RURAL ADVANCEMENT FOUNDATION INTERNATIONAL - USA

ADDRESS
P.O. BOX 640
PITTSBORO, NC 27312

PHONE
919.542.1396

WEB
RAFIUSA.ORG

S. Brett Offutt
Packers and Stockyards Division, USDA AMS Fair Trade Practices Program,
1400 Independence Ave. SW,
Washington, DC 20250-0201
Docket Number: AMS-FTPP-22-0046
September 26, 2022

Rural Advancement Foundation International - USA (RAFI-USA) is a nonprofit organization based in North Carolina that challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. We envision a thriving, sustainable, and equitable food system: where farmers and farmworkers have dignity and agency; where they are supported by just agricultural policies; and where corporations and institutions are accountable to their community. We help farmers find markets, advocate for and with farmers who are experiencing financial crisis, convene a Farmers of Color Network (primarily in the Southeastern United States), work with farmers markets and rural faith communities to increase food access, provide infrastructure and emergency grants to farmers, and help coordinate a seed breeding cooperative. The following recommendations for addressing corporate consolidation within the food system emerge directly from this work.

Our Challenging Corporate Power Program (formerly known as Contract Agriculture Reform program) has worked primarily with contract poultry growers for more than 30 years to fight for better treatment from, and regulation of, giant meatpacking corporations. In that time period we have seen the trend of corporate consolidation (both vertical and horizontal) within industrial animal agriculture continue unchecked. RAFI-USA now works with both contract and independent livestock and poultry producers to reverse the rampant negative effects of corporate concentration across the food system.

From their on-the-ground vantage point, contract poultry growers see the skewed reality of the tournament system more clearly than anyone. It is vital that USDA listen to the voices of current and former contract poultry growers who are directly impacted by the practices of the poultry industry that this rule seeks to address. However, these same contract growers also face the greatest retaliation risks for making their voices heard. In our advocacy on these issues over the past decade, we have consistently observed growers we partner with experience retaliation from the poultry corporations they contract with, in many cases to the point of losing their farms.

For this reason, we have conducted an anonymous contract grower survey in preparation for submitting these comments, which received responses from 105 current and former contract poultry growers from 17 states. Our comments are directly informed by these growers' narration of their own experiences to us, and it is our hope that these comments will channel their feedback directly to USDA about what the department should do to secure fairness on their behalf. We are grateful for this opportunity to provide these comments in response to USDA's advanced notice of proposed rulemaking, "Poultry Growing Tournament Systems: Fairness and Related Concerns," on badly needed improvements to fair competition and antitrust enforcement in today's poultry industry. In our following comments, we will define the tournament system's true purpose, and situate it within its wider anti-competitive context, while also putting that system in conversation with the voices of the contract growers we surveyed. We will then describe the rules that contract growers need to secure fair future markets, while addressing all of USDA's relevant questions.

Sincerely,

Edna Rodriguez
Executive Director
edna@rafiusa.org

Margaret Krome-Lukens
Policy Director
margaret@rafiusa.org

Aaron Johnson
Challenging Corporate Power Program Manager
aaron@rafiusa.org

Table of Contents

These comments and recommendations were authored by Aaron Johnson, RAFI-USA Challenging Corporate Power program manager Aaron Johnson, and edited by RAFI-USA Policy Director Margaret Krome-Lukens and RAFI-USA Executive Director Edna Rodriguez. Special thanks to the contract growers who entrusted us with their feedback in the survey conducted in preparation for this comment.

Manipulative By Design

Regional Poultry Monopsonies Use Tournament Systems to Externalize Costs and Control Growers

USDA begins its request for comments regarding the fairness of poultry tournament systems with a critical question. What is the tournament system's intended purpose? The poultry industry has its answer to this question:

> *The current compensation system rewards family farmers for putting in the hard work to raise the best birds as efficiently as possible. It features fair, honest contracts that reward growers for superior, efficient performance, resulting in lowered costs of raising chickens that benefit the grower, our integrator, and the consumer…the current poultry grower compensation system… encourages innovation and investment in the best equipment and practices.*[1]

The cornerstones of this answer - rewarding hard work, incentivizing innovation and investment, and shared benefits for all - are intuitively compelling. They are also deceptive and false.

Contrary to the statement above, today's poultry industry features contracts that might not even be legally legitimate contracts, too often forced upon growers under duress, whose "independent contractor" status probably doesn't meet the legal definition of an independent contractor. Payment outcomes within these contracts' tournament payment systems fluctuate drastically, not based on grower effort, but based on the numerous variables controlled by the poultry corporations they contract with (their "integrators"), including the quality of the inputs they provide, when they choose to pick up flocks, and how they organize their growers into tournament groups. Contrary to integrators' claims, the arbitrariness of tournament system outcomes disincentivizes growers to innovate or invest in infrastructure upgrades, because growers know their incomes are not truly within their control. Furthermore, the tournament system affords integrators unchecked coercive control over their contract growers, a convenient variety of ways to retaliate against growers deemed inconvenient or troublesome, and a means of pitting those growers against each other to undermine any attempts by growers to organize or find solidarity.

To some, the problems outlined above would be indicative of a system designed with the purpose of rewarding grower effort, innovation, and investment gone horribly awry - but this is a mistake. If the poultry industry's definition of the tournament system's purpose is accepted at face value, the answers to all of USDA's further questions in this request for comments will be distorted. The tournament system was never designed to reward growers or incentivize innovation. Instead its purpose is to manipulatively control the prices that growers receive so as to externalize as many corporate costs and extract as much corporate profit as possible - and it is

[1] https://www.regulations.gov/comment/AMS-FTPP-21-0044-0080

working exactly as intended, while also giving integrators the ability to retaliate against growers who resist their control. Even the source of the statement above is indicative of this reality - after all, it was quoted from an industry form letter, circulated to growers in an attempt to use their voices as "support" for the continuation of the same scheme that makes them feel manipulated in the first place.[2]

The comments and recommendations below summarize input entrusted to us by growers who felt it was safe to speak their mind freely to us in our grower survey - and they have a lot to say. However, to fully understand how today's tournament systems are possible, what their purpose is, and how they harm growers, they must be understood in their wider context. That context is one of autocratic corporate power abuse, made possible by the rampant regional monopsony control that poultry corporations have over their regional markets.

The Context of the Tournament System: Anticompetitive Regional Monopsony Power

Today, a "big four" cluster of giant corporations exert coordinated oligopolistic[3] and oligopsonistic control over 54% of the poultry market.[4] Giant meatpacking "integrators" shape the structure and rules of our food system by design to secure the greatest possible profits for themselves, while treating people, land, and animals as disposable units of production in the name of efficiency. Unfortunately, this efficiency cuts two ways; while efficiently producing meat, the industry also efficiently harms farmers and workers, their communities, and the land, air, and water we all rely on.

The antitrust lens that has been applied to the agriculture sector over the past 40 years of antitrust enforcement has been woefully shallow in its narrow, national level focus on consumer prices, and the result has been massive downstream harms in the form of thousands upon thousands of lost farms, inequitable environmental harm, and the hollowing out of rural communities throughout the country. Monopsony and oligopsony, or concentrated buyer power (as opposed to monopoly, concentrated seller power) has historically been less of a focus for antitrust regulators. However, the regional constraints that farmers and ranchers face by virtue of their reliance on long-term land ownership and their production of perishable commodities make them particularly vulnerable to regionalized monopsony power. Thus, the abusive exercise of monopsony power has outsized impacts on farmers, including contract poultry growers, and is core to the incredible power imbalance they experience. The permissive nature of merger enforcement policy over the past 40 years has allowed regional monopsony power to become commonplace in food economies, resulting in a wide range of economic, social, and environmental harms.

