



January 17, 2023

Secretary Tom Vilsack
United States Department of Agriculture
Departmental Administration
1400 Independence Avenue, S.W.
Washington, DC 20250

S. Brett Offutt, Chief Legal Office/Policy Advisor
Packers and Stockyards Division
USDA AMS Fair Trade Practices Program
1400 Independence Avenue, S.W.
Washington, DC 20250

Via electronic submission to regulations.gov

Re: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, Docket
ID: AMS-FTPP-21-0045

Dear Mr. Offutt,

Thank you for this invitation to comment on the Agricultural Marketing Service's (AMS) proposed rule regarding Inclusive Competition and Market Integrity Under the Packers and Stockyards Act (the Proposed Rule). We are pleased to see further action for clearer enforcement of the Packers and Stockyards Act (PSA) and applaud AMS's continuing efforts to curb unfair practices in the livestock and poultry sectors.

The Farm Bill Law Enterprise (FBLE) brings together faculty, staff, and students from programs at seven law schools with expertise in agriculture, nutrition, and the environment. Our mission is to work toward a farm bill that reflects a thoughtful consideration of the long-term needs of our society, including economic opportunity and stability, public health and nutrition, public resources stewardship, and fair access and equal protection. We accomplish this mission through joint research, analysis, and advocacy and by drawing on the experience of our members, collaboratively building deeper knowledge, and equipping the next generation of legal practitioners to engage with the farm bill. We have written about our concerns that regulation and enforcement under the PSA has been inadequate in protecting producers and markets from unfair practices and competition and have recommended concerted action by Congress and USDA to address these deficiencies.¹

¹ See FARM BILL LAW ENTER., FARM VIABILITY (2022), <https://www.farmbilllaw.org/wp-content/uploads/2022/07/Farm-Viability-Report.pdf> (Goal IV, starting p. 36).

FBLE generally supports the rule AMS has proposed as a meaningful step forward in clarifying and supporting enforcement against undue prejudices and disadvantages, unjust discrimination, and deceptive practices. This comment sets forth our support for the rule, suggestions for amendments to specific language, and a response to AMS's inquiry concerning the scope of its market vulnerable individual definition.²

I. Background

Concentration in livestock and poultry markets puts growers at risk. In 2020, the largest four firms in livestock and poultry slaughter accounted for 81%, 64%, 53%, and 55% of steers and heifers, hogs, broilers, and turkeys respectively.³ This year, an acquisition in the chicken industry bumped the market share of the top four companies in that industry to over 60%.⁴ Meanwhile, many producers are operating in a monopsony or near monopsony conditions. Over 50% of broiler growers operate in an area with only 1 or 2 integrators.⁵ An "estimated 90% of U.S. hog production [is] now under some form of contract, direct ownership, or advance marketing agreement,"⁶ and many hog producers have just 1 or 2 packers to choose from.⁷ Smithfield Foods, for example, is the only buyer in the Southeastern United States.⁸ Similarly, the prevalence of the cash market for cattle has declined in favor of forward contracts or formula pricing, and even cash markets frequently have fewer than 5 buyers at any market.⁹

Rising vertical integration and horizontal consolidation give small producers fewer options. Producers have reported capital investment requirements that leave them in debt,¹⁰ predatory contracts,¹¹ and retaliation.¹² The number of smaller producers has fallen dramatically in the last

² This comment benefitted from research and drafting by Naomi Jennings, Harvard Law School JD 2024, as well as research and a memorandum authored by former law students Scott Sanderson, Harvard Law School JD 2021, and Stefane Victor, Harvard Law School JD 2021.

³ Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010, 60011 (proposed Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201) [hereinafter Proposed Rule].

⁴ Chloe Sorvino, *Higher Chicken Prices Expected After \$4.5 Billion Poultry Merger Wins U.S. Approval*, FORBES, <https://www.forbes.com/sites/chloesorvino/2022/08/05/higher-chicken-prices-expected-after-45-billion-poultry-merger-wins-us-approval/?sh=7771993f67b9>.

