



August 23, 2022

Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Submitted via regulations.gov

Re: Proposed Rulemaking on Transparency in Poultry Grower Contracting and Tournaments, AMS-FTPP-21-0044.

Dear Secretary Vilsack,

Farm Action respectfully submits this comment¹ to the United States Department of Agriculture (“USDA” or “the Department”) regarding the proposed rule, “Transparency in Poultry Grower Contracting and Tournaments” (“Transparency Rule”).² We are pleased that USDA is revisiting the unfair “tournament system” under which most poultry growers are paid, and we are hopeful for an outcome that makes progress toward addressing the problematic power imbalance in this industry.

Farm Action is a nonprofit organization dedicated to ending corporate monopolies and to ensuring a fair food and agricultural system. We seek to establish a better balance of power between everyday people and big corporations through advocacy, research, policy development, and political expertise. We are made up of farmers, ranchers, rural communities, policymakers, and advocates.

¹ Farm Action thanks Maher Mahmood and Will Bardwell of Democracy Forward Foundation for their assistance in preparing this comment.

² Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34,980 (Jun. 8. 2020). Farm Action intends to address some of the issues discussed below in a comment on the Department’s related advanced notice of proposed rulemaking, “Poultry Growing Tournament Systems: Fairness and Related Concerns,” (“Tournament Rule”), as well. The issues we address are of sufficient immediacy, however, that we request the Department consider them when considering whether and how to modify the proposed Transparency Rule.

American farms strengthen our economy by providing food security and jobs, yet poultry growers have long endured deceptive, unfair, and abusive practices by vertically integrated poultry companies. Poultry dealers control almost every aspect of the poultry grower's production, putting growers at the mercy of their decisions, however arbitrary. Because they have little bargaining power, poultry growers are often forced either to accept unfavorable terms or to lose their livelihoods.

The Transparency Rule will benefit poultry growers, and we support its inclusion as part of a comprehensive rulemaking. It is a welcome step forward in the effort to remedy the power imbalance between poultry growers and live poultry dealers. More is necessary, however, to make the relationship between poultry growers and dealers fair. All the transparency in the world cannot level a playing field that is intrinsically unfair, as the tournament system is. For that reason, USDA should seek comment on amending the proposed rules to include a ban on the tournament system, in order to limit the control and influence of poultry companies that engage in predatory practices.

This comment discusses the history of the rulemaking, including past failed attempts at preventing abusive practices; explains how the tournament system is unfair and in violation of the Packers and Stockyards Act ("P&S Act"); supports the provisions of the proposed Transparency Rule; and explains why transparency alone will not solve the underlying power imbalance. Farm Action urges the Department to implement the transparency disclosure requirements without further delay, and to propose a new rulemaking to ban the tournament system.

1. Rulemaking to Protect Poultry Growers Is Long Overdue.

Live poultry dealers typically outsource the growth of chickens to independent contractors. These poultry growers raise chicks until they are ready to be delivered back to the live poultry dealer for slaughter. In this relationship, from the time the live poultry dealer delivers a new group of chicks to the time it re-collects the flock from the poultry grower, the live poultry dealer controls virtually every aspect of the chick's development: the specifications of the poultry grower's facility, the flock's food, the flock's medicine, and how many chickens are delivered, among many other things. Outside the actual day-to-day labor, nearly every aspect of this process is outside the poultry grower's control.

Throughout this time, however, poultry growers generally have no idea how much they will be paid at the end of the process, because most poultry growers are paid under a "tournament system." Within the tournament system, growers' performance (roughly speaking, the delivered flock's weight measured against the amount of feed it consumed) is compared to that of other poultry growers. The highest

performers are paid more per pound than the lower performers – even though nearly all the factors affecting the final results (such as inputs, like the food and medicine that birds receive, or the health or gender composition of flocks) are outside a poultry grower’s control. In light of this imbalance of power, Congress and USDA have recognized the special problems facing poultry farmers.³ Nevertheless, despite efforts to address the current market failure dating back to 2008, USDA has not yet promulgated a rule to address these problems. In the meantime, the situation has become dire, as poultry growers are squeezed out of their livelihoods and driven off their farms.