---

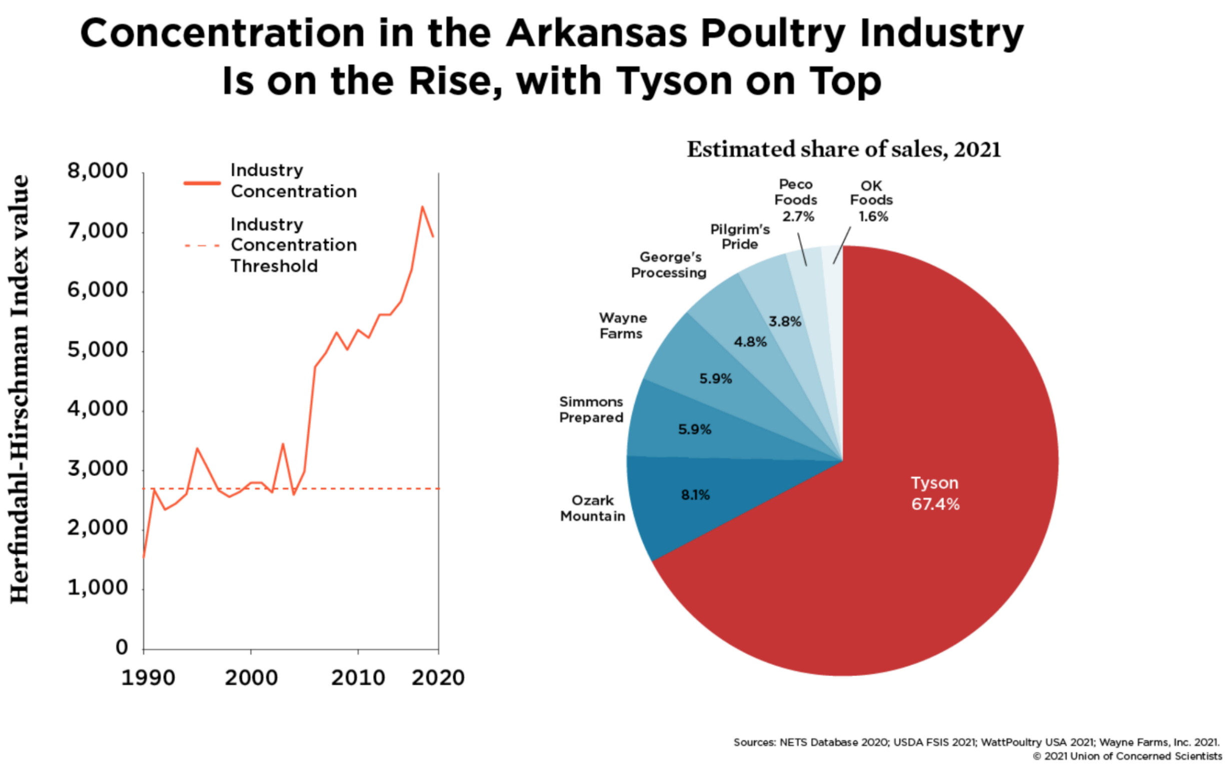
[2] https://www.reuters.com/world/us/big-us-chicken-company-mountaire-asks-contractors-oppose-transparency-rule-2022-08-05/

[3] Oligopolies or oligopsonies arise when just a few buyers or sellers operate in a market. In oligopolies and oligopsonies, the few companies operating in a market can more easily act as price setters by coordinating with each other to dictate prices and the quantity of goods and services they sell or buy. (Rebecca Boehm, Tyson Spells Trouble for Arkansas, Published Aug 11, 2021)

[4] https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/

For example, in the wake of last year's announcement Cargill/Continental intended to acquire Sanderson Farms, industry supporters were quick to respond to criticisms of the proposed acquisition by pointing out that the resultant national Herfindahl-Hirschman Index for the U.S. poultry industry would be 1,080,[5] well below the 2,500 HHI threshold over which the FTC and DOJ consider an industry to be highly concentrated.[6] Leaving aside whether the current HHI threshold should be retained, this analysis sidesteps the fact that *regional concentration, rather than national concentration, is the key factor that determines the impact of industry concentration upon farmers and ranchers.* It is vital that any analysis of the impacts of corporate concentration within our food system devote careful attention to regional monopsony power.

[A recent report published by the Union of Concerned Scientists](https://www.ucsusa.org/resources/tyson-spells-trouble#read-online-content)[7] (UCS) on the concentration of the Arkansas poultry industry since the 1980s provides an instructive example of how national consolidation trends in poultry processing are even more pronounced on regional levels. The Arkansas poultry industry is dominated by Tyson Foods, which controls 67% of the state's market today. In 2020, the Arkansas poultry industry had an HHI value of 6,930, and the last time that the sector had an HHI value below the Department of Justice Antitrust Division's 2,500 threshold was in 1994.



[5] https://www.wattagnet.com/blogs/14-food-safety-and-processing-perspective/post/43457-us-broiler-industry-not-as-concentrated-as-15-years-ago
[6] https://www.justice.gov/atr/herfindahl-hirschman-index
[7] The remainder of this case study heavily relies on the following online report by the Union of Concerned Scientists: "Tyson Spells Trouble for Arkansas," Rebecca Boehm, Published Aug 11, 2021. https://www.ucsusa.org/resources/tyson-spells-trouble#read-online-content

The impacts of this precipitous rise of industry concentration within Arkansas have had profound downstream effects on farm level concentration. UCS found that since 1978, 50% of Arkansas broiler farmers went out of business, even as the state's overall poultry production has more than doubled.

The regional effects of this high level concentration on poultry growers ability to competitively negotiate their contracts become even more pronounced when analyzed on a county by county level. To understand why this level of regional analysis is necessary, it is vital to understand the practical constraints that limit farmers' ability to negotiate between more than one or two buyers. On average, live chickens are trucked just 34 miles from farms to processing plants to minimize the transportation costs and associated economic losses that may incur due to chicken injury or death during transit. This means that the radius within which a poultry grower can practically seek other buyers or contracts is extremely limited; according to a 2011 USDA study, half of all contract growers reported only two integrator options in their region, while 21% only had one.[8] USDA research shows that "growers facing a single integrator are paid 7–8% less on average."[9] In Arkansas, UCS found that 11 of the state's 14 poultry producing counties had only one integrator available to contract growers, with Tyson being the exclusive option in 7 of those counties. Thus, the vast majority of poultry growers in Arkansas operated within a 100% monopsony environment in practical terms.

In addition to the obvious anti-competitive effects of such monopsony power, the realities of regional agribusiness concentration also create ripe opportunities for tacit collusion between regional players. Over the years that RAFI-USA has spent advocating for contract poultry growers, it has become evident that it is commonplace for such regional monopsonies to operate in conscious parallelism, with integrators refusing to contract with growers in each others' perceived "territory." The impact of this is that a farmer has no, or very few, other options for making money with the facilities they have gone into debt to construct. Even in areas with multiple integrator companies, shifting between integrators is not always a good or viable option: new integrators may require expensive updates to equipment, and many farmers report informal no-poach agreements, where companies decline to take on "each other's" growers - which is one focus of the lawsuit by growers filed in Oklahoma.[10] Thus, even growers that might find themselves within range of more than one processing option must operate functionally under total monopsony, because integrators tacitly collude to limit growers' alternative contracting options.

When poultry growers are forced to operate in such monopsonistic markets, with little to no ability to choose between multiple integrators to contract with, their precarity is profound. Knowing that their contract growers' ability to find a different integrator is extremely limited or impossible in such market conditions, integrators like Tyson Foods have free reign to

[8] https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=7182
[9] https://www.researchgate.net/publication/305948391_Market_Power_in_Poultry_Production_Contracting_Evidence_from_a_Farm_Survey
[10] https://www.harvestpublicmedia.org/post/tyson-perdue-farms-shell-out-36-million-settle-antitrust-claims

unilaterally dictate base prices, offer one-sided contracts (often under duress), and utilize manipulative payment schemes like the tournament system; in short, to treat growers like they are disposable. In our own decades of organizing poultry growers, RAFI-USA has repeatedly observed integrators coercing growers to accept degraded contract terms or incur further debt loads to finance mandatory infrastructure upgrades though take-it-or-leave-it contract revisions. In cases where growers resist, the lack of competitive options affords dominant integrators the ability to retaliate against resistant growers either in the form of being dropped from their contract, or by delivering poor quality chicks or feed which — because of the tournament payment system[11] — will reduce their earnings, impacting their farm's ability to stay afloat.

The Purpose of the Tournament System: Manipulative Control of Cost and Price

What then is the purpose of the tournament system? The tournament system is a manipulative scheme designed by poultry processing corporations to stabilize and control their own production expenses—in the form of prices paid to farmers—while transferring as much of the financial risk involved with growing chickens as possible onto growers they contract with. Contract poultry growers do not own the chickens they raise, nor do they control what feed or medicine is provided to their flock — these are all provided by the integrator. Contract poultry growers are tasked with achieving the most efficient possible growth of their flocks for the least amount of feed - which is expressed, in performance terms, in their statistical feed conversion efficiency. It is vital at this point to note that the the final weight and feed conversion efficiency of a broiler flock depends largely on the initial health and gender of the chicks, the quality and reliable availability of their feed, and the timing of flock pick-up - all factors that are controlled by the integrator, not the contract grower.