⁵ Transparency in Poultry Grower Contracting and Tournaments, 87 FR 34980 (proposed Jun. 8, 2022) (to be codified at 9 C.F.R. pt. 201), table 1.

⁶ TIMOTHY A. WISE & SARAH E. TRIST, GLOBAL DEVELOPMENT AND ENVIRONMENT INSTITUTE, BUYER POWER IN U.S. HOG MARKETS: A CRITICAL REVIEW OF THE LITERATURE 12 (2010), <https://ageconsearch.umn.edu/record/179085/?ln=en>.

⁷ *Id.* at 13.

⁸ Tufts University Global Development and Environment Institute, Comment Letter on Proposed Rule Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy (Aug. 27, 2009), <https://www.justice.gov/sites/default/files/atr/legacy/2012/02/29/AGW-15692.doc>, p. 2.

⁹ Claire Kelloway, *Beef Packing Merger Threatens America's Last Competitive Cash Cattle Market*, OPEN MARKETS (Apr. 11, 2019), <https://www.openmarketsinstitute.org/publications/beef-packing-merger-threatens-americas-last-competitive-cash-cattle-market>.

¹⁰ See, e.g., Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov. 9, 2010), <https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/>; John Oliver Viewer's Guide, RAFI (Jun. 11, 2015), <https://www.rafiusa.org/blog/john-oliver-viewers-guide/>; Annie Lowrey, *The Human Cost of Chicken Farming*, THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2019/11/human-cost-chicken-farming/601687/>; Marcia Brown, *The Chicken Farmers Are Pushing Back*, MOTHER JONES (Oct. 6, 2021), <https://www.motherjones.com/environment/2021/10/the-chicken-farmers-are-pushing-back/>.

¹¹ Khan, *supra* note 10; Brown, *supra* note 10.

¹² Khan, *supra* note 10; Brown, *supra* note 10.

50 years. Only 28.5% of broilers were raised by farms that produced at least 100,000 broilers each year in 1959.¹³ In 2011, a study of 17 states concluded that 50% of broilers were raised by farms that produced at least 628,600 broilers a year.¹⁴ Similarly, between 1992 and 2009, the United States lost more than 70 percent of its hog farms, yet “hog inventories remained stable.”¹⁵

Congress enacted the PSA in response to similar problems. In 1919, the Federal Trade Commission reported that five corporations controlled 70% of livestock slaughter in the United States.¹⁶ The FTC warned Congress that the “Big Five” manipulated livestock markets, “extort[ed] excessive profits,” exploited producers, and punished individual producers.¹⁷ “[E]ffective competition” was no longer present in the meat industry.¹⁸ Congress passed PSA in response in 1921.¹⁹ The PSA remains a potentially strong tool for addressing these issues today. Unfortunately, the PSA has been underenforced, in part due to the lack of clear regulations and guidance to industry on complying with its mandates. Strong and clear regulations are essential to ensuring that the PSA’s protections are enforced.

II. AMS Should Move Forward with the Proposed Rule

The Proposed Rule marks a step forward in providing the kind of clarity and enforcement basis necessary to achieve the PSA’s purpose. In addition to supporting the Proposed Rule generally, FBLE notes two important aspects that should be retained.

First, we support the inclusion of producer cooperatives in the rule’s protections. Producer cooperatives support producers in asserting their rights and can improve their access to markets.²⁰ Producer cooperatives can keep markets open to smaller producers, thereby preventing further consolidation. Integrators may prefer to receive larger quantities of animals in single transactions,²¹ and cooperatives can give smaller producers the ability to band together to deliver larger numbers of animals.

¹³ WILLIAM D. MCBRIDE & NIGEL KEY, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERVICE, EIB-43, THE TRANSFORMATION OF U.S. LIVESTOCK AGRICULTURE: SCALE, EFFICIENCY, AND RISKS 7–8(2009), https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=7879.3.

