August 9, 2024

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

RE: Docket Number: 2024-12415; RIN: 0581-AE18; 89 FR 49002
"Poultry Grower Payment Systems and Capital Improvement Systems"
(submitted via regulations.gov)

Dear Mr. Offutt:

Thank you for the opportunity to submit comments on this important proposed rule to bring greater fairness and sound business practices to our nation's contract poultry production system. These comments, which pertain to the proposed rule "Poultry Grower Payment Systems and Capital Improvement Systems," are submitted by the Campaign for Contract Agriculture Reform (CCAR) and the Rural Advancement Foundation International (RAFI).

Reform of the contract poultry production system has long been a top priority of the **Campaign for Contract Agriculture Reform** (CCAR). CCAR is a national alliance of organizations working to provide a voice for farmers and ranchers involved in contract agriculture, as well as the communities in which they live. The member organizations of CCAR include Farm Aid, Farm and Ranch Freedom Alliance, Food Integrity Campaign, National Family Farm Coalition, National Farmers Union, National Sustainable Agriculture Coalition, R-CALF USA, Rural Advancement Foundation International, and Western Organization of Resource Councils.

RAFI is a nonprofit organization which challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. RAFIs Challenging Corporate Power Program (formerly known as Contract Agriculture Reform program) has worked with contract poultry growers for more than 30 years to fight for better treatment from, and regulation of, giant meatpacking companies.

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Summary

<u>Contract Poultry Growers Experience Perverse Impacts due to the Tournament System</u>

In today's poultry industry, greater consolidation comes with greater power for the largest integrators. Horizontal market consolidation has effectively eliminated fair competition on the regional level, while vertical integration has given integrators control of virtually every step of production and eliminated market transparency. It is vital to understand that within the current industry structure, many farmers are not, in reality, independent economic entities selling livestock into markets, but rather are going into debt to contract their *labor* and *land* to integrator corporations to grow livestock they do not own. With the power they have, these corporations carefully and deliberately pass as much of the risk and costs of this system as possible on to the farmers with whom they contract.

Perhaps nothing exemplifies this dynamic more than the "tournament system" that is ubiquitous within the poultry industry. The tournament system is a payment scheme designed by poultry processing corporations that transfers the financial risk involved with growing chickens onto growers they contract with, who are placed in "tournament" groups and pitted against each other. Contract poultry growers do not own the chickens they raise, nor do they choose the feed or medicine they use to raise them — these are all provided by the poultry corporation, or "integrator," with whom they contract. 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 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 bird pick up at the end of the growout period - all factors that are controlled by the integrator, not the contract grower.

When these growers return flocks of fully grown chickens to 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 or 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.

While poultry corporations cast this system as encouraging healthy competition 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.

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. Some, like the biological variability of the chickens themselves, have already been noted above and in USDA's own final rule on *Transparency in Poultry Contracting and Tournaments*.

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.

Contract Poultry Growers Face Threats of Retaliation and Unfair Practices

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 drive down and hold down the incomes of their growers. This ability can be used to compel growers to comply with poultry house upgrade requests, threaten growers who speak out against their integrator, or drive growers into debt, bankruptcy, and even suicide. We greatly appreciate the provisions in the final rule on *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act*, which prohibit, as unjust discrimination, retaliatory and adverse actions that interfere with lawful communications, assertion of rights, associational participation, and other protected activities. These provisions will help to tamp down at least some of the retaliatory threats that poultry growers have faced in the past, while other such threats remain.

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) and leave them with millions of dollars of debt tied up in specialized, 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.

The Tournament System is Deceptive and Fatally Flawed

The tournament system at its core is deceptive because it creates the expectation that a grower's payment for a flock is largely dependent on their own actions and managerial skills relative to other growers against whom they are being ranked. In reality, a grower's feed conversion performance for an individual flock is based primarily on the quality of inputs provided by the live poultry dealer, such as chicks and feed, and the timing of chick pick-up by the live poultry dealer at the end of the growout period, relative to other growers in the ranking.

In our communications with growers, we have learned that when they signed their initial poultry contract, most had expectations that their contract relationship with a poultry company would be one of mutual respect where both parties shared in the risks and rewards of producing chicken for consumers. They expected a transparent system that would reward them for their hard work and management services. Instead, what they quickly found was a dictatorial system that gives growers an unpredictable and often inadequate income stream, and allows poultry companies to shift risks onto growers, without fairly sharing in the economic rewards commensurate with their financial investment and services provided.

Most growers agree that the tournament system as currently structured is unfair and deceptive. They hope for a system that gives them a reasonable minimum pay to allow them and their lenders to predict their base income for the year. Many growers also express an interest in having the opportunity to earn above the minimum base pay, to reward them for their managerial expertise. The struggle we have is that it is very difficult to imagine any type of bonus payment system that would fairly and transparently reward growers without merely replicating the deceptions, unfair cost shifting, and retaliation threats that are inherent in the current tournament system, if the bonuses are still based on inputs and decisions that are controlled of the poultry company.

Through the decades of CCAR's work in advocating for a more transparent and fair system of poultry production, the nation's poultry companies and their advocates have steadfastly argued that the current tournament system is the only way to ensure that growers are doing their job adequately and tending to their duties. This paternalistic attitude by poultry companies toward their contract growers has been a smoke screen for the true purpose of the tournament system, which is to allow poultry companies to minimize their costs of live poultry production through cost shifting and deception. Poultry companies do this by:

- Inducing growers (and their lenders) to put up all the capital and land to build the facilities to raise the company's chickens for them, without providing any commitments for a reasonable return on that investment;
- Forcing growers to make periodic modifications to their facilities and equipment, at their own expense, as a way to research the efficiency of different facility configurations, without having to pay for that research;
- Creating false expectations to induce growers to commit to providing the labor to raise the company's chickens for them, without providing any commitment to minimum pay or income predictability.