More than a century ago, Congress enacted the P&S Act in an effort to protect farmers and ranchers from unfair trade practices.⁴ The goal of the P&S Act was to create a fair, open, efficient, and transparent market for livestock.⁵ Pursuant to the P&S Act, it is unlawful for poultry dealers to engage in any unfair, unjustly discriminatory,⁶ or unduly preferential practice.⁷

In 1994, Congress authorized the Grain Inspection, Packers, and Stockyard Administration (GIPSA), then a component of USDA, to investigate illegal market structures and ensure fair competition and fair-trade practices intended to protect farmers, ranchers, and agricultural producers.⁸ Despite GIPSA’s mandate, it struggled to make meaningful improvements for independent farmers. In 2006, the Government Accountability Office (GAO) released a report on “Continuing Problems with GIPSA Investigations of Competitive Practices” (“GAO Report”). The GAO found that, for years, GIPSA failed to sufficiently address and investigate companies’ anti-competitive practices.⁹

Congress responded in the 2008 Farm Bill, instructing USDA to develop new rules to clarify the P&S Act.¹⁰ Among other things, Congress instructed the Secretary of Agriculture to promulgate new regulations determining “whether an undue or unreasonable preference or advantage has occurred in violation of” the P&S Act, and “when a requirement of additional capital resources over the life of a

³ 87 Fed. Reg. 34,980-88.

⁴ Packers and Stockyards Act, 1921, 7 U.S.C. §§ 181-231 (2000).

⁵ See H.R. Rep. No. 851048, at 2 (1957).

⁶ 7 U.S.C. § 192(a) (unlawful for a packer, swine contractor, or live poultry dealer to “[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device.”)

⁷ 7 U.S.C. § 192(b) (unlawful to “make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.”)

⁸ USDA Agric. Mktg. Servs., *Fair and Competitive Markets*, <https://www.ams.usda.gov/about-ams/fair-competitive> (last visited August 5, 2020).

⁹ *Packers and Stockyards Programs: Continuing Problems with GIPSA Investigations of Competitive Practices: Testimony Before the Comm. On Agriculture, Nutrition, and Forestry*, 109th Cong. (2006) (statement of Daniel Bertoni), <https://www.gao.gov/assets/gao-06-532t.pdf>.

¹⁰ Act of Jun. 18, 2008, Pub.L. No. 110-246 § 11006, 122 Stat. 1651 (2008)..

poultry growing arrangement . . . constitutes a violation of” the P&S Act.¹¹ Beginning in 2010, the Department of Justice and USDA hosted several workshops and listening sessions across the nation to hear from farmers about the impact of consolidation on their livelihoods.¹² Farmers informed the agencies during those sessions that, in one grower’s words, “the current system is one that favors integrators and allows for the manipulation of outcomes to growers primarily through the tournament system.”¹³

In 2010, USDA issued several draft rules for public comments, known as the “GIPSA Rules.”¹⁴ These rules would have required dealers under the tournament system to pay growers the same base pay for growing the same type of poultry.¹⁵ Poultry growers hoped these rules would provide them protection by establishing a uniform base pay for each chicken and prohibiting any poultry grower from receiving anything less than that base pay.¹⁶ In response to strong opposition from industry lobbyists, Congress prohibited USDA from finalizing the rules through “GIPSA Riders” to appropriations acts.¹⁷ Subsequent appropriations acts, however, did not include this limitation, and in December 2016, USDA issued the Farmer Fair Practices Rules.¹⁸ These rules were less robust than the proposed 2010 rules would have been in promoting fairness for poultry growers, but in any event, the 2016 rules were withdrawn shortly thereafter – adding further delay in addressing the years of unfair practices by poultry companies.¹⁹

In 2021, President Biden issued an Executive Order entitled “Promoting Competition in America’s Economy,” in an effort to protect fair competition.²⁰ The President acknowledged that consolidation in the agriculture industry poses a challenge for independent family farms to survive, and that farmers “are squeezed between concentrated market power in the agricultural input industries — seed, fertilizer, feed, and equipment suppliers — and concentrated market power in the channels for selling

¹¹ *Id.* § 11006(1, 3).

¹² U.S. Dept. of Just., *Public Workshops: Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy*, <https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10>.

¹³ U.S. Dept. of Just. & U.S. Dept. of Agric., Public Workshops Exploring Competition in Agriculture: Poultry Workshop 149, (May 21, 2010, 9:12 AM), <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf>

¹⁴ See Implementation of Regulations Required Under Title IX of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,339 (Jun. 22, 2010).

¹⁵ 87 Fed. Reg. 34,981.

¹⁶ 75 Fed. Reg. 35,338, at 35,344.

¹⁷ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. at 92,567 (Dec. 20, 2016).

¹⁸ 81 Fed. Reg. at 92,570; 81 Fed. Reg. at 92,704-07.