¹⁴ JAMES M. MACDONALD, ECON. RSCH. SERV., TECHNOLOGY, ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION 20 (2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=0.

¹⁵ JAMES M. MACDONALD & WILLIAM D. MCBRIDE, ECON. RSCH. SERV., ERR-159, U.S. HOG PRODUCTION FROM 1992 TO 2009: TECHNOLOGY, RESTRUCTURING, AND PRODUCTIVITY GROWTH i, 10 (2013), https://www.ers.usda.gov/webdocs/publications/45148/40364_err158.pdf?v=1041.4.

¹⁶ FED. TRADE COMM’N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY: SUMMARY AND PART I 33 (1919), <https://heinonline.org/HOL/P?h=hein.trade/rftcmpl0001&i=1>.

¹⁷ *Id.* at 68–72.

¹⁸ *Id.* at 33.

¹⁹ Packers and Stockyards Act, 1921, Pub. L. No. 67-51, 42 Stat. 159 (1921).

²⁰ *See, e.g.*, PRODUCERS LIVESTOCK MARKETING ASSOCIATION, <http://www.producerslivestock.com/>; EQUITY COOPERATIVE LIVESTOCK SALES ASSOCIATION, <https://www.equitycoop.com/>; *Livestock Marketing*, PRODUCERS, INC., <https://www.uproducers.com/livestock-marketing/>.

²¹ *See* U.S. Dep’t of Justice & U.S. Dep’t of Agric., Public Workshops, Exploring Competition Issues in Agriculture Livestock Workshop: A Dialogue on Competition Issues Facing Farmers in Today’s Agricultural Marketplaces, Fort Collins, Colorado, August 27, 2010, <https://www.justice.gov/sites/default/files/atr/legacy/2012/08/20/colorado-agworkshop-transcript.pdf>.

Second, FBLE supports the addition and proposed definition of deceptive practices. The proposed language appears to reflect the broad range of forms deceptive practices can take and various junctions in which they may arise during the contract process. FBLE nevertheless encourages USDA to consider appropriate additions raised during the comment period so that the rule may be as comprehensive as possible.

III. Several Aspects of the Proposed Rule Merit Modest Adjustment

FBLE generally supports these elements of the proposed rule but would offer the following suggestions.

A. FBLE supports the addition of inequitable information disclosure to the list of prohibited adverse actions.

The Proposed Rule prohibits regulated entities from prejudicing, disadvantaging, inhibiting market access, and otherwise taking adverse action against a covered producer based upon that covered producer's status as a market vulnerable individual or as a cooperative. It includes a non-exhaustive list of actions that may qualify as "prejudice or disadvantage."²²

FBLE supports AMS's proposal to provide a non-exhaustive list of actions that violate this section. Outlining specific actions under this prohibition decreases uncertainty in the industry and will make section 201.304 easier to administer. FBLE further encourages AMS to emphasize that the list of actions is non-exhaustive and consider adding other actions to put entities on notice that such conduct will violate the section.

For instance, FBLE supports an additional covered action concerning information disclosure. Correcting information asymmetry, especially for contract growers, is an important component to ensuring fairness in the industry, as was discussed in AMS's proposed rule, *Transparency in Poultry Grower Contracting and Tournaments*, released this summer.²³ Failing to provide some producers information on acquiring, handling, processing, and quality when that information is provided to other producers places certain producers at an undue disadvantage. The disclosure of information can advantage producers by giving them insight into best practices for producers (for example, if they receive sick animals, it will be useful to know that in order to properly quarantine and treat those animals to prevent disease spread) and into longer term strategies for capital investment. Information asymmetry between producers and buyers strengthens buyer monopsony or oligopsony position;²⁴ creating further information asymmetry between various producers unjustifiably strengthens certain producers' positions at the expense of others. Thus, failing to provide information materially relevant to a producer's operation while providing that information to one or more other producers should be included as an action demonstrating undue prejudice or disadvantage under section 201.304(a)(2).