- Controlling all the inputs used by the grower to raise the chickens (chicks, feed, medicine), without acknowledging to growers that those inputs will be of variable quality relative to the inputs provided to other growers.
- Creating the false expectation that a grower's managerial skills are the main factors determining the performance of their flock, when research has shown that the quality of the inputs provided to the grower by the poultry company are the dominant factor in determining feed conversion performance.
- Ranking growers against each other for compensation based on the performance of their flocks, which allows the poultry company to insulate themselves from the risk of input quality variability, and to opaquely shift that risk to the growers.
- Writing contracts in a manner that allows the companies to provide fewer flocks to growers based on market conditions, without compensating the growers for the downtime, thereby insulating themselves from market conditions such as oversupply.
- Aggressively discouraging growers from communicating with each other about their operations and their contract relationships with their poultry companies, or from communicating with their legislators or federal regulators about these factors. This often takes the form of intimidation and retaliation against growers who do so.
- Maintaining detailed data about all aspects of the poultry production process and sharing that data with their competitors through confidential data collection firms.

Given the longstanding defense by the poultry industry of the current poultry model and the tournament payment system that undergirds it, we have been very interested in the letter that the newly merged Wayne-Sanderson Farms poultry company sent to their growers announcing what appear to be significant changes in the way they pay their growers.[1] Specifically, the Wayne-Sanderson letter promises the following payment system changes:

- a consistent base pay per pound with additional incentives scaled to performance and farm investment;
- once broiler weekly settlements are calculated, the base pay stated in a grower's contract will become the new "floor" or minimum base price per pound, and downward adjustments will no long occur;
- while the new base payment rate will limit financial risk to growers, it will not restrict financial benefit for excellent performance;
- providing growers access to capital for farm improvement and expansion.

There is no question that these announced changes are being made because of the U.S. Department of Justice consent decree with the parties related to the Continental Grain-Cargill merger and related acquisition of Sanderson Farms. But the Wayne-Sanderson letter to their growers seems to be including changes that go beyond the minimum changes required under the DOJ consent decree. We are not arguing that the new Wayne-Sanderson payment system reforms resolve all our concerns about poultry grower payment structures. In fact, the summary explanation of the new payment system in the Wayne-Sanderson grower letter begs many questions about the details. The company promised to provide those details ``in the near term." However, the announcement confirms what CCAR has long argued, that the tournament system is not sacrosanct and should be abandoned.

[1] "Wayne-Sanderson Farms alert contract poultry growers to new changes post-merger" (Politico PRO article, September 9, 2022)

The actions taken by the U.S. Department of Justice consent decree regarding mandatory changes to grower payment systems go beyond what USDA has established through the final rule ***Transparency in Poultry Grower Contracting and Tournaments*** *and also differs somewhat from the proposed rule that is the subject of these comments* ***(Poultry Grower Payment Systems and Capital Improvement Systems).***

In in our 2022 comments in response to advanced notice of proposed rulemaking entitled "Poultry Growing Tournament Systems: Fairness and Related Concerns" (87 FR 34814), CCAR argued that AMS should use the following overarching principles of minimum standards for fair grower compensation to inform regulatory structures regarding grower payment systems:

1. Growers should be given a guaranteed minimum price per pound for the chickens they raise and should not be paid below that price.
2. Growers should also receive basic contractual guarantees for the minimum number of flocks in a year and minimum flock density, so that growers (and their lenders) can predict their minimum annual income to allow them to make informed investment decisions.
3. Growers should be able to make their own decisions about when, or if, to make changes to their chicken houses they use to raise the birds.
4. If a grower's facilities are in good working order, poultry companies may not coerce or cut off the contracts of growers who refuse to implement further modifications not agreed to in their initial contract.
5. If a poultry company wants to incentivize additional actions by growers, those actions should be measured objectively and based on things within the grower's control and not something that can be unfairly manipulated by the poultry company.

We believe that this proposed rule addresses many of the principles CCAR recommended. For example,

1. With regard to our recommendation that live poultry dealers (LPDs) should provide growers with a guaranteed minimum price per pound and that growers should not be paid below that price, we believe that new proposed § 201.106 addresses this concern. Specifically, the new proposed section addresses the concern "by prohibiting the reduction, or discounting, of any compensation rate under the broiler growing arrangement on account of a comparison to other growers. That is, when a broiler growing arrangement between an LPD and the grower provides for the grower's compensation (which is commonly determined by a weight-based rate), the broiler growing arrangement would clearly state that rate and not provide for further mechanisms or calculations that would reduce that rate based on the grower's performance relative to other growers."

2. With regard to our recommendation that LPD should provide growers with a basic contractual guarantee for minimum flocks in a year and flock density, we believe that recommendation is addressed by recently finalized § 201.102(b)(5) in the ***Transparency in Poultry Grower Contracting and Tournaments*** rule, which mandates LPDs to make

disclosures in the contract that also set out the minimum number of placements to be delivered to the broiler grower's farm for each year of the broiler growing arrangement contract, as well as the minimum stocking density of each placement.

3. With regard to our recommendation that growers should be able to make their own decisions about when, or if, to make changes to their chicken houses they use to raise the birds, we believe that new proposed §201.112 of this rule would partially address this concern by mandating disclosure requires that would provide growers with information they need to decide an additional capital investment makes financial sense to their operation. Specifically, proposed §201.112 of the rule would require LPDs use a Capital Improvement Disclosure Document (Disclosure Document), which would state that when an LPD requests that a grower make an Additional Capital Investment (ACI), the LPD must provide the grower with a Disclosure Document, which would:
    a. include the purpose of the ACI and a summary of relevant research or other supporting material that the LPD has relied upon in justifying the ACI (paragraph (b)(1));
    b. disclose all relevant financial incentives and compensation for the grower associated with the ACI (paragraph (b)(2)), along with all relevant construction schedules related to the request for the ACI (paragraph (b)(3).
    c. identify the housing specifications associated with the ACI (paragraph (b)(4)) and any required or approved manufacturers or vendors (paragraph (b)(5)).
    d. an analysis—including any assumptions, risks, or uncertainties—of projected returns the grower can expect related to the ACI sufficient to allow the grower to make their own projections (paragraph (b)(6)).
    e. Lastly, the proposed rule (in paragraph (b)(7)) would require LPDs to provide a specific statement in the Disclosure Document indicating that USDA has not verified the information contained in the Disclosure Document and that if the Disclosure Document contains any false or misleading statement or a material omission, a violation of Federal and/or State law may have occurred which may be determined to be unlawful under the P&S Act.