¹⁹ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. at 48,594-603 (Oct. 18, 2020).

²⁰ Exec. Order. No. 14036, 86 Fed. Reg. 36,987 (Jul. 9, 2021).

agricultural products.²¹ The Order directed agencies to protect the conditions of fair competition by policing unfair, deceptive, and abusive business practices; promulgating rules that promote competition; and promoting market transparency through disclosures of information.²² It specifically required that the Secretary of Agriculture “address the unfair treatment of farmers and improve conditions of competition in the market . . . [and] consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act.”²³

In 2022, the President also announced an “Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain.”²⁴ This plan included direction to specific agencies on how to carry out the goals of the Executive Order, including requiring USDA to work on issuing stronger rules under the P&S Act.²⁵

2. The Transparency Rule, While Welcome, Is Not Sufficient to Address the Disproportionate Power Between Poultry Growers and Live Poultry Dealers.

Farm Action supports the disclosure requirements as outlined in the Advance Notice of Proposed Rulemaking (ANPRM). They are a welcome step forward, and Farm Action supports the ANPRM. The proposed rule’s requirements will allow poultry growers and prospective poultry growers to make more informed business decisions based on more complete information. Specifically, the Transparency Rule would require new contracts to provide information on certain inputs, such as minimum number of placements, minimum stock density, the expected value of the contracts, historical payment information to growers, and past litigation.²⁶

These are positive changes. Poultry growers currently do not have access to this information, which can be a means for poultry dealers to manipulate their inputs, thereby impacting a grower’s success. By providing information on key inputs, poultry growers can more effectively manage their operations, address financial risks, and make better decisions for their businesses.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ The White House Briefing Room, *FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, (January 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/> (last visited August 4, 2022).

²⁵ *Id.*

²⁶ 87 Fed. Reg. 34,991-35,000 (“under proposed § 201.100(b)(5), the dealer would be required to state the minimum number of poultry placements and the minimum stocking density”)

For instance, the Transparency Rule would require the dealer to state the minimum number of poultry placements and stocking density.²⁷ USDA correctly reasoned that the minimum number of placements²⁸ and stocking density²⁹ directly impact the grower’s revenue, and therefore, “[b]oth figures are crucial to a current or prospective grower’s ability to evaluate potential earnings under the contract and their ability to . . . meet financial obligations.”³⁰ Poultry growers rely on the stocking density to know the size of flocks that will be placed for growout. This allows them to make more informed business and management decisions ahead of time.³¹ This is a positive step toward evening the balance of power.

The disclosure requirement also extends to the tournament ranking system.³² Under the proposed Transparency Rule, the dealer is required to provide specific input information within 24 hours of the placement on the grower’s farm.³³ The information includes a flock’s stocking density, breed, sex, age, breeder facility identifier, any known health impairments, and how the grower’s pay will be adjusted to reflect these inputs.³⁴ Dealers are required to disclose these inputs for each grower in any grower tournament group to all participants.³⁵ USDA reasoned that this will equip poultry growers with accurate information at the beginning of each growout period about the placement to help inform the grower’s management decisions.³⁶ USDA suggested that this will allow growers to allocate their resources more efficiently while maximizing profitability.³⁷

Also, because this information will be visible to all participants, growers may be able to use it to determine whether or not they have experienced retaliation or were unfairly treated. The data will provide a record for them to use in the future to bolster potential legal retaliation claims.

²⁷ 87 Fed. Reg. 34,993.

²⁸ *Id.* (“Minimum number of placements would mean the least number of flocks of animals the live poultry dealer will deliver to the grower for growout annually under the terms of the poultry growing arrangement.”)

²⁹ 87 Fed. Reg. 34,994 (“*Minimum stocking density* would be defined to mean the ratio that reflects the minimum weight of poultry per facility square foot the live poultry dealer intends to harvest from the grower following each growout.”)

³⁰ 87 Fed. Reg. 34,998.

³¹ 87 Fed. Reg. 34,984.