When these growers' flocks of fully grown chickens are picked up by their integrator for processing, the corporation does a detailed analysis of the feed conversion performance of each grower in that week's "tournament group." It then averages these statistics, docks the pay of the growers whose flocks were found to be below average, and transfers that money to growers of above-average flocks as bonuses. In essence, the effect of this system is to stabilize and externalize the costs of the integrator, while accomplishing an extractive transfer of bonuses to some growers by penalizing others - all within a system that is heavily influenced by integrator controlled inputs and actions.

Within this system, a grower can perform exactly the same functions and make exactly the same managerial decisions for one flock of birds as they do for the next flock of birds, and receive significantly different compensation between the two flocks relative to other growers in the settlement group. This could be a result of the quality of the inputs or the pick-up timing decisions made by their integrator, or this could be impacted by the group of other growers that they are put into competition with by their integrator within any given tournament group. Consider, for example, this account:

[11] https://rafi-usa.medium.com/eight-questions-you-might-not-know-you-have-about-the-packers-and-stockyards-act-80b0af5054ea

> *The grower pays for all of his mistakes and all of the integrator's mistakes. It is not uncommon for several houses to have feed outages every grow out. Also, the service tech "looks better" if there is little to no feed left over at the end of the growout, so they tend to short the grower on the last load(s) of feed resulting in the birds being off feed an additional 10-14 hours earlier than they should be. Any time during the growout the birds are without feed negatively impacts performance - and thus our income.* - Alabama poultry grower

While integrators cast this system as encouraging healthy competition, in reality, the outcome of this competition is never in the control of growers. The most decisive variables that lead to a flock performing above or below average, like the health and quality of chicks, feed, and medicine or the timing of when flocks are picked up for processing, are all controlled by the integrator.

Unfair Externalization of Mundane Production Costs

It is additionally important to note that the tournament system functions to allow integrators to externalize many of the mundane systemic costs of poultry production onto their contract growers. Poultry production, like any agricultural venture, does not operate like a Swiss clock - there are biological and human factors that introduce variability and error into the system, and these manifest as costs.

The most prominent example is the quality of the chicken flocks themselves. It is well documented that the age[12] [13] [14] and health of the breeder flocks that produce broiler chicks affect the final performance[15] [16] of broiler chickens, and thus grower income. Additionally, the health status of the provided broiler flocks themselves can also obviously have major impacts on mortality, final weight, and feed conversion efficiency. Growers are not able to control whether they will receive a flock with these issues, while integrators have every ability to decide which growers receive more or less optimal flocks. In our grower survey, grower after grower provided accounts illustrating the impact of flock quality on their income stability and inability to fairly compete:

> *You have those farms that tend to get the better chicks and when you have 15% mortality the first couple of days there's no way to compete with that. Integrators deliver sickly chicks but offer no products to try to help those chicks and expect you to take the loss.* - Alabama poultry grower

---

[12] Washburn, K.W., and R.A. Guill. "Relationship of Embryo Weight as a Percent of Egg Weight to Efficiency of Feed Utilization in the Hatched Chick." Poultry Science 53.2 (1974):766-769.

[13] Weatherup, S. T. C., and W. H. Foster. "A Description of the Curve Relating Egg Weight and Age of Hen." British Poultry Science 21.6 (1980): 511-519.

[14] Wilson, H. R. "Interrelationships of Egg Size, Chick Size, Posthatching Growth and Hatchability." World's Poultry Science Journal 47.1 (1991): 5-20.

[15] Goodwin, K. "Effect of Hatching Egg Size and Chick Size Upon Subsequent Growth Rate in Chickens." Poultry Science 40 (1961): 1408-1409.

[16] Morris, R.H., D.F. Hessels, and R.J. Bishop. "The Relationship Between Hatching Egg Weight and Subsequent Performance of Broiler Chickens." British Poultry Science 9.4 (1968): 305-315.

I have gotten really small chicks from a flock of hens of an age of only 26 weeks old, which is known and verified by veterinarians that they will grow smaller in weight and size compared to "prime chicks of 32-50 week old hens…then you sell/settle against farmers who have prime chicks that beat you and you receive a minus and have to give money to the "better grower" - North Carolina poultry grower

Chick quality (genetics) accounts for 90% of the performance of the flock (feed 5% health 2%) and the environment (which the grower controls) only 3%. Studies published show these statistics. This means the integrator is responsible for 97% of the chicken's performance. If they send the grower poor chicks then the performance and productivity of the farm will be poor. - Alabama poultry grower

We receive birds from several hatcheries in Alabama. Birds from different hatcheries definitely are not the same. We have seen the difference time and time again yet we still settle against the other farms with far superior chick quality. It's impossible to compete with growers who get the good chickens vs those who get all the culls. - Alabama poultry grower

Seven years ago [our integrator] started bringing us birds with severe genetic disadvantages. The chick quality was terrible and there was no way to make these birds perform, it was a nightmare and totally out of my control but I was blamed for it like so many other growers and my income suffered severely. They threatened to put me in a high management program where we had to perform better over the next three flocks or our contract would be terminated. I ended up selling that farm due to the impossible standards. - Missouri poultry grower

I have gotten a different breed before. All the other growers got a higher performing breed than I received but I was required to sell against the other farms. There is no way you can be competitive when you are raising a totally different breed from those you are selling against! - North Carolina poultry grower

I was given sick birds, and I finished so poorly that I could not even make a bank payment. My integrator acknowledged they gave me sick birds and that was the reason for my poor performance, but they still took over half of my check to offset their losses. When I asked about my losses I was told that this is how the business works. I had to get an extra loan to pay for my gas and electricity. In another example, I was brought a bad batch of feed 3 days before my flock was picked up. The birds stopped eating and drinking. My integrator acknowledged the mistake. My birds were the lightest I ever grew. They died a lot towards the end. The company did nothing to offset my losses. - Georgia poultry grower

We grow and our barns are set up for tray packs. In August 2020 we were required to grow big birds. We are in south Mississippi and August is the hottest part of the year. Of course we did not meet weight requirements for big birds and we were 30 points above cost. When we discussed our

> *concerns about our settlement our division manager said, and I quote, "y'all did better than we thought you would.'* - Mississippi poultry grower

Discrepancies and disputes surrounding feed quality and delivery was one of the most consistently reported issues highlighted by the growers who completed our grower survey. Flock performance - and thus grower pay - can be significantly impacted by a diverse range of feed discrepancies beyond a simple lack of feed for a period of time. For example, if a portion of the feed in delivery is inadvertently or carelessly not fully deposited on a grower's farm, their feed efficiency metrics will suffer. Or, because flocks are progressively transitioned from a finer ground feed to a pelleted feed to maximize feed efficiency, if flocks are, at some point during their growth, provided with the incorrect feed mix, feed efficiency metrics will suffer. From their on-the-ground vantage point, contract growers are best positioned to identify when these issues arise - and according to our surveying and interviewing, these issues are pervasive. 96% of growers in our survey reported experiencing a negative impact on their income due to one or more of the following feed issues:

- Having a feed disruption of at least 6 hours (90%)
- Having a feed disruption of at least 12 hours (83%)
- Receiving an incorrect feed mix for my flock's growth stage during grow-out (75%)
- Receiving less feed than stated on my feed load receipt (59%)

One story in particular that was relayed to us is an excellent example of the type of issue that requires further structures to account for. A poultry grower we spoke to described a time when he observed an issue with one of his feed deliveries. The feed truck driver stopped the truck's auger when the truck had been emptied, but before all of the grain in the auger had been transferred to the grower's grain bins. This resulted in the grower not receiving several thousand pounds of feed that his integrator thought he had received. Despite the flock being, in his estimation, a well performing flock with chickens that had put on more than average weight, he came in last place in that flock's tournament group, likely due to the feed discrepancy he experienced. He "asked [his] representative if there was any way they could catch that a feed truck's auger didn't run completely," and was told there was no recourse for the issue.