4. While new proposed §201.112 would require LPDs to provide meaningful disclosures about the ACI the LPDs is requesting poultry grower to make to their facilities, this provision does not address CCAR's recommendation that it be considered an unfair practice under the Act for the LDP to penalize growers for failing to make this additional capital investment.

    We note, however, that the existing regulation under §201.216 addresses criteria the Secretary may consider in determining whether a requirement that a poultry grower make additional capital investments over the life of a production contract or growing arrangement constitutes a violation of the Act. Specifically the criteria enumerated in this section of the current regulations include, but are not limited to:

> “**(a)** Whether a packer, swine contractor or live poultry dealer failed to give a poultry grower or swine production contract grower discretion to decide against the additional capital investment requirement;
>
> **(b)** Whether the additional capital investment is the result of coercion, retaliation or threats of coercion or retaliation by the packer, swine contractor or live poultry dealer;
>
> **(c)** Whether the packer, swine contractor or live poultry dealer intends or does substantially reduce or end operations at the slaughter plant or processing facility or intends or does substantially reduce or end production operations within 12 months of requiring the additional capital investment, absent the occurrence of a catastrophic or natural disaster, or other emergency, such as unforeseen bankruptcy;
>
> **(d)** Whether the packer, swine contractor, or live poultry dealer required some poultry growers or swine production contract growers to make additional capital investments, but did not require other similarly situated poultry growers or swine production contract growers to make the same additional capital investments;
>
> **(e)** The age and number of recent upgrades to, or capital investments in, the poultry grower's or swine production contract grower's operations;
>
> **(f)** Whether the cost of the required additional capital investments can reasonably be expected to be recouped by the poultry grower or swine production contract grower;
>
> **(g)** Whether a reasonable time period to implement the required additional capital investments is provided to the poultry grower or swine production contract grower; and
>
> **(h)** Whether equipment changes are required with respect to equipment previously approved and accepted by the packer, swine contractor, or live poultry dealer, if existing equipment is functioning as it was intended to function unless the packer, swine contractor, or live poultry dealer provides adequate compensation incentives to the poultry grower or swine production contract grower.”

We believe that the disclosure requirements under proposed proposed §201.112 would help to provide necessary data to inform the Secretary’s decisions under existing §201.216 regarding circumstances where a requirement by an LPD for a grower to make an additional capital investment would be considered a violation of the Act.

5. With regard to CCAR’s recommendation that a LPD be permitted to incentivize additional actions and performance by growers, as long as those actions and performance are measured objectively and based on things within the grower’s control and not something that can be unfairly manipulated by the poultry company, we believe that proposed §201.110 to regulate LPDs' operation of ranking systems (*i.e.,* tournaments) for broiler growers could address our concerns, if enforced correctly.

Specifically, proposed §201.110(a) establishes an LPD duty of fair comparison in tournaments. This duty of fair comparison would require LPDs to structure their tournament system in a manner that will provide a fair comparison among growers. In our view a fair comparison under proposed §201.110(a) should include a calculation by the LPD to neutralize any differences in payment to growers based on flock performance variations related to the variable quality of inputs provided to the grower by the LDP, or any managerial decisions made by the LPD (such as variable flock pick up timing) that impacts the performance of a grower's flock.

With regard to the question about whether the final rule should place any limits on grower bonus payments as a percentage of total grower compensation, we are recommending that such a change be made in the final rule. We believe that it is in the best interest of poultry growers to be able to rely on reasonable base payment per pound of production, and then to be able to compete for a potential bonus payment, not to exceed a certain percentage of the base payment, such as 25 percent. In order for such a payment mechanism to be meaningful to individual growers and their lenders, we believe this requirement should apply to each grower individually. We realize this is somewhat more granular than the bonus payment limit included in the Department of Justice/Wayne-Sanderson consent decree, which is calculated as an annual average across an entire complex. However, we argue that applying this bonus limitation relative to base pay for an individual grower will be significantly more meaningful for growers and allow them to make more informed financial calculations.

As CCAR mentioned in our ANPR comments, it's very relevant to note that there are examples in poultry grower compensation systems that, in our view, meet the standard of being fair payments systems that do not rely on deception or abusive cost shifting from the LPD to the grower. .

One such example is the use of square footage contract, where growers are paid by a poultry company based on the square footage of the grower's facilities used to grow the company's birds to processing weight. One former poultry company, Minnesota-based Gold'n Plump, used a square footage-based approach to pay their growers, until they were purchased by Pilgrim's Pride in 2016.

Another example is Farmer Focus, a Virginia-based organic poultry company, which pays growers based on the weight of the chickens they sell to the company. The growers own the birds they raise, buy their chicks and feed from third-party providers, and make their own decisions about the poultry houses they use to raise their chickens.

In our view, if an LDP were to adopt a payment system similar to one of these models, it would greatly simplify any compliance burden they may fear with regard to this rule.