³² 87 Fed. Reg. 34,999.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

The abuse of power caused by concentrated buyers in the agricultural market prompted the P&S Act, and that power imbalance still exists today.³⁸ Just four poultry companies dominate 54 percent of the market.³⁹ President Biden has acknowledged this imbalance of power, recognizing that the poultry companies control much of the supply chain and have the ability to increase their own profits at the expense of the farmers who make less and the customers who pay more.⁴⁰ USDA has received numerous complaints from poultry growers about challenges of the tournament system and the poultry growers' contracts. The complaints center on the stark power imbalance between the poultry dealers and growers.⁴¹ Poultry companies have used their power to exploit poultry growers to the point of bankruptcy and have engaged in retaliation. Farmers currently have limited recourse to seek justice.⁴²

Under the proposed Transparency Rule, poultry dealers still will control most of the production inputs, thereby failing to close the extreme disparity in bargaining power between the poultry growers and the poultry dealers. Based on the experiences of growers in our network,⁴³ we anticipate the following problems will remain even after the proposed Transparency Rule is implemented.

a. Power Imbalance

First, the proposed Transparency Rule would not fully level the playing field among the poultry growers and the poultry dealers. As noted, live poultry dealers would still control inputs used in farm production.⁴⁴ Even if poultry growers have access to more information related to the inputs, they cannot control how these inputs are provided to them. These contracts still provide poultry dealers complete control over the way chickens are raised.

In 2018, an investigation by the Small Business Administration's Inspector General found that the control imposed by poultry processors "overcame practically all of a grower's ability to operate their

³⁸ Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 Drake J. Agric. L. at 93-94 (2003).

³⁹ The White House Briefing Room, *supra* note 23. .

⁴⁰ *Id.*

⁴¹ 87 Fed. Reg. at 34,987-88.

⁴² Audio recording of Trina McClendon and Eric Shafer - owner and manager of a Mississippi 8-house poultry operation who contract grow for Sanderson Farms. Other farmers' names have been protected to preserve anonymity.

⁴³ Audio recording of Trina McClendon and Eric Shafer - owner and manager of a Mississippi 8-house poultry operation who contract grow for Sanderson Farms. Other farmers' names have been protected to preserve anonymity.

⁴⁴ AEDA, *Definition: Farm inputs*,

[http://www.environmentdata.org/archive/vocabpref:19893#:~:text=Definition%20\(http%3A%2F%2Fwww.agriculturelaw,feed%2C%20seed%2C%20and%20energy](http://www.environmentdata.org/archive/vocabpref:19893#:~:text=Definition%20(http%3A%2F%2Fwww.agriculturelaw,feed%2C%20seed%2C%20and%20energy) (last visited August 5, 2022).

business independent of [them].”⁴⁵ Integrators exercised control through “a series of contractual restrictions, management agreements, oversight inspections, and market controls.”⁴⁶ Growers’ economic viability depended on a “steady” and “predictable” supply of flocks from the same companies they rely upon to purchase their products.⁴⁷ Failure to comply could result in a decrease in integrator payments, flock placements, withholding the flocks, and canceling of contracts.⁴⁸

As farmers have told us, they are faced with limited options: either accept the unfavorable contract or stop growing chickens.⁴⁹ Farmers do not have the opportunity to negotiate the amount and quality of the very same inputs that determine their pay. They are subject to the poultry dealer’s decisions, which are often unpredictable and can be retaliatory. Although the proposed Transparency Rule would provide important disclosure requirements, it is not sufficient to correct the power imbalance between poultry growers and dealers.

b. Retaliation

Second, the proposed rule may provide some relevant information, but it does not solve the pervasive problem of retaliation by dealers against growers who object to the tournament system. Such retaliation includes dealers delaying shipment, providing defective inputs, canceling contracts, and threatening to report health and animal welfare violations.⁵⁰ Many farmers,⁵¹ including those in our network, have experienced these retaliatory actions. For instance:

- In 2019, a farmer purchased an eight-house chicken farm for approximately \$2 million. Sanderson Farms contracted with the farmer and provided no indication that any upgrades to the chicken farm would be necessary, other than digging an additional well. Later that year, the farmer had low-weight chicks, and Sanderson Farm blamed it on the water. Sanderson Farms provided him with a list of required updates, totaling \$300,000, which included digging yet

⁴⁵ U.S. Small Bus. Admin., Rep. No 18-13, EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS, at 7 (2018), <https://www.sba.gov/sites/default/files/2019-07/SBA-OIG-Report-18-13.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

⁴⁹ Audio recording of Trina M. and Eric S.

⁵⁰ Michael Sainato, *I can't get above water': how America's chicken giant Perdue controls farmers*, The Guardian (Mar. 14, 2020),

<https://www.theguardian.com/environment/2020/mar/14/i-cant-get-above-water-how-americas-chicken-giant-perdue-controls-farmers>.