Growers in our survey had other detailed comments about these issues:

> *I am on flock 26 with my integrator. In 25 flocks I have yet to be able to match the feed tickets to what they show in my settlement. This results in an average of 250,000 pounds per flock of feed that they say I used that I don't have tickets for. This greatly affects my feed conversion…One flock I actually found a ticket they had in my settlement twice. When I called they did admit the problem but they found another ticket that supposedly wasn't added and it was for 11,000 pounds which was supposedly just enough to not change my feed conversion.* - Arkansas poultry grower

> *My integrator made me take the chicken off feed for 12 hours five days before they were picked up - it killed my feed conversion* - Arkansas poultry grower

> *We had a flock down the road that got pellets too early - the birds were scratching the feed out terribly and wasting it. They replaced the feed for that farm. I asked the supervisor how they were going to be paid? She said she honestly didn't know.* - North Carolina poultry grower

> *Our complex has two feed mills. One mill feed generally delivers correctly, but when we receive feed from the other mill we either run out all the time or have feed that sits nearly the whole flock because of overshipments. I personally had two loads that were shorted because they were whole loads I got credited for, but I have no way to know if I got credit for the overshipped feed that was hauled back.* - Alabama poultry grower

> *Feed delivery is another issue. Sometimes when we receive split loads of feed we do not get the feed that we supposed to because when they deliver, the first farm gets more of the feed because the doors on the truck leak* - Louisiana poultry grower

Similarly, the age of a flock at pick-up can significantly impact grower income. Poultry feed conversion efficiency peaks at a certain age, after which their feed conversion efficiency starts to lag. Consequently, there is an ideal flock pick-up time range in a flock's life cycle. When integrators choose to pick up flocks before or after this ideal range, for whatever reason (often pick-up time is determined based on integrator complex supply needs), growers end up being penalized for their flock's less optimal weight or efficiency metrics, even though pick-up time is not in their control. As several growers told us,

> *Your birds go out on different days. It is a known genetic fact that birds' feed conversion ratio changes daily as they age. I might sell my birds today at 46 days old and you sell tomorrow and your birds are 49 days old. There is no way you can compete fairly when your birds are 3 days different in age.* - North Carolina poultry grower

> *Some farms are moved at 49 days and others moved at 53 days. You can't compete with farms that are moved at 49 days when you are moved at 53 days."* - Maryland poultry grower

Herein lies the perverse brilliance of the tournament system: instead of sharing these inherent costs equitably, integrators pit their growers against each other and extract these costs from whoever happens to fall below the arbitrary tournament average. Thus, instead of a legitimate competition, the tournament system functions as a way for poultry companies to transfer the risk and cost of any problems with the chicks, feed, or medicine they provide onto the growers with whom they contract. Given that these costs are externalized onto growers in the form of penalties assessed within the tournament system that can result in a reduction in prices below contractually stated base pay rates, the cost externalization of the tournament system can be understood as a price manipulation scheme and deceptive practice.

Facilitation of Retaliation Against Grower Solidarity and Self-Advocacy

In addition to its role in externalizing integrators' costs onto growers, the tournament system also affords integrators a myriad of ways of retaliating against growers whom they want to pressure into silence or compliance with their wishes, or whom they want to drive out of the industry. With their control over so many of the variables that affect poultry growers tournament system performance - from flock and input quality, to correct feed provision, to flock pick-up time, to tournament group composition - integrators have many ways in which they can hold down the incomes of their growers. This ability can be used to compel growers to comply with upgrade requests, threaten growers who speak out against their integrator, or drive growers into debt, bankruptcy, and even suicide. As one North Carolina contract poultry grower told us, "They don't have to cut you off, they can just bleed you dry. The barn we're sitting in here hatched flocks with salmonella issues. They can send those compromised flocks to growers they want to bleed." Multiple growers in our survey conveyed their experiences of these toxic dynamics:

> *My main concern is that [my integrator] operates on fear and threatening tactics to make every grower they have scared they are going to lose their contract every single day. No human being should have to live every single day in fear that their livelihood and only source of income can be taken away from them. I am sick of it, someone needs to do something to help us! I love to grow chickens and feed the world, but I do not like to live as if under a dictatorship.* - Mississippi poultry grower

> *When I filed a complaint with the Packers and Stockyards Division about a weight issue, in which I was proven right, I was punished with bad tournament grouping for a year. Also, I have been told by my integrator, after receiving a really bad flock of birds, that they would be sure to not let it happen next time- so they know how to make it happen!* - Alabama poultry grower

> *We were shut off in 2012 due to massive updates that the company required. They used the tournament system to shut growers down. Because of the system we were shut off earlier than we should have. We only had three years left on our loan.* - Arkansas poultry grower

> *I was the number four ranked grower in my complex, and then went all the way to the bottom. When I asked my service tech about it, she said I had "help" to go to the bottom.* - Texas poultry grower

Integrators' ability to intentionally leverage their control over the quality and reliable provision of inputs to their contract growers constitutes a major undue preference, discrimination, and retaliation concern. This overall imbalance of power allows integrators to treat farmers like they are disposable. We repeatedly observe integrators cutting off farmers' contracts (often in retaliation after farmers speak out against unfair practices), leaving them with millions of dollars of debt tied up in single-use structures which do not have the ability to generate revenue, or contribute to a property's value, in the absence of an active contract. The abandoned poultry houses that litter the rural landscape across the Southeast testify to this pattern.

Enablement of Price Control and Undue Preference Through Tournament Group Composition
One of the most egregious methods of price manipulation available to integrators is found in their control over the composition of tournament groups themselves. In the current tournament system, growers generally compete against other growers whose flocks have been delivered for processing within the same week. Depending on the timing of flock delivery or pickup, contract growers may find themselves competing against completely different growers from flock to flock. This can result in a grower who delivers two substantially similarly performing flocks making very different income on each, based on the arbitrarily different competition they face.

While this arbitrary level of tournament group composition risk is concerning enough, income losses due to tournament group composition effects are also possible due to direct integrator manipulation of tournament groups. Integrators have multiple ways to intentionally and unilaterally control how growers are grouped into tournaments, and they can use this control to strategically manipulate the performance average and competition sample size and composition against which any given grower is compared, functionally manipulating or controlling the price that any given grower or group of growers receives. This can have drastic effects, as one grower relayed to us:

> *We've always been in the same tournament group with about 25 growers from the surrounding area. In the past few years, I was placed in a much smaller division with only three other growers. We're all top growers, but after that change one of us was always average, one was above, and one was below. How fair is that?"* - Mississippi poultry grower

In this example, the growers' integrator essentially manipulated the price that it had to pay to four of its top growers. In their initial, larger tournament group, these growers would have all placed above average and received bonuses, and thus a higher final price. By sectioning these growers off into a separate tournament group, two of these growers subsequently received final prices below base pay, based solely on the integrator's power to control how their tournament group was composed. This should be considered both an example of unlawful undue preference, and an example of unlawful manipulative control of grower prices, under the Packers and Stockyards Act.

The Verdict on The Tournament System: An Illegal Course of Business

Integrators designed the tournament system as a mechanism to control the price they pay for poultry production through cost and risk externalization and direct grower price manipulation through tournament group composition. Given the true nature of the tournament system as a price manipulation scheme, it can be argued that the tournament system is an illegal course of business under Section 202(e) of the Packers and Stockyards Act. Section 202 (e) [7 U.S.C. 192] states that it is unlawful to "engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices.

As established above, integrators utilize their current contract structures, most prominently the tournament system, to manipulate the real prices they pay growers for poultry production. Variable input quality and unreliable feed provision represent mundane operational costs that are both stabilized and externalized onto growers through this manipulation. More nefariously, the manipulation of grower tournament group placement or sample size, flock pick-up time, and layout times all represent methods of integrator price control. Most fundamentally, contractual base prices themselves are totally and noncompetitively controlled by integrators, who exercise ubiquitous regional monopsony power to depress grower prices relative to historical inflation.

In his 2022 paper "*Protecting Livestock Producers and Chicken Growers*, Michael Kades, now Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice, argues that for the livestock and poultry industries, the Packers and Stockyards Act fills a gap in the broader regime of antitrust law found in the Sherman and Clayton Acts that allows for the unilateral exercise of market power within oligopolies and oligopsonies. He notes that,

> *Section 202 (e) says that "any act or course of business" that, among other things, restrains commerce" applies to single firm conduct that would not "constitute single firm monopolization under §2 of the Sherman Act.'* [17]*As the 7th Circuit explains in Swift and Co. v. United States, "Under the Sherman Act, it is true that a simple refusal to deal is permissible,"*[18] *but "an individual refusal to buy may be within the prohibitions of the Packers and Stockyards Act."*[19] [20]

While the *Swift* case pertained to firms' refusal to buy within the context of an oligopsonistic market without inter-firm agreement, the key point, in this case, is that agreement between firms is not required to prove that a course of business is unlawful under the Packers and Stockyards Act. Under this logic, the usage of oligopsony power to unilaterally impose contracts that enable price manipulation and control would be unlawful; "even if there is no agreement, a packer or integrator may have violated Section 202 (e) if the individual contract provision reduces price competition."[21]

The imposition of contracts that contain provisions like the tournament system that can be shown to afford integrators the ability to manipulate and control prices should be considered an anticompetitive form of single-firm conduct. On price manipulative conduct, Kades argues,

---

[17] Been v. O.K. Industries, 495 F.3d, p. 1231 ("The antitrust requirement that monopoly power be acquired willfully and include the power to exclude competitors does not apply in the context of the PSA"; Hovenkamp, "Does the Packers and Stockyards Act Require Antitrust Harm?" p. 3–4

[18] Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968).