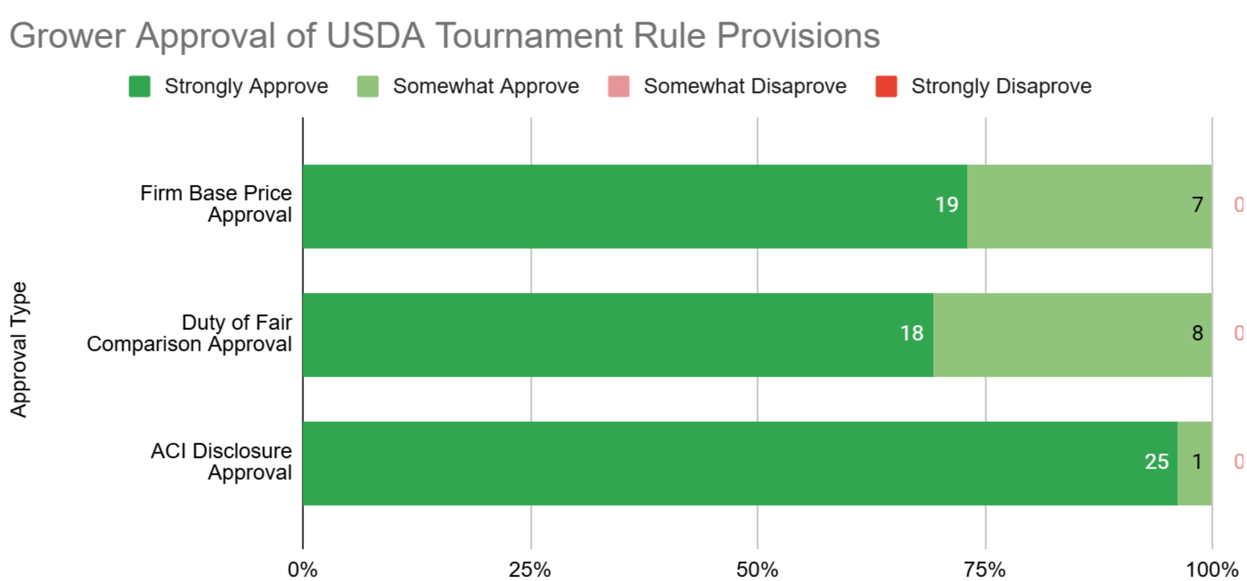
Lastly, CCAR is concerned by the exclusion of contract turkey producers from the protections provided by this proposed rule – and their exclusion from the finalized rule "Transparency in Poultry Grower Contracting and Tournaments." In many cases, turkey and broiler production contracts and operational requirements are similar. In cases where turkey producers face similar conditions and challenges faced by broiler producers, the same protections that apply to broiler producers should apply to turkey producers. Many contract turkey producers face unfairness arising from the use of poultry grower ranking systems, including lack of transparency and fairness regarding payments under tournament pay systems. Turkey producers should not be ignored by this proposed rule. We urge USDA to more thoroughly evaluate how to appropriately ensure fairness in ranking systems in turkey production – and to incorporate provisions with respect to turkey production as appropriate in the final rule.

Below, we seek to provide answers to some of the specific questions posed in the proposed rule.

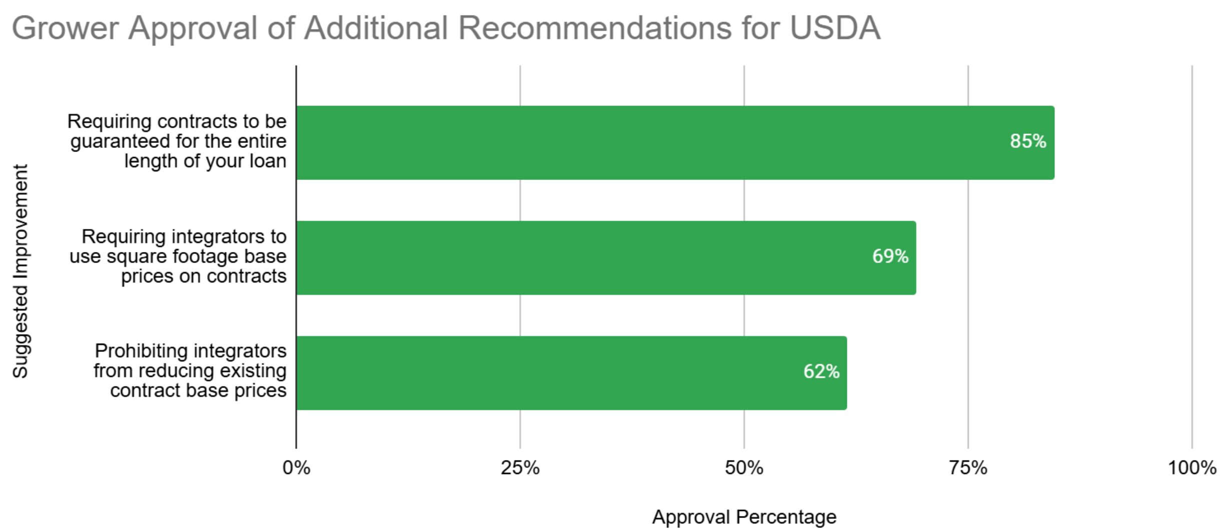
Grower Survey: Contract Poultry Growers Overwhelmingly Approve of USDA's Rule

In preparation for our comments below, CCAR-member RAFI-USA conducted a survey of active and former contract growers that asked how strongly they approved or disapproved of USDA's proposed tournament system rule. Growers had the option to respond anonymously. A total of 26 contract poultry growers from 9 states responded to our survey. 85% of respondents were active growers while 15% were former growers.

In our survey growers indicated unanimous approval of USDA's rule, and all of its sub-provisions. To state it again - not a single grower indicated disapproval of the rule overall, or disapproval of any of the rule's three sub-provisions. 100% of growers either strongly approve (54%) or somewhat approve (46%) of USDA's tournament rule overall. 96% strongly approved of USDA's ACI disclosure requirement, 73% strongly approved of USDA's firm base price provision, and 69% strongly approved of USDA's duty of fair comparison requirements, with the remainder of respondents indicating "somewhat approve" for each of those provisions.



We also asked growers whether they approved of a number of additional recommendations for USDA. 85% of growers approved of a requirement that poultry contracts be guaranteed for the entire length of the loan taken out by the grower. 69% recommended that integrators be required to use square footage base prices in their contracts, and 62% recommended that integrators be prohibited from reducing existing contract base prices if USDA's rule is finalized.



Comment Question Responses

Questions Regarding Broiler Grower Compensation Design

Question 1

Does proposed § 201.106 effectively and appropriately address concerns that growers have expressed in increasing transparency, understandability, fairness, or certainty as to compensation under a comparison system or otherwise benefit growers in reducing deception and/or unfairness? How might this rulemaking more effectively and appropriately ensure that what growers can reasonably expect regarding their compensation (based on disclosures in the contract or otherwise) matches what growers actually receive? If the proposal will be effective, why? If not effective, in what ways can it better do so?