²² Proposed Rule, *supra* note 3, at 60054 (§ 201.304).

²³ *Transparency in Poultry Grower Contracting and Tournaments*, 87 FR 34980 (proposed Jun. 8, 2022) (to be codified at 9 C.F.R. pt. 201).

²⁴ C. ROBERT TAYLOR & DAVID A. DOMINA, *RESTORING ECONOMIC HEALTH TO CONTRACT POULTRY PRODUCTION* 17 (2010), <http://www.dominalaw.com/documents/Restoring-Economic-Health-to-Contract-Poultry-Production.pdf>.

The former Grain Inspection, Packers and Stockyards Administration (GIPSA) recognized that information asymmetry is an undue or unreasonable advantage, prejudice or disadvantage, and included information asymmetry in section 201.211(c) of its 2010 proposed rule *Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008: Conduct in Violation of the Act*.²⁵ The criteria for determining whether an undue or unreasonable prejudice or disadvantage included consideration of: “Whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers.” AMS should adopt similar language as it enacts section 201.304 and include informational disadvantages in the list of prohibited actions.

B. FBLE supports expansion of the retaliation prohibition to include additional activities.

The Proposed Rule prohibits regulated entities from retaliating against or taking adverse action against producers for their engagement in certain activities. This proposal reflects a critical addition to the PSA’s governing regulations. As noted in the Proposed Rule’s background, retaliation and threats of retaliation are a prevalent concern in the industry and have interfered with lawful governance and oversight of industry practices.²⁶ Affirmation that retaliation is prohibited under § 202 of the PSA and providing clarity regarding what constitutes retaliation is an important first step in addressing this problem.

Each of the activities specified in the Proposed Rule—communication with the government, assertion of rights under PSA or under this rulemaking, assertion of the right to join or form an association or collective organization, communication with a person to improve production or marketing, communication or negotiation to explore a business relationship, and supporting or acting as a witness for a PSA action or other action against buyers—are extremely important in empowering producers to promote a fair market and assert their rights. FBLE has three additional recommendations, detailed below. We also encourage AMS to consider and include other retaliatory actions raised by producers and other stakeholders in response to this rulemaking so that the list in the regulation and/or associated guidance is as comprehensive as feasible. FBLE also encourages AMS to expressly include coercion as prohibited conduct.

First, AMS should include in the list of protected activities the assertion of any civil right held by the producer. Currently, the Proposed Rule includes a covered producer’s “assert[ion] of any of the rights granted under the Act or this part, or asserts contract rights.” This provision extends protection to rights granted under the PSA, this rulemaking, and contract rights, but fails to extend protection to other rights that a producer may have. For example, this may not adequately extend protection to a producer exercising their whistleblower rights or other rights conferred by federal or state law. AMS should consider extending this protection to the extent feasible within the scope of its authority.

Second, the Proposed Rule should protect communications with various types of third-party entities. The Rule currently includes communications with a government agency, petitioning a

²⁵ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35352 (proposed Jun. 22, 2010) (to be codified at 9 C.F.R. pt. 201).

²⁶ Proposed Rule, *supra* note 3, at 60013.

court, legislature, or government agency for redress, or with a person for the purposes of improving production or marketing of livestock or poultry. These protections are important and should be included in the final rule. However, these are not the only third parties who may be necessary for ensuring fair access to markets and aiding in producers' assertion of rights and protections. Lawyers, legal aid organizations, and other organizations may be useful and often critical in assisting producers in navigating contracts, their rights, and options for redress. Communications with such entities for these purposes should be protected. Producers may also wish to speak with organizations and individuals working on animal welfare, such as veterinarians. Doing so can allow producers to promote the health of their animals and gather evidence related to retaliation if they believe that they are being retaliated against by receiving sick animals.²⁷ Finally, producers should not be retaliated against for speaking with the media. Producers have expressed fear about speaking to the media for fear of retaliation,²⁸ which reduces transparency in the industry and hinders the ability of AMS and Congress to learn more about potential issues and solutions. AMS should thus protect this activity as well