[19] Ibid., p. 253.

[20] Kades, Michael. *Protecting Livestock Producers and Chicken Growers.* Washington Center for Equitable Growth, May 5, 2022, 76.

[21] Kades, 76.

> *Conduct can manipulate or control price if it is "anticompetitive" or "illegitimate." In defining manipulation, the court looked to the Securities and Exchange Act, which focuses on conduct that artificially affects prices."Manipulating or controlling" should include market manipulation. Market manipulation is "the creation of an artificial price by planned action" by one or more actors. It undermines market integrity and transparency. Although market manipulation can be an antitrust violation and may be more likely when a firm has market power (either monopoly or monopsony power), neither is required. Rather, market manipulation involves exploiting market frictions, bargaining leverage, and information asymmetry to artificially increase or decrease the market price. These tactics are most likely to harm smaller participants—retail investors in securities markets, for example.*[22]

It should be noted here that "market price" in this case need only refer to the price that contract growers receive for the animals they raise under contract, not to the wholesale or retail price of those livestock or poultry commodities. Kades explains that,

> *In claims involving monopsony harms, there is no requirement to show that prices increased in the packers' market or at the retail level…In cases involving monopsony, the focus is solely on the impact within the seller's market. The plaintiff has no obligation to prove any effect—actual, likely, or tendency to cause an effect—in the market in which the packer sells. The U.S. Supreme Court precedent is clear: Harm to the seller is sufficient for an antitrust violation.*[23] *As a matter of economics, in cases involving a traditional monopsonist, the buyer will not pass lower costs on to its customers. Even in situations where a buyer with bargaining power were to pass along the benefits of an artificially low purchase price to the monopsonist's customers, the buyer would simply be sharing the anticompetitive benefit with its customers. That scenario is no different than if a cartel raised prices to customers (obviously bad) and justified it by saying that they shared their newfound profits with their suppliers. Therefore, harm to the producer should be sufficient for a Packers and Stockyards Act violation.*[24]

The tournament system is pervasively used across poultry markets, and in aggregate, its externalization of cost and ability to control prices offered through tournament group composition manipulation in effect creates an artificial price by planned action. Kades notes that when the USDA used to administer the Commodities Exchange Act, it had a four part test for illegal price manipulation:[25]

1. The accused had the ability to influence market prices.
2. They specifically intended to do so.
3. Artificial prices existed.
4. The accused caused the artificial prices.

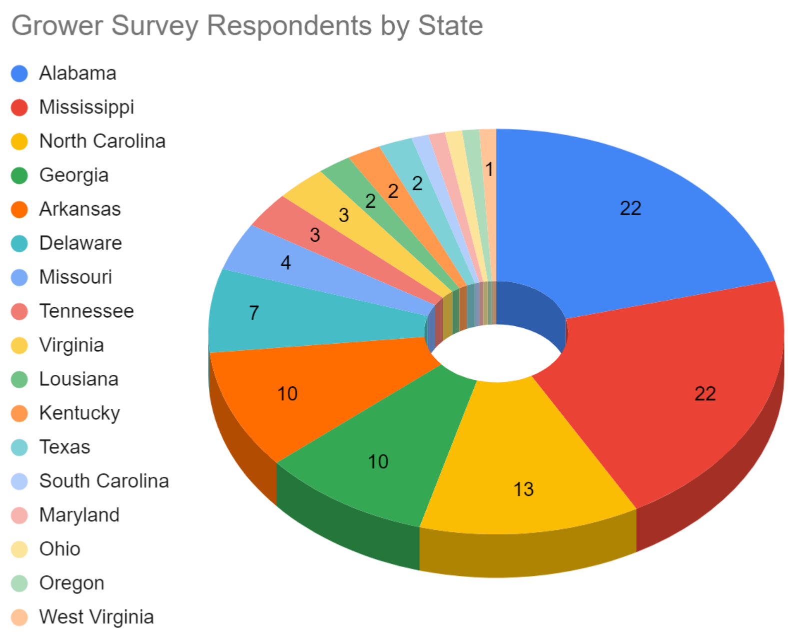
"At a minimum," he contends, "manipulating or controlling prices should apply to any conduct that satisfies those four elements." When considering the externalization of production costs or

[22] Kades, 70.
[23] Mandeville Island Farms Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948).
[24] Kades, 77 - 78
[25] Ibid.

the effects of tournament group composition, it seems clear that integrators have the ability and intention to cause artificial prices, and in fact do so. According *Live Chicken Production Trends*, a report prepared by the National Chicken Council in March of 2022, contract poultry growers made 6.33 cents per pound in 2012 dollars in 1990, by 2012 their pay had fallen by over 8% when considering inflation, to 5.81 cents per pound. They received 6.13 cents per pound in 2012 dollars in 2020, for a net decline of 3.1% in their prices relative to inflation.

Contract Poultry Growers Speak Up: Our Grower Survey Analysis

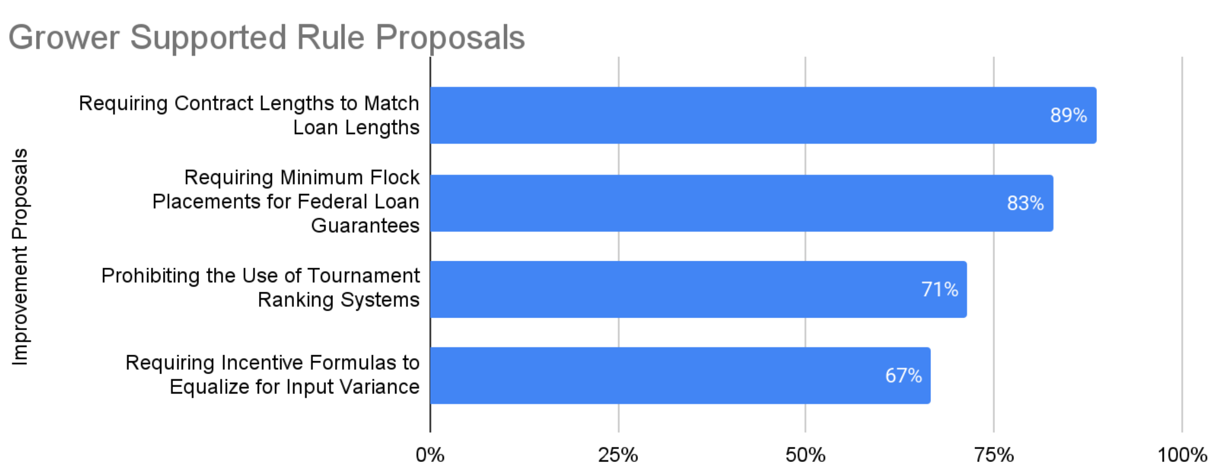
In preparation for our comments below, CCAR-member RAFI-USA conducted a survey of active and former contract growers that sought stories of their experiences of unfair or deceptive practices in the poultry industry, as well as their feedback on USDA's proposed rule. This survey was conducted anonymously, in response to widespread grower concerns about retaliation should they speak up about their experiences or support of reform.



A total of 105 contract poultry growers from 17 states responded to our survey. 90% of respondents were active growers while 10% were former growers. Only three grower respondents agreed that tournament systems "are generally fair and foster healthy competition," while 94% of grower respondents expressed at least one of the following sentiments regarding tournament systems:

1. Tournament systems are generally unfair and pit growers against each other (75%)
2. Tournament systems are too often used to retaliate or discriminate against growers (70%)
3. Tournament systems often negatively impact grower income (68%)