Overall, this proposed rule addresses concerns that growers have expressed in increasing transparency, understandability, fairness, and certainty regarding compensation under a comparison system. Of particular note are the requirements that hold LPDs responsible for informing their growers through developing comprehensive policy, creating non-comparison based methods of compensation, and establishing a fixed base price. A crucial component of the proposed rule is the avenues it creates for enforcement. Where this rule could more effectively benefit growers and provide more certainty is in establishing that LPDs must honor base prices through a grower's loan period, establishing non-comparison compensation methods that rely on grower-controlled factors such as square footage base prices, and safeguarding from wild fluctuations in bonus and base pay through capped bonuses.

CCAR is concerned by the exclusion of contract turkey producers from the protections provided by this proposed rule – and their exclusion from the finalized rule "Transparency in Poultry Grower Contracting and Tournaments." In many cases, turkey and broiler production contracts and operational requirements are similar. In cases where turkey producers face similar conditions and challenges faced by broiler producers, the same protections that apply to broiler producers should apply to turkey producers. Many contract turkey producers face unfairness arising from the use of poultry grower ranking systems, including lack of transparency and fairness regarding payments under tournament pay systems. Turkey producers should not be ignored by this proposed rule. We urge USDA to more thoroughly evaluate how to appropriately ensure fairness in ranking systems in turkey production – and to incorporate provisions with respect to turkey production as appropriate in the final rule.

Question 2

AMS has indicated that if the base pay rate is suppressed below the competitive levels, such as due to the LPD's unlawful exercise of market power or other legally unjustified means, and does not provide a reasonable return considering the operating costs and the costs of investments over the long term, the compensation system may be unfair. Should AMS adopt a rule that more prescriptively requires that the base pay rate must be expected to provide a reasonable opportunity for a grower that delivers under the contract to earn a reasonable return if they comply generally with the specified production practices? If so, please describe the rationale and methodology to be applied (including whether and how it should account for local market power dynamics); and, if not, would another approach be more effective?

Summary

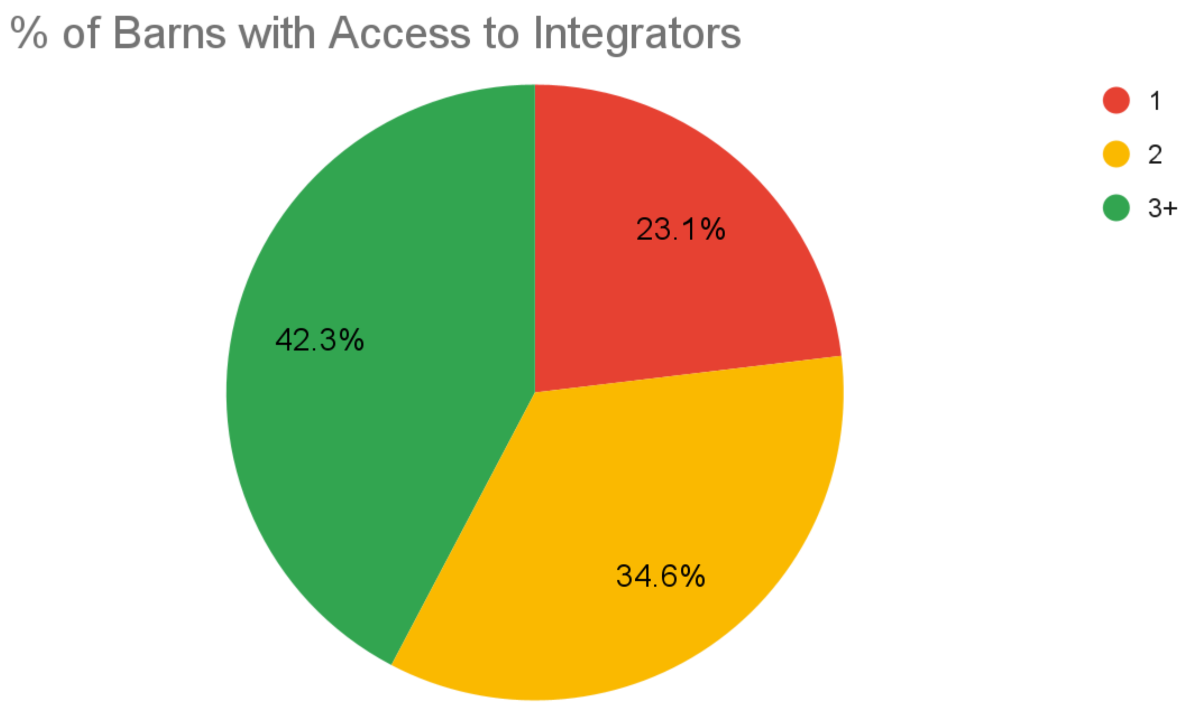
USDA should prescriptively require base pay rates to cohere with competitive levels and offer a reasonable return, considering the operating costs and the costs of investments over the long term, based on an analysis of integrator monopsony power at the regional complex level. Based on original geospatial analysis conducted by CCAR-member RAFI, we estimate that over half of all broiler growers in the United States only have access to one or two integrators with which to contract. We propose that AMS apply a two-part monopsony power test to determine if a contract's base price has been depressed due to anticompetitive monopsony or oligopsony power. To do so, AMS should include a requirement that LPDs submit to AMS for review any contracts modified or revised to comply with new §201.106, and should also require all LPD's to submit compensation data for review. With this information, AMS should determine the average contract base price in regions in which contract growers have at least three integrator options to contract with (based on the assumption that these regions are likely to surface more competitively determined contract base prices) and then take action against any contracts with depressed base prices received by growers in regions with only two or one integrator option. Secondly, AMS should consider any contract that is offered to a grower in debt that cannot cash flow and pay off that debt, based on the minimum income possible from the contracts guaranteed flock placements, stocking density, and firm base price, to be a fact that directly establishes the existence of undue buyer power. In a truly competitive environment, an integrator would be very unlikely to offer a contract that cannot cash flow and pay off a grower's debt because of the likelihood the grower would switch to an integrator that could provide a viable contract.