⁵¹ Food Integrity Campaign, *Whistleblower Profiles*,

<https://foodwhistleblower.org/education-outreach/whistleblower-profiles/> (lasted visited August 8, 2022).

another well. The farmer refused to do the requested upgrades because of the cost. Shortly thereafter, Sanderson Farms stopped providing the farmer chicks. The farmer then went six months without any chicks, when the average time between flocks is generally two weeks. The farmer received a new flock only after Sanderson Farms had been short on chickens after they sold their plant in Laurel, Mississippi. The farmer had no other available poultry dealers in his region, so he had two options: provide an additional \$300,000 worth of upgrades (which Sanderson did not mention at the time that he purchased the chicken farm) or wait for untenable periods of time between flock deliveries, causing him severe financial hardship.

- Another farmer, Trina, has recently engaged in advocacy work and appears to be experiencing retaliation as a result. Her most recent flock is a bad set of chicks. She received a total of 22,000 chicks; however, she lost 1,039 chicks within the first 24 hours; and by the seventh day, she lost 3,336 chicks. Before the flock placement, her service tech inspected her farm and found no issues. Sanderson Farms replaced 1,000 of the chicks, but the flock continued to underperform. The chicks she has received are also undersized, and Trina received a low-quality feed (off-color, wet, moldy, and continued to clog the feeders). Trina suspects the poor feed was extra, scraped out of feed bins at the end of a flock that is typically used as “withdrawal feed” for the last few days prior to slaughter.
- Similarly, a top poultry grower for Perdue Farms was vocal with public health advocates, lawmakers, regulatory agencies, and the media about receiving “poor quality feed” and “sickly chicks.”⁵² He spoke out about unsanitary conditions and threats to flock health.⁵³ Perdue Farms became aware of the poultry grower’s involvement with the media and public. Without any prior warning or discussion, it terminated his 25-plus year relationship, reasoning that he had “materially breached” his contract by allowing visitors to tour inside of his poultry houses, although the contract made no mention of visitors.⁵⁴
- Another poultry grower took out a \$500,000 loan to build a chicken house on his farm, but refused to add in additional equipment, despite Tyson’s request.⁵⁵ Shortly after, Tyson provided him with sick chickens and ultimately terminated his contract.⁵⁶ He sued Tyson,

⁵² Food Integrity Campaign, *Rudy Howell Complaint of Retaliation*, Food Integrity Campaign Blog (Feb. 12, 2021), <https://foodwhistleblower.org/howell-complaint/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Alison Moodie, *Fowl play: the chicken farmers being bullied by big poultry*, The Guardian, (Apr. 22, 2017), <https://www.theguardian.com/sustainable-business/2017/apr/22/chicken-farmers-big-poultry-rules>.

⁵⁶ *Id.*

alleging that his contract was terminated because he encouraged other poultry growers to file complaints against Tyson for various mistreatment tactics. In response to his suit against Tyson, the court ruled in favor of the poultry company, reasoning that although Tyson's actions were wrongful, it did not violate the P&S Act because Tyson's treatment of the poultry grower did not hurt the competition within the industry as a whole.⁵⁷ The U.S. Court of Appeals for the Sixth Circuit affirmed,⁵⁸ and the U.S. Supreme Court declined to hear a petition to review the circuit court's decision.⁵⁹ In the end, the poultry grower was forced to declare bankruptcy.⁶⁰

This type of retaliation can and has cost farmers their livelihood and their farms, and the threat of such retaliation silences other farmers. USDA should go beyond the current proposal to curb this abusive behavior.

c. Debt Accumulation

Poultry growers invest significant amounts of money in poultry houses and then add technology modifications and upgrades, as frequently required by live poultry dealers as a condition of renewing a contract.⁶¹ Since poultry growers have virtually no leverage to negotiate favorable contract terms, they often incur substantial debt loads in making these purchases. Indeed, as acknowledged by the Transparency Rule, poultry houses and equipment are some of the costliest investments.⁶²

If a contract is not renewed, poultry growers are stuck paying back the loans to the same companies that required them to make the investments in the first place. This vicious cycle has led to crippling accumulations of debt resulting in numerous bankruptcies. Just last year, Tyson and Perdue reached a \$35 million settlement in a lawsuit brought by farmers alleging that the companies pushed them into debt and locked their compensation at a low rate.⁶³

⁵⁷ See *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010).

⁵⁸ *Id.*

⁵⁹ Nat'l Sustainable Agric. Coal., *U.S. Supreme Court Declines to Review Jury Award to Poultry Growers*, NSAC's Blog, (May 6, 2011), <https://sustainableagriculture.net/blog/poultry-growers-win/>.