Third, the Proposed Rule should protect communications that would lead to the assertion of a right protected in the current proposal. Currently, the Proposed Rule protects a covered producer's right "to form or join a producer or grower association or organization, or to collectively process, prepare for market, handle, or market livestock or poultry." However, it does not provide protection to a producer engaging in talks about, but not actually engaged in, the listed activities. This potentially creates a gap in retaliation protection during the initial communications and negotiations process. AMS should close this gap by including as a protected activity communication or negotiation with an individual or organization for the purpose of joining or entering a producer or grower association or organization, or to collectively process, prepare for market, handle, or market livestock or poultry.

Finally, the Proposed Rule sets forth several actions that constitute retaliation, including termination or non-renewal of contracts, adversely differential performance or enforcement of a contract, refusing to deal, and interference with third party real estate transactions or contracts. In addition to the list set forth in the proposal, FBLE recommends including language that contemplates coercion or intimidation such as threats to take one of the prohibited actions. This would make it clear that threats to take action that would constitute retaliation and violate the prohibition.

C. FBLE supports clarification of the recordkeeping standard.

While FBLE supports inclusion of a recordkeeping requirement, the Proposed Rule is relatively vague as to what records are necessary to retain for compliance purposes. The Proposed Rule requires entities to retain all records relevant to its compliance with paragraphs (a) and (b) of the section for 5 years. But the illustrative list includes: "policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of complaints received relevant to this section." It omits any mention of individual contracts or documents and communications related to those contracts that would likely provide

²⁷ See, e.g., Khan, *supra* note 10.

²⁸ See, e.g., Brown, *supra* note 10.

the clearest evidence for evaluating a claim of retaliation or an entity's decision of whether to do business with a market vulnerable individual or a cooperative.

This mismatch creates uncertainty for the industry and challenges for effectively making a violation determination. The language GIPSA's 2010 proposed rule, *Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008: Conduct in Violation of the Act*,²⁹ offered greater clarity:

A packer, swine contractor or live poultry dealer must maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers, swine production contract growers, or livestock producers.

FBLE recommends returning to this framing or using similar language to ensure that sufficient records are retained and available for proper evaluation of claims under this section.

IV. AMS Should Broaden its Conception of Market Vulnerable Producer

The Proposed Rule adopts an approach of focusing on adverse actions by covered entities against "a market vulnerable individual" due to that producer's status as such. It further defines a market vulnerable individual as "a person who is a member, or who a regulated entity perceives to be a member, of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as a member or perceived member of the group without regard to their individual qualities." AMS requested input on this definition and whether it should be limited to members of a protected class or extend beyond such existing definitions.

FBLE supports efforts by AMS to carry out its statutory mandate and agrees that certain conduct against specific types of producers exacerbates inequities and distorts market conditions. FBLE also interprets the Proposed Rule to provide an enforcement mechanism that complements AMS's authority under Sections 202(a) and (b) to enforce restrictions against certain practices irrespective of competitive harm, an authority that FBLE hopes to see codified in a future rulemaking.³⁰

With respect to the current proposal, FBLE encourages USDA to expand upon the proposed definition of "market vulnerable individual" In addition to the protected classes AMS identifies, the agency should explore the potential scope of adding producers operating in monopsony conditions to the current market vulnerable individual definition. In monopsony conditions there is no ability for a producer to avoid the negative effect of the prohibited activities by contracting with a different integrator. Additionally, in a monopsony, the integrator may be more easily able to manipulate the market and end prices in the region. It thus seems likely that discrimination,

²⁹ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35351 (proposed Jun. 22, 2010) (to be codified at 9 C.F.R. pt. 201).