Background

As of 2019, the four-firm concentration ratio in the national U.S. poultry industry was estimated to be 53% by USDA.[2] With the subsequent acquisition of Sanderson Farms by Cargill, this has likely increased. Original geospatial and business data analysis conducted by CCAR member RAFI indicates that the four firm concentration ratio in the broiler chicken industry may now be as high as 63.4%. However, focusing on the national level of industry concentration in the poultry industry completely misses the true level of monopsony power wielded by poultry integrators over growers.

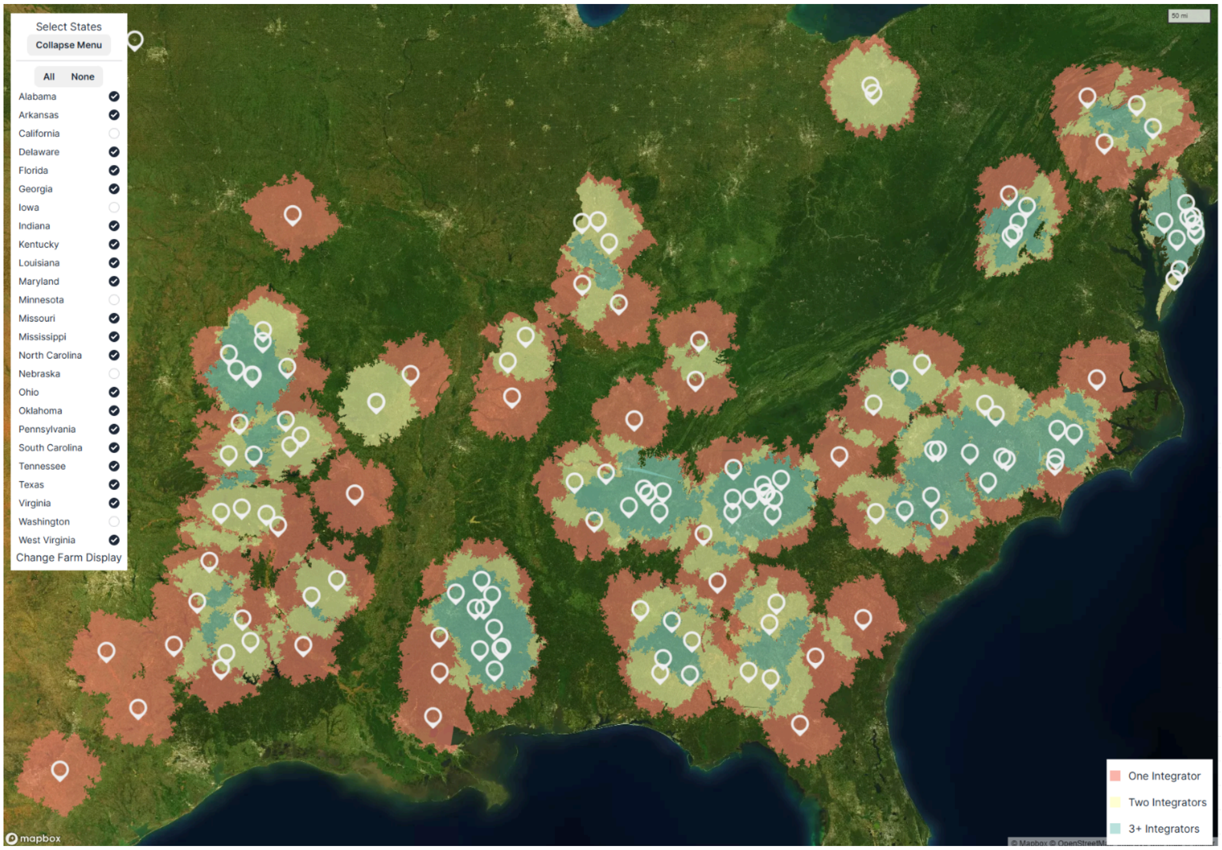
[2] U.S. Department of Agriculture, AMS Packers and Stockyards annual reports. Available at https://www.ams.usda.gov/reports/psd-annual-reports

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. To minimize the transportation costs and associated economic losses that may incur due to chicken injury or death during transit, 90% of broilers are raised on a farm that is no further than 60 miles from their processing plant.[3] This means that the radius within which a poultry grower can practically seek other buyers or contracts is extremely limited. RAFI projects that nearly 60% of all growers in the United States only have access to one integrator. These 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.



In the image below, major integrator processing plants engaged in broiler slaughter are marked with white pins. The colored regions around those processing plants are "captive draw areas" - regions around each plant that are 60 miles or less by road travel. Any farm located in a red shaded area only has one integrator processing plant within 60 miles of their farm. Farms located in yellow regions only have two integrators available, while farms in green regions have three or more.

[3] MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, U.S. Department of Agriculture, Economic Research Service, June 2014. https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=7182



https://www.rafiusa.org/programs/challenging-corporate-power/poultry-barons-map/

USDA research shows that "growers facing a single integrator are paid 7–8% less on average."[4] Our analysis shows that over half of all growers face at least a tight oligopsony, with nearly 35% only having access to two integrators, and 23% facing total single firm monopsony, in their truly relevant market. As such, a majority of growers in the United States are vulnerable to undue exercise of monopsony power by their integrators.

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 have free reign to 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 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.

Given the degree of regional monopsony power present in the U.S. poultry sector, we are concerned that poultry integrators have the outsized market power necessary to unilaterally depress contract base prices in many regions of the country in response to this proposed rule.

[4] Ibid.

This is in no way an argument against the proposed rule, because the rule delivers key and long asked-for reforms to performance incentive systems that will level the playing field for growers and in many ways neutralize one of the integrators' primary mechanisms for retaliating against disfavored growers. Instead, this concern motivates our contention that AMS should proactively and aggressively exercise its authority under Sections 202(a) and 202(e) of the Packers and Stockyards Act to prevent integrators from exploiting their regional buyer power to offer anti-competitively depressed base prices, as described above.