⁶⁰ Moodie, *supra* note 54.

⁶¹ Audio recording of Trina McClendon and Eric Shafer.

⁶² 87 Fed. Reg. at 34,982-83.

⁶³ The Associated Press, *Tyson Foods, Perdue Farms to pay \$35 million to settle lawsuit with chicken farmers*, AL.com, (Sep. 3, 2021, 9:06 AM), <https://www.al.com/news/2021/09/tyson-foods-perdue-farms-to-pay-35-million-to-settle-lawsuit-with-chicken-farmers.html>.

The Transparency Rule cited research from 2011 that the “U.S. contract poultry growers’ total debt amounted to \$5.2 billion.”⁶⁴ It’s now 2022, and this debt number has grown exponentially: “[f]arm sector debt is forecast to increase 2.9 percent . . . [total] to \$467.4 billion.”⁶⁵ Multiple poultry houses now can cost more than \$1.5 million,⁶⁶ plus company-required upgrades that are around five to six figures.⁶⁷ The amount of this debt will only increase, leading to further economic damage for rural communities.

d. Legal Limitations

There are limited legal resources available to farmers to fight against these powerful poultry companies. Time and legal costs deter farmers from seeking justice in court. The farmers in our network have explained to us the frustration of filing a lawsuit against these poultry companies. In particular, funding a lawsuit requires a considerable amount of money, which many contract growers do not have because they are either bankrupt or in debt.

The Transparency Rule provides some legal recourse for controversies related to the Disclosure Document and poultry growing arrangements.⁶⁸ However, the exchange of information between poultry growers and dealers is not sufficient, and the costs of litigation are still often prohibitive. Although Farm Action appreciates the Department’s efforts to increase transparency among growers to avoid unfair practices, it is not enough. The Transparency Rule allows poultry growers to receive additional information but does not shift the overall power structure. The only way to cure the imbalance is to eliminate the tournament ranking system.

3. Ranking Systems that Lack a Base Price Guarantee Are Unfair.

The proposed rule does not go far enough to enforce the Packers and Stockyards Act’s ban on unfair practices. The tournament system is inherently unfair when poultry growers participate without any guarantee of how much they will be paid. For that reason, USDA should use its rulemaking authority⁶⁹

⁶⁴ 87 Fed. Reg. at 34,983.

⁶⁵ USDA Econ. Rsch. Serv., *2022 Farm Sector Income Forecast*, (Feb. 4, 2022), <https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-sector-income-forecast/>.

⁶⁶ Patti Anderson & Mike Weaver, *Op-ed: Monopolies are Giving Chicken Farmers a Raw Deal. We’re Urging States to Act.*, *Civil Eats*, (May 2, 2022), <https://civileats.com/2022/05/02/op-ed-chicken-farmers-raw-deal-monopoly-consolidation-meat-industry-beef-pork-price-s-inflation/>.

⁶⁷ *Id.*

⁶⁸ 87 Fed. Reg. at 34,994.

⁶⁹ 7 U.S.C. § 228(a).

to receive comments on a proposed rule incorporating the principle that a ranking system violates the P&S Act when conducted without a base pay guarantee.

The Department’s proposed rule confirms what poultry growers have long known: that no degree of transparency can ever make a ranking system fair when it lacks a base pay guarantee. The tournament system puts growers at an unfair disadvantage with dealers by denying growers the basic guarantees of a workable contract.

Section 202(a) of the Packers and Stockyards Act forbids live poultry dealers from engaging in or using unfair practices or devices.⁷⁰ That protection cannot be squared with a ranking system that lacks a base pay guarantee. As the Department’s own proposed rule recognizes, the modern landscape of massive, consolidated, integrated live poultry dealers have left growers with “few or no alternatives,” under which “growers lack the bargaining power to negotiate”⁷¹ “Integrators exert significant power over contract poultry grower operations through . . . payment systems.”⁷² In turn, growers have “little market power.”⁷³

A grower’s lack of control over inputs further underscores the need for a base price guarantee. USDA’s proposed rule acknowledges that “the timing and quality of certain inputs controlled by the live poultry dealer” directly impact “grower payments.”⁷⁴ Without a base price guarantee, the grower bears all the risk of the live poultry dealer’s inputs without any guaranteed return.