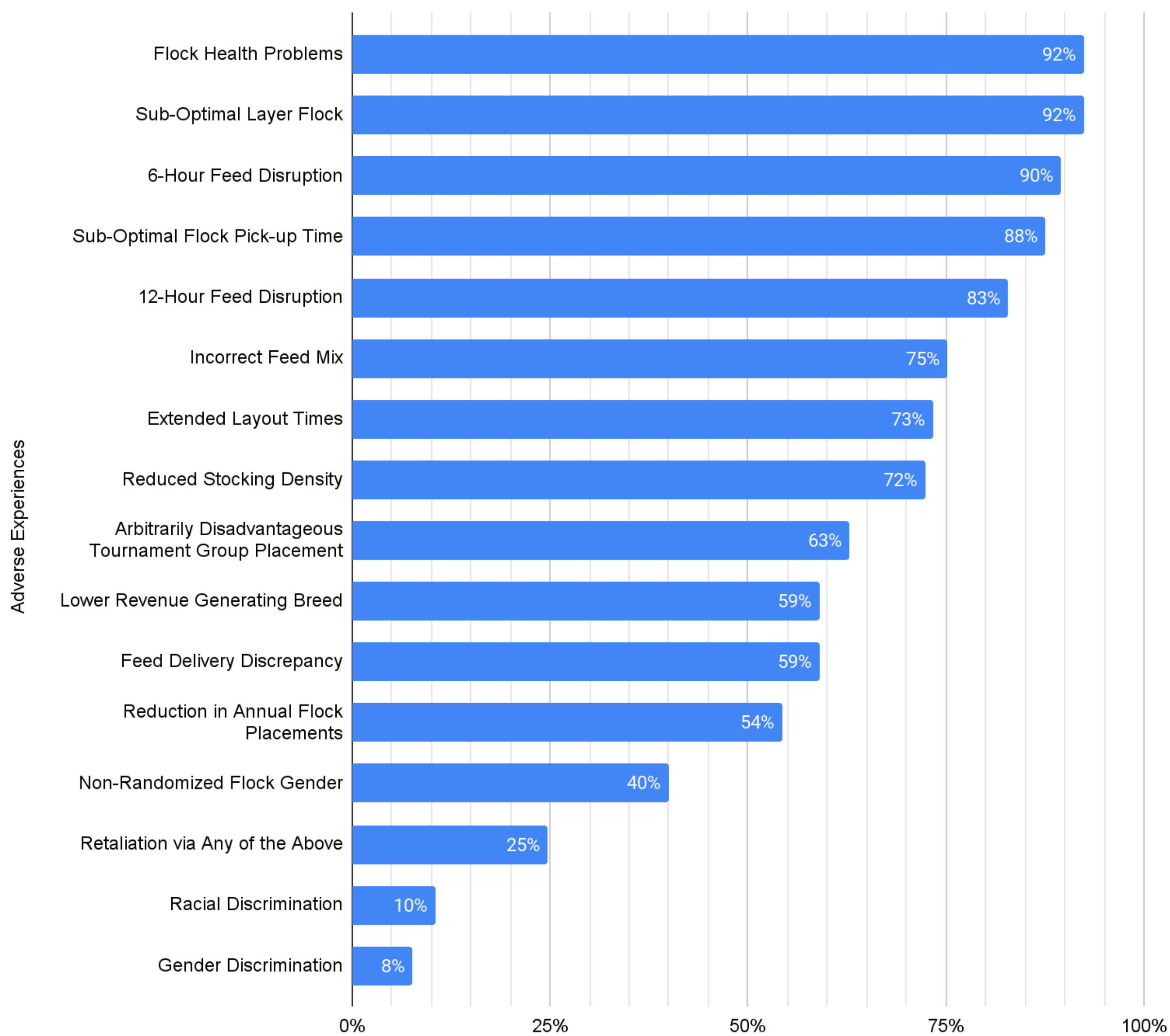
When we asked growers about a range of rule proposals, we received the following feedback:



The most popular proposed rule provisions amongst those growers we surveyed were new requirements for contract length guarantees to match the length of capital investment loans (89%) and for contracts to provide minimum guarantees for annual flock placements and flock stocking density (83%). Over 70% of growers would like to see rules that resulted in the prohibition of the usage of the current industry standard tournament system, and nearly that number would like to see any future contractual incentive formulas dynamically account for variable input quality. When combined, 90% of growers favored either prohibition of the tournament system or a mandate that formulas dynamically account for variable input quality.

We also asked our grower survey respondents whether they had experienced any of a range of commonly reported issues, which are within the control of integrators rather than poultry growers, that can negatively impact their income:

Adverse Experiences of Contract Growers



As can be seen above, sub-optimal flock health and layer flock lineage have pervasive impacts on over 90% of contract growers, as do a range of feed provision and quality issues. A striking 83% of growers had experienced a 12-hour feed disruption (with even more - 90% - experiencing a 6-hour disruption), 75% had received incorrect feed mixes for their birds' age (which can have a major impact on feed conversion efficiency), and 59% had experienced an incorrect feed delivery that differed from their feed load receipt. Additionally, 63% had been arbitrarily placed in a tournament group with a composition in which they were disadvantaged, which can arbitrarily change a grower's fortunes from profit to loss. Cumulatively, our survey results clearly demonstrate that adverse grower income impacts caused by integrator controlled variables are pervasive across today's poultry industry.

Designing a Fair Framework

Regulating Production Contracts to Promote Fairness and Innovation

The purpose of today's tournament system is unacceptable and unlawful, and regulatory intervention is needed to remove integrators' ability to manipulate their prices and their growers. New regulatory standards and contract forms are needed to ensure livestock and poultry markets that reward effort, efficiency, and innovation with integrity. The purpose of USDA's regulatory activity should be to protect growers from the abusive exercise of market power, ensure that growers are paid and incentivized for what is in their control, and foster innovation.

Current industry-standard production contracts tie both base pay thresholds and performance incentive premiums or penalties on the weight or performance of integrator-owned animals that receive integrator-provided inputs. Within this paradigm, contract growers currently have meaningful control over only a small minority of the factors currently determinative of the final prices they receive, and no meaningful competitive bargaining power in relation to their integrators. It is vital to understand that within the current industry structure, contract livestock and poultry producers are not, in reality, independent economic entities selling livestock into markets, but rather are going into debt to contract their *labor, land, and built infrastructure* to integrator corporations to grow livestock they do not own. The contract grower's relationship to all of the variables that currently impact their final price is fundamentally different from that of a truly independent producer. When an independent producer has a problem with a feed delivery, the company with which they must resolve that issue is likely not associated with the company they will sell their animals to, or the company they purchase their medicine from. In this way, the independent producer does not face the pervasive and multi-vectored control and perverse corporate incentives that contract producers face when contracting with vertically integrated corporations. There are simply too many variables that are unavoidably controlled by integrators, and within such a dynamic, it is fundamentally impossible to structure a payment system predicated on input-to-output performance with fairness and integrity.

USDA should issue a new framework of rules, grounded in the authority of the Packers and Stockyards Act, to correct this dynamic and ensure that production contracts compensate and incentivize growers based on what they, as independent contractors, actually control. Corporations should not be allowed to design contract provisions that allow them to unilaterally manipulate the real prices they deliver to their contract producers, as they currently do through their control of tournament group composition. Furthermore, contract growers need regulations that strictly mitigate the impact of integrator-owned inputs on contract producer income. Ultimately, such regulations should seek to structure a new power dynamic in contract animal agriculture, in which the agency and bargaining power of contract producers is protected in the face of the current industry's pervasive regional monopsony power.

Proposed Production Contract and Cooperative Bargaining Rule

The following proposed rule framework is designed to increase grower agency and protection by offering integrator corporations a choice: be willing to pay truly independent contract growers for what they actually control, most likely (and preferably) through square footage contracts, or be willing to negotiate with grower cooperatives or associations on contracts that tie base price to integrator-owned animal performance fairly. In either case, production contracts may retain performance-based payment formulas under this proposal, provided they comply with new, stricter guardrails and guarantee minimum prices.

***Definitions*:**

- **Livestock or Poultry Production Contract:** Any contract established between a meatpacker or live poultry dealer and an independent contract producer in which the independent contract producer provides their land, farm infrastructure, and/or management labor to house and raise livestock or poultry owned by the meatpacker or live poultry dealer.
- **Independent Contract Producer:** Any agricultural producer that enters into a contract to manage the production of an agricultural commodity owned by another contracting party, whose status within the contract is that of an independent contractor under the Fair Labor Standards Act, and who is not a member of a cooperative association of producers that has engaged in bargaining with the other contracting party.
- **Cooperative Association of Producers:** The term "association of producers" means any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in Section 1141j(a) of Title 12, or Section 192 of Title 7.
- **Base Price:** The price established within a livestock or poultry production contract that corresponds to the stated value provided by the independent contract producer within the contract's terms, prior to the assessment of any performance-based premiums or penalties. Common ways of establishing a contractual base price include but may not be limited to price per square foot of contracted farm infrastructure or price per pound of livestock or poultry production.
- **Minimum Price:** A contractually guaranteed price floor within a livestock or poultry production contract below which the final price delivered to a contract producer may not be reduced, even by performance-based penalties.
- **Expected Performance Standard:** An established standard for the growth and health performance of livestock or live poultry while under the management of an independent contract producer, which may include but may not be limited to expected mortality, weight gain, or feed conversion efficiency.
- **Performance-Based Incentive Formula:** A formula designed to compare the real performance of livestock or poultry being managed by a contract producer relative to an expected performance standard.
- **Premium:** The percentage of additional compensation added to a contract producer's base pay based on their performance relative to an expected performance standard.