For additional information regarding the methodology of RAFI's geospatial analysis of poultry integrator captive draw areas, see Appendix 1

Question 3

Is it presumptively unfair for comparison-based compensation to equal or exceed 25 percent of total (base pay rate plus comparison-based) compensation for any grower? If so, is the 25 percent threshold the appropriate portion to presume unfairness, and is it most effective if calculated at the complex level or at the individual grower level?

With regard to the question about whether the final rule should place any limits on grower bonus payments as a percentage of total grower compensation, we are recommending that such a change be made in the final rule. We believe that it is in the best interest of poultry growers to be able to rely on a reasonable base payment per pound of production, and then to be able to compete for a potential bonus payment, not to exceed 25 percent of the base payment. However, it is important that the bonus be based on factors in the grower's control.

This will help to provide a more stable range of income for growers, and limit income variability, which can make it easier for growers, and their lenders. to make wise financial plans. In order for such a payment structure to be meaningful to individual growers and their lenders, we believe this requirement should apply to each grower individually. We realize this is somewhat more granular than the bonus payment limit included in the Department of Justice/Wayne-Sanderson consent decree, which is calculated as an annual average across an entire complex. However, we argue that applying this bonus limitation relative to base pay for an individual grower will be significantly more meaningful for growers and allow them to make more informed financial calculations.

As explained in our response to Question 2 above, AMS oversight of LPD actions to unfairly lower grower base payment should be the primary focus of the oversight, such that if the base pay is deemed reasonable, the regulatory scrutiny of bonus payment levels becomes somewhat secondary.

Question 4

Is case-by-case enforcement on the fairness of the total comparison-based bonus effective? Should AMS include a paragraph (b) to proposed § 201.106 stating that, "Although unfairness will be determined on a case by case basis, the LPD shall be deemed presumptively in violation of this paragraph (b) if: on an annual basis at any complex [for any grower] of the LPD, the amount of Performance Payments exceeds 25% of the sum of Performance Payments and Base Payments, where 'Performance Payments' are the compensation paid to broiler *grower that is subject to adjustment based upon the relative performance in a grouping, ranking, or other comparison of broiler growers; and 'Base Payments' are all compensation that is guaranteed to be paid to broiler growers."?*

With regard to the question about whether the final rule should include specific language in proposed §201.106 informing LPDs that performance payments that exceed 25 percent of total compensation will be deemed a violation, we believe that such a statement should be included in the final rule. However, as explained in our response to question III(3) above, we believe that this provision should be structured to apply based on compensation to individual growers, not on an annual basis for an entire complex. However, we argue that applying this income variability limitation for an individual grower will be significantly more meaningful for growers and allow them to make more informed financial calculations.

Question 5

Please comment on the expected response to the inclusion of the provision described in question 4. In particular, how likely is the provision to be a binding constraint at either the grower or complex level? When the constraint is binding, would LPDs be likely to raise base pay and/or limit performance payments—thus reducing the difference between top and bottom performing growers—without increasing total grower compensation expenditures? Would LPDs also change the types of growers they contract with, for example in terms of size or performance?

The likely response to this provision by LDPs will probably depend on the LDPs market power in their area. The goal of this limitation from CCAR's standpoint is to minimize unsustainable income variability to growers, and give growers an opportunity for increased compensation without having to fear a reduction in their compensation. However, we are concerned that LDPs with monopsony power in their territory might react to this provision by changing their contracts to lower base pay, and limit bonus pay, with the net effect being an actual reduction in total grower compensation. This is why we are recommending that the final rule include provisions to clarify that AMS will take action against LDPs that use their monopsony power to lower grower base payment rates. [See more detailed explanation in our response to question III(2)].

Question 6

If AMS were to include the provision described in question 4, would LPDs be likely to provide non-comparison-based incentives (such as per pound or per square foot compensation for housing known to provide efficiencies to the LPD), or deploy other incentives (such as fixed performance bonuses)? Would total grower compensation expenditures by LPDs be expected to increase under these other incentives? How would this vary with or depend upon grower characteristics (e.g., size, individual management ability, or investment) or market conditions?

CCAR has long advocated for the use of more objective and fair grower compensation methods, such as payments based on the square footage of the growout houses used by the grower to raise the LPD's birds for them. This type of non-comparison based payment system is much more straightforward and much less subject to manipulation, deception, and unfair cost shifts from the LPD to the grower. LDPs should have an incentive to shift toward a square footage contract or similar payment method, because it would reduce some (not all) of the regulatory oversight envisioned in this rule. In a competitive market, LPDs would have to offer a square footage payment rate that is economically sustainable to an average grower, or else they will be short on production capacity for their birds. Of course, many poultry production areas of the country have only one or two LPDs, and therefore are not competitive markets. In addition, existing growers who have already gone deeply into debt to build chicken houses will not have the financial flexibility to refuse a square footage contract, even if the payment rate is not sufficient in their view. Therefore, even for a square footage contract or similar non-comparison payment mechanism, AMS should take action against any LPD that uses its monopsony power to lower payment rates to unsustainable levels.

Question 7

How would the inclusion of the provision described in question 4 affect the relationship between tournament compensation systems and additional capital investments? Would it help to ensure that growers receive adequate compensation for ACIs?

If an LPD is limited in the magnitude of a performance bonus payment relative to the base pay plus bonus compensation, it could result in LPDs increasing incentive payments for ACIs, as a way to make sure they have sufficient production capacity for their processing plant(s). This could be a positive outcome for growers, depending on the magnitude of the ACI incentive, as long as the incentive does not unfairly penalize growers who shift their contracts to another LPD in their area.[5]

Question 8

What additional requirements would help ensure compliance with this proposed rule such that grower comparison-based unfair and deceptive reductions or discounts to compensation are eliminated, while continuing to permit payment designed to incentivize performance? Please provide as much detail as possible regarding the relationship between payment and performance, any injuries to growers and whether they can be avoided, the effects on other growers and competition, and what data sources AMS should examine to evaluate these concerns more effectively.