³⁰ See *Unfair Practices, Undue Preferences, and Harm to Competition Under the Packers and Stockyards Act (AMS-FTPP-21-0046)*, OFF. OF MGMT. & BUDGET (Fall 2022), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0581-AE04>; see generally Packers and Stockyards Act, 1921 §§ 202(a)–(b), 308(a)(2); 7 U.S.C. §§ 192(a)–(b), 209(a)(2); *Spencer Livestock v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988).

retaliation, and undue preferences or disadvantages under monopsony conditions can increase the likelihood of competitive injury, making appropriate a rule or presumption that certain actions, like those outlined in the Proposed Rule, always constitute a violation of the act when performed against a producer in a monopsony.

There is also judicial support for this kind of reasoning. As the Tenth Circuit stated, [W]e have acknowledged that, like a monopoly, a monopsony can threaten competition. . . . In other words, a poultry processor with monopsony power can fix and manipulate prices resulting in injury to both poultry producers (i.e., growers) and end-users (i.e., consumers). . . . In addition, in the vertically integrated poultry market, a processor with a monopsony need not wait for poultry growers to produce less to increase prices on the wholesale market because the processor also controls the growers' supply. It may simply deliver fewer chicks to the growers, pay them the same low prices, and resell at the same or a higher price. When this happens, both the growers and the end-users are adversely affected. That is, by manipulating prices to suppliers, a monopsonist threatens to injure the end-users.³¹

The District Court for the Western District of Kentucky acknowledged that monopsonist power can adversely impact or may be likely to adversely impact competition.³² The court described multiple pieces of “evidence in the record that Tyson exercised monopsonist power in way that adversely impacts or is likely to adversely impact competition,”³³ including controlling the supply of chicks to control the supply of chicken meat, keeping base pay artificially low, manipulating grower pay through tournaments, and reducing grower pay through Tyson's condemnation policy.³⁴ Indeed, whether an area is in fact a monopsony has been legally relevant in PSA cases.³⁵

Although monopsony conditions alone may be insufficient to establish a violation of PSA,³⁶ when such conditions are combined with the sort of outlined behavior in the proposed rule, AMS may find that a presumption of increased likelihood of injury to competition is warranted. Thus, AMS should consider whether the covered actions in section 201.304(a)(2) (and any additions) will create the likelihood of competitive injury when performed against a producer in a monopsony. Based on its market expertise and available resources, AMS should further evaluate whether including producers located in a monopsony in the definition of “market vulnerable” is consistent with the purposes of PSA and the realities of the market and incorporate such producers if it finds sufficient support.

V. Conclusion

FBLE looks forward to finalization of the Proposed Rule and believes enactment will reflect a meaningful step forward in clarifying obligations and supporting enforcement. AMS should consider adding to its list of actions constituting prejudice or disadvantage, expanding its

³¹ *Been v. O.K. Industries*, 495 F.3d 1217, 1232 (10th Cir. 2007).

³² *Morris v. Tyson Chicken, Inc.*, 497 F.Supp.3d 282, 286–87 (W.D. Ky. 2020).

³³ *Morris v. Tyson Chicken, Inc.*, 497 F.Supp.3d 282, 286 (W.D. Ky. 2020).

³⁴ *Morris v. Tyson Chicken, Inc.*, 497 F.Supp.3d 282, 286 (W.D. Ky. 2020).

³⁵ *See, e.g., M&M Poultry Inc. v. Pilgrim's Pride Corporation*, 281 F.Supp.3d 610, 618 (N.D.W.V. 2017)

³⁶ *See* *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1234 (10th Cir. 2007).

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approach to retaliation, and amending its recordkeeping requirement to ensure these provisions support robust enforcement of the PSA against violative conduct. We also look forward to a broader interpretation of market vulnerable individual to ensure that harmful conduct will be effectively deterred.

Thank you for your consideration of our comments, and please feel free to contact us if you any follow-up questions.

Sincerely,

Farm Bill Law Enterprise

farmbilllaw.org

Contact for questions:

Emma Scott, escott@law.harvard.edu