Even more perversely, a grower’s payout remains outside their control even if inputs do not negatively affect their work, because the tournament system conditions payouts on a grower’s performance *relative to other growers*. In other words – as the proposed rule put it – “[g]rower pay rates vary depending on the performance of other growers, even if a specific grower’s performance remains unchanged or even improved compared to their performance in previous growout periods.”⁷⁵

The unfairness of these results is supported by scholarship. In a 2018 article, a group of University of Missouri scholars proposed a framework for evaluating claims of unfairness in agriculture. “Fairness,” they explained, “is the perception that rules, practices or outcomes are consistent with one’s expectations.”⁷⁶ They explained that poultry growers and live poultry dealers exist within a “network,” wherein an actor’s power is evinced through the number of “links” that actor enjoys to other actors

⁷⁰ 7 U.S.C. § 192(a).

⁷¹ 87 Fed. Reg. at 34,982.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 34,983.

⁷⁵ 87 Fed. Reg. at 34,989.

⁷⁶ Mary K. Hendrickson, et. al, *The assessment of fairness in agricultural markets*, Geoforum, 41, 44 (2018).

within the network.⁷⁷ If one actor (such as a buyer) has links to many other actors (such as sellers), then the buyer has many options for purchasing; on the other hand, if actors have few links to sellers, then they have fewer options and are comparably beholden. “In other words, if a buyer can choose from many possible sellers, then the buyer’s dependence on a particular seller will be small. Thus, for power to exist in an exchange network, at least one actor must have an excess of available partners with which to trade.”⁷⁸ Conversely, “the dependence of [one actor upon another] is directly proportional to the perceived value of [the other] of the exchange with the [actor] or, in other words, with [the other]’s motivational investment in the relationship with [the actor]. The more value an actor places on the relationship or the more motivated an actor is to obtain resources or access to exchange partners, the more dependent that actor will be.”⁷⁹

This paints an accurate picture of the relationship between poultry growers and live poultry dealers. As the Department’s proposed rule acknowledges, live poultry dealers “exert significant power over contract poultry grower operations,”⁸⁰ because consolidation within the live poultry industry leaves growers with “few or no alternatives” and has created a climate in which “growers lack the bargaining power to negotiate”⁸¹

This limited universe of market opportunities for poultry growers is not the only unfair aspect of their relationship with live poultry dealers. The University of Missouri scholars also observed that “a reduction in the set of exchange opportunities within a network structure in which one’s exchange opportunities is less than another’s[] can be a prima facie case for a claim of unfairness.”⁸² For instance, “an agent within a network that sees a reduction in exchange opportunities *or available resources* could be at a power disadvantage, thus creating the possibility for a claim of unfairness, other things being equal.”⁸³ As the proposed rule explains, the complete lack of control over inputs harms poultry growers, whose performance rises and falls on the quality or inferiority of elements outside their control: stocking density, flock age, flock health, feed disruptions, and medicines, among others.⁸⁴ Any inequality among these inputs places growers at a competitive disadvantage over which they have no control. This is a wide power imbalance, by any definition. A legal framework that prohibits unfair trade practices between poultry growers and live poultry dealers should not tolerate this practice.

⁷⁷ *Id.* at 42.

⁷⁸ *Id.* at 43.

⁷⁹ *Id.*

⁸⁰ 87 Fed. Reg. at 34,982.

⁸¹ *Id.*

⁸² Hendrickson, *supra* note 76, at 43.

⁸³ *Id.* (emphasis added).

⁸⁴ 87 Fed. Reg. at 34,990.

The tournament system's inherent unfairness also is illustrated by its conflict with principles of contract law. It is fundamental to the validity of contracts that agreements not be unconscionable, in either their substance or the procedures leading to assent.⁸⁵ That is, a contract is invalid if “fundamentally unfair or unreasonably one-sided,” and if its formation leads to results that “amount[] to unfair surprise or depriv[e] the [party] of meaningful choice.”⁸⁶ Terms of contracts also may be unenforceable when they contravene public policy, such as when enforcement of the contract violates “the parties’ justified expectations” and when enforcement lacks “any special public interest.”⁸⁷

Without a base pay guarantee, a ranking system denies growers basic fairness. It creates an oppressive power dynamic under which growers take what they get because they must, and under which live poultry dealers pay what they want, because they can – and all of it by design. Growers typically begin their contractual relationship with a live poultry dealer by financing and constructing expensive, single-use facilities according to a live poultry dealer’s specifications. Since these facilities typically have no plausible use except for growing chickens, poultry growers cannot get out of the poultry business and transition their facility to another use; if they leave the business, then they will default on the debt they incurred to build the facility. This problem is exacerbated by the fact that, without a base pay guarantee, growers enter the contract with no idea what they will be paid – making a live poultry dealer’s “offer” impossible to understand, much less assent.⁸⁸ Moreover, contracts between growers and dealers carry all the trappings of unconscionability: unfair (growers develop and deliver their flocks without any idea how much they’ll be paid⁸⁹) and unreasonably one-sided (growers’ payouts depend heavily on inputs over which the live poultry dealer has sole control⁹⁰), resulting in unfair surprise (growers frequently earn less than they are led to believe they’ll earn⁹¹), and deprived of meaningful choice.⁹² There is simply no way to square this with a provision of law that forbids live poultry dealers