- **Penalty:** The percentage of compensation subtracted from a contract producer's base pay based on their performance relative to an expected performance standard.
- **Complex:** A collection of contract producers who supply the same livestock or poultry processing plant.

Regulation of Base Pricing in Production Contracts

A livestock or poultry production contract established with an independent contract producer may not utilize a base price that is contingent on the weight or growing performance of livestock or poultry not owned by the independent contract producer. Production contracts that utilize a base price that is contingent on the weight or performance of animals not owned by individual contract producers may only be established within or negotiated with a cooperative association of producers.

Regulation of Performance-Based Incentive Formulas in Production Contracts

Any livestock or poultry production contract that incorporates a performance-based incentive formula to calculate premiums or penalties based on production performance relative to an expected performance standard must comply with the following conditions:

- The contract must guarantee a minimum price floor.
- The expected performance standard must be based on at least a six month rolling performance average of all producers in the contract producer's complex.
- No performance-based incentive formula may assess a premium or penalty percentage that exceeds the percentage difference between a grower's performance and the expected performance average.
- The expected performance standard must be mathematically adjusted to account for expected performance, with regards to expected mortality, weight, or feed conversion efficiency, with differences relative to:
    - Layer flock age and health
    - Pre-delivery health issues
    - Flock breed
    - Flock pick-up age
    - Feed type
    - Feed disruption of 6 hours or more
    - Medical care protocols
- Contracts must include a clearly elaborated procedure for settling payment outside of the performance-based payment formula, through a performance average of at least the last five flocks of the grower in question, in cases where growers bring an appeal related to input quality or provision issues.

For clarity, the chart below provides a concise breakdown of the rule framework articulated above:

<table>
<tr><th colspan="3">Production Contract Rule Framework</th></tr>
<tr><th>Grower Status</th><th>Base Pricing Allowed</th><th>Performance Incentive System Allowed</th></tr>
<tr><td>Independent</td><td>$/lb pricing option not allowed
$/Square Foot preferred</td><td rowspan="2">Must comply with all requirements under “Performance-based Incentive Formulas” above</td></tr>
<tr><td>Member of Co-Op or Association</td><td>$/lb pricing option allowed when negotiated with the cooperative or association</td></tr>
</table>

According to the Agricultural Fair Practices Act (AFPA), it is already illegal for integrator corporations to coerce growers to join or not join a cooperative or association of growers. It is also illegal for buyers to retaliate against producers who form a cooperative under the AFPA. However, further rulemaking should specifically reinforce this protection for contract growers currently under contract with an integrator who might choose to join, or not join a cooperative or association. Any retaliation against growers with existing contracts based on their cooperative or association membership status should be considered unlawful undue preference and discrimination under the Packers and Stockyards Act. In the context of the rules we propose, growers should have the free choice to opt for square-footage contracts, or to voluntarily form local cooperatives or associations for the purpose of bargaining for standardized production contracts. Furthermore, for the purposes of bargaining for performance-based poultry contracts, a poultry grower cooperative or association must be fully autonomous from the integrator, only consist of poultry farmers, and comply with the Capper-Volstead Act.

It is also important to note that our rule framework is designed to work in conjunction with USDA’s proposed rule on transparency in poultry contracting. Transparent disclosure of provided input quality will be an important prerequisite for ensuring compliance with our proposed requirements for performance-based incentive formulas, especially with regards to the required dynamic adjustments to account for the various input quality variables stipulated.

Impact on Grower Welfare

In 2001, Theofanis Tsoulouhas and Tomislav Vukina examined the regulation of broiler contracts, comparing industry-standard contracts with tournament systems to a hypothetical regulation mandated fixed-performance contract, in their paper *Regulating Broiler Contracts: Tournaments versus Fixed Performance Standards.* In their study, they note that “the crux of growers’ complaints about tournaments is the problem of group composition risk,” which they acknowledge as a risk borne by growers, but argue that existing tournament system contracts provide growers protection from “common production risk,” since growers are paid relative to a common performance average.[26] Tsoulouhas and Vukina proceed to analyze the effects of mandated fixed performance contracts on grower welfare, compared to the industry status quo.

It should be noted that Tsoulouhas and Vukina's study has a glaring blindspot: it generally assumes that growers receive inputs of equal quality, and does not account for more intentionally manipulative integrator behavior. Nonetheless, their modeling leads them to the conclusion that a fixed-performance incentive system in which bonus systems have a maximum cap increase grower welfare. "Income insurance and grower welfare can simultaneously be increased provided that the slope of the bonus payment scheme, the so-called "piece rate," is also regulated."[27]

Our proposed regulatory framework differs from that posed by Tsoulouhas and Vukina in several important respects. Unlike a simple fixed-performance standard, our proposal requires expected performance standards to be determined based on an average of real grower outcomes, retaining a degree of risk protection against common shocks. However, by requiring the sample pool of outcomes to be expanded to at least a six month rolling average of the performance of all growers supplying the same complex, our framework eliminates the tournament group composition risk faced by growers generally, and specifically removes integrators' opportunity to manipulate performance through their control of tournament group composition. Overall, our proposed framework should provide greater risk protection for growers against common shocks than the contract form modeled by Tsoulouhas and Vukina, while retaining the same elimination of tournament group composition risk.

Nonetheless, our proposed framework is also informed by the analysis and recommendations of Tsoulouhas and Vukina. Our framework prohibits performance-based incentive formulas from providing premiums or penalties that exceed, in percentage terms, the percentage difference of the grower's performance relative to the expected performance average. For example, if a grower were to perform 10% better or worse than the expected performance average, they could only receive a 10% premium or penalty relative to their contract's base pay rate. Thus, our framework restricts the "piece rate" grower contracts, consistent with the primary recommendation of Tsoulouhas and Vukina.

Impact on Grower Income Variability and Degradation of Base Pay Rates

An additional benefit of the two rule provisions discussed above - a mandated expected performance standard based on at least a six-month rolling average, and the restriction of premiums and penalties relative to real variation of grower outcomes relative to the expected performance standard - are these provisions' stabilization of grower income variability. On the one hand, the significant expansion of the outcome sample pool provided by six-month rolling average performance standards should, by the law of averages, smooth the relative variability of the expected performance average itself. Growers will no longer be likely to be compared to

[26] Tsoulouhas, Theofanis and Tomislav Vukina, *Regulating Broiler Contracts: Tournaments versus Fixed Performance Standards.* Amer. J. Agr. Econ. 83(4) (November 2001): 1062–1073 Copyright 2001 American Agricultural Economics Association, 1063.
[27] Ibid., 1064.

wildly different performance standards from flock to flock based on their tournament group composition or an input quality or provision issue. On the other hand, the extent to which a growers' performance-based incentive may vary their final income will also be restricted relative to the real percentage of difference between their performance and the expected performance standard. According to growers in our networks, incomes within today's tournament system contracts can be cut by 50% or more if one places at or near the bottom of one's tournament group. It is highly unlikely that such growers are, in fact, delivering half of average value to their integrators on such flocks. Overall, these provisions should appropriately narrow the impact of performance incentive provisions in production contracts. Performance incentives should incentivize contract producers, but they should never make or break them.

In addition to the measures previously described, our proposed framework also requires contracts to directly limit the degradation of growers' base pay rate by requiring a contractually guaranteed minimum price. Significantly, our framework does not require that a contractually guaranteed minimum price threshold be equivalent to the contract's base pay, allowing but not requiring the option of explicitly restricted performance-based penalties. This will allow integrators and independent or associated growers the flexibility to negotiate appropriate base and minimum pay thresholds and performance incentive systems without incentivizing a depression of base pay rates to a lower common denominator to account for below-average grower performance, while still guaranteeing that the guaranteed minimum price provided by production contracts can be accurately assessed by growers, lending institutions, and USDA.

It may be helpful to note that the terms of the Department of Justice's recent consent decree with Cargill, Wayne Farms, and Sanderson Farms regarding poultry production contracts would be consistent with, but not required, under our proposed framework, provided that Wayne-Sanderson growers choose to form a cooperative association to continue such terms. However, for any growers who do not consent to join a cooperative or association of growers, new square-footage based contracts would be required.

