	0.003%
112210 - Hog Producers	4,480	333,607	0.03%	0.01%	0.003%
112320 - Poultry Growers	24,101	181,545	0.06%	0.01%	0.005%

Ten-year annualized cost savings of exempting small businesses would be \$212,830 using a three percent discount rate and \$225,570 using a seven percent discount

rate. The cost savings annualized into perpetuity of exempting small businesses would be \$47,794 using a three percent discount rate and \$82,209 using a seven percent discount rate. However, one purpose of proposed § 201.211 is to protect all livestock producers, swine production contract growers, and poultry growers from unfair and unreasonable preferences or advantages, regardless of whether the producer or grower and the packer, swine contractor, or live poultry dealer to which they sell or contract is a large or small business. PSD believes that the benefits of proposed § 201.211 would be captured by all livestock producers, swine production contract growers, and poultry growers. For this reason, AMS did not consider exempting small business from the proposed rule.

The number of regulated entities that could experience a cost increase is substantial. Most regulated packers and live poultry dealers are small businesses. However, the expected costs are not significant. For all four groups of regulated entities: beef packers, pork packers, live poultry dealers, and swine contractors, average first year costs are expected to amount to less than one tenth of one percent of annual revenue. Ten-year annualized costs discounted at 7 percent are highest for swine contractors at two one hundredths of a percent of revenue. Annualized expected costs of \$90 and \$112 for swine contractors, and pork packers, respectively are near the cost of one hog. An annualized expected cost of \$207 for beef packers is much less than the cost of one fed steer. Expected costs for live poultry dealers are higher, but as percent of revenue, expected costs to live poultry dealers are very low. AMS expects that the additional costs to small packers, live poultry dealers, and swine contractors will not change their ability to continue operations or place any of them at a competitive disadvantage.

The number of unregulated entities that could experience a cost increase is also substantial. Most effected livestock producers and poultry growers are small businesses. Expected costs are not significant. The expected first year cost for each unregulated livestock producer or poultry grower is \$104. Annualized expected 10-year costs discounted at 3 percent are \$23. Costs as percent of revenue are expected to be well below 1 percent. AMS expects that \$23 per year will not change any producers' or poultry grower's ability to continue operations or place any livestock producer or poultry grower at a competitive disadvantage.

As discussed in the Regulatory Impact Analysis, AMS does not expect welfare transfers among market segments or within segments. Estimated changes in prices and quantities are indistinguishable from zero. AMS does not expect proposed § 201.211 to cause changes in production or marketing for small businesses, and the increase in direct costs is very small in relation to total costs.

Based on the above analyses, AMS does not expect that proposed § 201.211 would have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). However, AMS seeks public comment on whether proposed § 201.211 will have a significant economic impact on a substantial number of small business entities before making a determination.

#### *Civil Rights Review*

AMS has considered the potential civil rights implications of this rule on members of protected groups to ensure that no person or group would be adversely or disproportionately at risk or discriminated against on the basis of race, color, national

origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This proposed rule does not contain any requirements related to eligibility, benefits, or services that would have the purpose or effect of excluding, limiting, or otherwise disadvantaging any individual, group, or class of persons on one or more prohibited bases. AMS has developed an outreach program to ensure information about the proposed regulation and the opportunity to comment on it is made available to socially and economically disadvantaged or limited resource farmers, producers, growers, and members of racial and ethnic minority groups.

#### *Paperwork Reduction Act*

This proposed rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the Federal Government. According to PSD records, there were approximately 312 bonded packers; 1,326 market agencies selling on commission; 4,582 livestock dealers and commission buyers; and 95 live poultry dealers regulated under the Act in 2018. The 2017 Census of Agriculture indicated that there were 575 swine contractors in 2017. The 2017 Census of Agriculture also indicated that there were 826,733 livestock producers and poultry growers. None of these entities would be required to submit forms or other information to AMS or to keep additional records in consequence of this proposed rule.

#### *E-Government Act*

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

*Executive Order 13175*

This rule has been reviewed in accordance with the requirements of Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or the distribution of power and responsibilities between the Federal Government and Indian tribes.

The USDA’s Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian tribes and determined that this rule may have tribal implications that require continued outreach efforts to determine if tribal consultation under Executive Order 13175 is required.

If a tribe requests consultation, AMS will work with the OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

*Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule as defined by 5 U.S.C. 804(2).

*Executive Order 12988*

This proposed rule has been reviewed under Executive Order 12988 – Civil Justice Reform. This proposed rule is not intended to have retroactive effect. This proposed rule would not preempt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this proposed rule is intended to interfere with a person’s right to enforce liability against any person subject to the Act under authority granted in section 308 of the Act.

**List of Subjects in 9 CFR Part 201**

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

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

**PART 201 – REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT**

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

**Authority:** 7 U.S.C. 181 – 229c.

2. Section 201.211 is added to read as follows:

**§ 201.211 Undue or unreasonable preferences or advantages.**

The Secretary will consider one or more criteria when determining whether a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect

in violation of section 202(b) of the Act. These criteria include, but are not limited to, whether the preference or advantage under consideration:

(a) Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;

(b) Cannot be justified on the basis of meeting a competitor's prices;

(c) Cannot be justified on the basis of meeting other terms offered by a competitor; and

(d) Cannot be justified as a reasonable business decision that would be customary in the industry.

Dated: January 6, 2020.

Bruce Summers, Administrator,  
Agricultural Marketing Service.

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