⁸⁵ *Restatement of the Law, Consumer Contracts* § 5 (A.L.I., Tentative Draft 2019).

⁸⁶ *Id.* at (b)(1-2).

⁸⁷ *Restatement 2d Contracts* § 178(2).

⁸⁸ 87 Fed. Reg. at 34,986 (“[P]oultry production contracts often do not guarantee the number of flocks a grower will receive, even under long-term contracts, although this is a critical datapoint for understanding the value of the contract to the grower.”).

⁸⁹ *Id.* at 34,989 (in a tournament system, “[g]rower pay rates vary depending on the performance of other growers, even if a specific grower’s performance remains unchanged or even improved compared to their performance in previous growout periods.”).

⁹⁰ *Id.* at 34,991 (“Pay systems highly correlated with individual input variability may be inconsistent with the merit premise and demonstrate misrepresentations and deception in the operation of tournament pay systems.”).

⁹¹ *Id.* at 34,986-87 (“The structure of the contracts themselves results in such a wide range of potential grower financial outcomes that it is difficult for growers to make reliable profitability projections.”)

⁹² *Id.* at 34,986 (“[G]rowers entering the market are tied to growing poultry to pay off the financing of the capital investment. Growers have reported that they must accept unfavorable contract terms because they are tied to production to pay off lenders and they have few, if any, alternative dealers with whom they can contract.”).

from “engag[ing] in or us[ing] any unfair . . . practice or device[.]”⁹³ Indeed, the Department of Justice’s recent lawsuit alleging that two prominent live poultry dealers, Sanderson Farms and Wayne Farms, violated the P&S Act through their tournaments (albeit on different grounds than those raised here)⁹⁴ is evidence that there is a sound basis to believe that the Act and the tournament system cannot both stand.

This unfairness would be ameliorated substantially by a requirement that live poultry dealers implement a base pay guarantee into payment systems. Such a regime is in fact used in some parts of the poultry industry. The proposed rule itself notes that a minority of poultry grower pay systems operate under a principle of “fixed performance.”⁹⁵ In a fixed-performance system,

growers are paid a base rate for each animal or for the farm weight delivered to the processor. These contracts generally adjust payments based on fixed performance standards. For example, farmers with lower animal mortality or higher conversion of feed to live weight might receive higher pay. These are called fixed performance contracts because although compensation might fluctuate, the performance elements are tied to fixed standards.⁹⁶

In contrast, a ranking system without a base pay guarantee deprives poultry growers of these protections by punishing them for circumstances fully under the control of the live poultry dealer. This is at odds with basic concepts of contract law, basic concepts of fairness, and the most basic requirements of the Packers and Stockyards Act. USDA should acknowledge as much and propose a rule to ban ranking systems when conducted without a base pay guarantee.

4. Conclusion

At bottom, the motivating spirit of the Packers and Stockyards Act is to level the playing field between the powerful and powerless. For countless poultry growers, that promise has not been kept. A century after the P&S Act’s enactment, poultry growers still endure a system in which they bear all the risk and suffer all the pain when those risks come due. Live poultry dealers insist that the tournament system

⁹³ 7 U.S.C. § 192(a).

⁹⁴ U.S. Dept. of Just., *Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers*, (Jul, 25, 2022). <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

⁹⁵ 87 Fed. Reg. at 34,988.

⁹⁶ *Id.*

incentivizes poultry dealers to out-compete one another. If incentives matter, then poultry growers deserve the incentive of knowing that they are being dealt with openly and honestly.

Ultimately, the best path toward the goal that the Transparency Rule hopes to achieve is also to ban ranking systems when performed without base pay guarantees. We urge USDA to seek comment on that addition to the rule. Until then, the proposed rule's transparency is a step forward. USDA should take that step. But that should not be its last.

Sincerely,

A handwritten signature in black ink, appearing to be 'S C', written in a cursive style.

Sarah Carden
Policy Advocate
Farm Action