Ensuring Growers are Compensated Based on Variables They Control

Perhaps the most important goal of our proposed framework is that contract producer income be more directly aligned with factors under their operational or negotiational control. For independent contract producers, our framework will require base payment rates to be based not on integrator-owned animals or inputs, but instead on the factors that growers control: the provision and quality of the land and built infrastructure required for integrator-owned livestock or poultry production. In this respect, square-footage contracts are clearly the most optimally aligned contract form. It should further be noted that this proposed framework helpfully corrects industry standard contract terms to better comply with the correct classification status that independent contract producers should fall under within the Fair Labor Standards Act, anticipating any potential challenge to the industry's current potential misclassification of growers as independent contractors, as is alleged in Diaz et al. v. Amick Farms, LLC. Furthermore, our framework still accounts for the potential variability of the management labor component of a contract producer's services through its tightly regulated provisions for performance-based incentives.

Our framework takes specific additional care to ensure that variability of quality or correct provision of integrator-controlled inputs is fairly accounted for, even within the more restrictive terms of the performance-based payment formulas we allow. We require that performance-based payment formulas mathematically adjust the final expected performance average to which any contract producer is compared based on expected mortality, weight gain, or feed conversion efficiency performance differentials that might be caused by layer flock age and health, pre-delivery broiler flock health issues, broiler flock breed, or broiler flock pick-up age. We also require mathematical adjustment of the expected performance standard based on significant differences in feed or medical care provided, to account for expected performance differences for growers assigned non-GMO or antibiotic-free flocks, as well as for feed disruptions of 6 hours or more. Additionally, nearly 90% of growers we surveyed expressed support for USDA explicitly protecting their right to install feed scales on their farms without retaliation, so that they can independently verify feed delivery accuracy.

Integrators, of course, need to place all of their flocks with a grower, whether they have ideal characteristics or not. The key point is that growers' performance-based payment formulas should assess whether or not they were able to achieve below or above average performance from their flock based on performance expectations *specific to that flock*, rather than based on performance expectations for a flock with relative quality advantages. For example, a grower that receives a flock from a sub-optimal layer flock that is subsequently picked up later than is optimal for feed conversion efficiency should be evaluated in comparison to an appropriately customized expected performance standard. Live poultry dealers already collect a great deal of data about all aspects of the poultry production system, including data about grower, housing and flock performance, through industry data consulting firms. With this data, integrators should be able to catalog and predict expected performance for flocks based on their unique mix of the above listed characteristics, and easily comply with our framework's provisions.

Facilitation of Collaborative Innovation and Infrastructure Competition

Contrary to the false narrative of the poultry industry, the current tournament system often disincentivizes the spread of innovation. As one Alabama grower relayed to us, "the tournament system stifles advancements in poultry production…if a grower develops a technique that improves his performance, the last thing he will do is share that information because he is in constant competition with his fellow growers." Competition is not the only driver of innovation - collaboration is important as well. While our proposed framework retains competitive performance incentivization, it decreases the intensity of the zero-sum dynamic found between individual growers relative to the current system. This should free growers to share knowledge about best practices and good infrastructure investments more freely.

Further Regulation of Contract Provisions and Discontinuation in the Poultry Industry

As detailed previously, the poultry industry currently exercises its pervasive regional monopsony power to extend incomplete and unconscionable contracts to current and prospective contract producers. Unconscionability in contracting was defined in *Been v. O.K. Industries* as "an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party" in contracts established under a "gross inequality of bargaining power."[28] This dynamic in the poultry industry was further acknowledged by USDA's own recent "Transparency in Poultry Grower Contracting and Tournaments" rule, which spoke to the "incompleteness" of industry standard poultry production contracts:

> *A contract may be viewed as complete if the terms include the substantive legal, practical, and economic promises, obligations, and contingencies needed to operate in a poultry growing arrangement…Incomplete contracts may arise when practically important terms do not meet those conditions. Incomplete contracts may magnify risks with respect to the performance of the contractual counterparty and lead to other potential inefficiencies. In particular, at least one party may have discretionary latitude to deviate from expectations. For example, poultry 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.*

At the end of their paper on poultry production contracts, Theofanis Tsoulouhas and Tomislav Vukina also acknowledged this power, specifically in reference to "hold-up" risk that growers face due to their integrators leverage of market power to coerce growers under threat, rather than incentivize growers with increased prices:

> *One of the more interesting issues is the problem of regional competition on the market for growers, and the related problem of a potential "hold-up." It is certainly conceivable that, by making growers incur large specific investments, integrators can increase grower incentives without increasing grower compensation, because the risk of losing his investment will increase a grower's fear of low performance. Because asset specificity has such an effect on distribution, integrators have an incentive to insist on investments that are unnecessarily specific. Thus, especially in geographical regions where the integrator enjoys market power, grower complaints about excessive investments may be theoretically justified.*[29]

Under these conditions, integrators have the power to offer or renew contracts with prospective and current contract poultry producers with unconscionable terms, including contracts guaranteed for fewer years than the lengths of the loans contract growers take out to finance their on-farm infrastructure, flock-to-flock contracts that do not guarantee sufficient flocks and

[28] *Been v. O.K. Indus., Inc.,* 495 F.3d at 1236.
[29] Tsoulouhas et al, 1072.

stocking density annually to keep up with loan payments and/or standard expenses. Furthermore, integrators are known to coerce growers into taking on additional debt to finance integrator preferred upgrades, under the threat of losing contracts or flock placements. Contracts that allow for this type of behavior should be considered incomplete and unconscionable, and the use of any incomplete or unconscionable contracts should be considered an unlawful deceptive practice under the Packers and Stockyards Act. **Perhaps most importantly, USDA should specifically clarify that it is unlawful for an integrator to coerce, intimidate, or break contract with a contract producer based on their unwillingness to implement integrator desired upgrades to their on-farm infrastructure, provided that their infrastructure is in good working order, and compliant with state and federal law.**

Further Regulation of Lending in the Poultry Industry

In addition to unfair contract provisions and discontinuation, integrators' ability to easily proliferate new poultry operations, backed by FSA or SBA-7(a) guaranteed loans that they share no liability in, is a significant factor in their ability to leverage their market power against their existing contract growers. The overall imbalance of power allows integrators to treat farmers like they are disposable, because it is easy and low-risk for the integrator to add new growers to replace those cut off. We repeatedly observe integrators cutting off farmers' contracts - often in retaliation after farmers refuse to implement desired upgrades or speak out against unfair practices - leaving them with millions of dollars of debt tied up in specialized, single-function structures which do not have the ability to generate revenue, or contribute to a property's value, in the absence of an active contract. As a result, it is increasingly common for us to hear feedback from current or former contract growers in our network about the need for strengthened rules to ensure fair contract terms and protect growers from contract discontinuation, as well as reforms to current lending practices that currently allow integrators to proliferate new poultry operations at will and without sufficient scrutiny.

USDA should enact reforms regarding the Farm Service Agency's lending practices in the poultry industry to ensure that live poultry dealers are not able to exploit their regional monopsony control to extend unconscionable contracts. Our recommendations are primarily directed at lending policy reforms for *new poultry operation applications*. One common practice of integrators in the industry is to require existing growers to implement expensive upgrades (which perpetuates the debt cycle) under threat of losing their contracts. Indeed, this often begins to happen to existing growers after new poultry operations are constructed nearby. For this reason, it is important that FSA take a more nuanced approach to approving loan guarantees for existing contract growers who need to secure capital for upgrades to avoid losing their contracts. RAFI-USA recommends the following reforms to the FSA Guaranteed Loan Making and Servicing Handbook:

- For contract income to be considered dependable, FSA should require that the contract be guaranteed not just for three years, but for the entire length of the loan term.
- For contract income to be considered dependable, FSA should require contracts to include sufficient minimum guarantees of animal placement and stocking density to

ensure dependable annual income. Flock-to-flock contract structures should not be considered dependable income.

- Income and expense projections considered during appraisal should be based on USDA required poultry contract transparency disclosures.
- FSA should not consider a loan application based on contract income to be viable unless the contract includes provisions guaranteeing that the contract cannot be revoked if upgrades aren't made (aside from upgrades required to comply with state and federal law). Appraisals should seek to evaluate that the life of the equipment funded by the loan has an expected service life (with standard maintenance) that extends past the term of the loan.
- For approval of applications for new poultry operations, FSA should require integrators to supply written justification for their need for overall capacity increase within a complex as a component of market analysis obligations, to ensure that new operations are not being sought to allow integrators to discriminate against or shutter other existing poultry operations within a given region.

These comments and recommendations were authored by Aaron Johnson, RAFI-USA Challenging Corporate Power program manager Aaron Johnson, and edited by RAFI-USA Policy Director Margaret Krome-Lukens and RAFI-USA Executive Director Edna Rodriguez. Special thanks to the contract growers who entrusted us with their feedback in the survey conducted in preparation for this comment.