Any performance incentive should be based on factors that are within the control of the grower. The Duty of Fair Comparison provisions in proposed §201.110 should address this issue. If an LPD supplies the chicks to the grower, the inherent variability in the quality and performance of those chicks should not be used to determine a grower's pay, because the grower has no control over the chick quality.

[5] See *United States* v. *Koch Foods Incorporated,* Civil Action No. 23–15813

Question 9

Should AMS require LPDs to document or disclose the process they use to establish the proportion of total grower pay that is determined by comparing a grower's performance to other growers' performance? Should regulations require documentation of comparisons designed to prevent unfair or unreasonable levels of relative performance-based pay? Should regulations require companies to report how the proportion of comparison-based performance pay to total pay incentivizes effort, grower investment, and other outcomes? If AMS creates these documentation responsibilities, should this be done based on an individual grower or complex-wide basis?

As part of the Duty of Fair Comparison provisions of proposed §201.110 LPDs should be required to document all of these comparisons and related data, and it should be done based on individual growers, not based on the complex.

Question 10

What specific burdens might LPDs face in complying with this proposed rule? Would this require LPDs to substantially modify their business model? If so, what specific modifications would be required and why?

LPDs currently spend a great deal of attention on how to suppress grower compensation and to shift economic costs from themselves onto growers balance sheets in a very non-transparent manner. Establishing clear standards that apply to all LPDs, as this rule would do, is beneficial to both the regulated LPDs and the growers. In fact, through the Wayne-Sanderson consent degree, a major LPD has already demonstrated their willingness, and ability, to comply with some of the same requirements.

Question 11

What risks might growers and/or LPDs face during any transition to the proposed § 201.106? How might AMS mitigate transition risks? How might AMS more fully account for unfairness and deception that may have occurred in the course of contracting for the current broiler growing arrangement? Should AMS establish a backstop for this regulation or set out criteria based on existing obligations under the present contract with the grower (e.g., requiring that the current base pay rate be the new minimum rate, or requiring current payments overall remain comparable), on a relationship between compensation per pound (pool payments) at the complex and the minimum pay, or on the proportion of comparison-based compensation for a grower (such as a limit to 25 percent of total compensation). If so, how long should any transition limitations extend?

As outlined in Question 2 above, we are concerned that poultry integrators have the outsized market power necessary to unilaterally depress contract base prices in many regions of the country in response to this proposed rule. This is in no way an argument against the proposed rule, because the rule delivers key and long asked-for reforms to performance incentive systems that will level the playing field for growers and in many ways neutralize one of the integrators' primary mechanisms for retaliating against disfavored growers. Instead, this concern motivates our contention that AMS should proactively and aggressively exercise its authority under Sections 202(a) and 202(e) of the Packers and Stockyards Act to prevent integrators from exploiting their regional buyer power to offer anti-competitively depressed base prices, as described above. Specifically, AMS should consider any contract that is offered to a grower in debt that cannot cash flow and pay off that debt, based on the minimum income possible from the contracts guaranteed flock placements, stocking density, and firm base price, to be a fact that directly establishes the existence of undue buyer power. In a truly competitive environment, an integrator should not be able to offer a contract that cannot cash flow and pay off a grower's debt without fear that they would switch to an integrator that could provide a viable contract.

Question 12

To minimize transition risks to growers, should AMS include a requirement that LPDs submit to AMS for review any contracts modified or revised to comply with new § 201.106? Should compensation data be required to be submitted for review? Should AMS review of modified or revised contracts during any transition assess the changes made to ensure LPDs have not reduced total aggregated and individual grower payments in such a way that is inconsistent with payment expectations under the original contracts?

As outlined in Question 2 above, AMS should include a requirement that LPDs submit to AMS for review any contracts modified or revised to comply with new § 201.106, and should also require all LPD's to submit compensation data for review. This data can be used as a basis for requiring all integrators to offer base prices that rise to a truly competitive level, and that are consistent with grower cash flow and loan servicing expectations under original contracts.

Question 13

Should AMS make the effective date for the provisions of this proposed rule 180 days following publication of the final rule in the Federal Register? If you recommend shorter or longer for some or all of the provisions, please explain why.

We do not object to making the effective date for the provisions of this proposed rule 180 days following the publication of the final rule in the *Federal Register.*

Questions Regarding the Operation of Broiler Grower Ranking Systems

Question 1

Does proposed § 201.110 effectively and appropriately benefit growers in reducing unfairness and deception? If so, why? If not, in what ways can it better do so?

This rule does effectively benefit growers in reducing unfairness and deception by upholding Duty of Fair Comparison. It requires LPDs to modify their comparison formulas to account for differences in input quality and growing practices, standardize methods for awarding bonuses outside of a comparison formula, and write compliance documentation for greater transparency. By assigning this responsibility to LPDs, this rule reduces unfairness and deception and creates opportunities to resolve disputes between growers and integrators without fear of retaliation. The rule explicitly notes that it is impossible for LPDs to provide equal inputs and growing practices to all their growers, but designates non-comparison compensation methods that reduce unfairness that will mitigate differences in inputs and growing practices.

However, this rule could also be more explicit in including more integrator-controlled operational factors outside of inputs and growing practices, such as timing of regular feed delivery and flock pick-up. RAFI's 2022 contract grower survey found that 83% of growers experienced a 12-hour feed disruption (with even more – 90% – experiencing a 6-hour disruption), 75% received incorrect feed mixes for their birds' age (which can majorly impact feed conversion efficiency), and 59% experienced an incorrect feed delivery that differed from their feed load receipt.

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. Pick-up time is often determined by dealer complex supply needs and can occur before or after this ideal range. As a result, growers are penalized for their flock's less optimal weight or efficiency metrics, even though pick-up time is not in their control. As several contract growers relayed to us in our survey:

"All flocks that are sold in a week should all be the same age, not some selling at 48 days and some selling at 53 days. If we have to compete against each other then it should be a level playing field." - Mississippi 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

We recommend that USDA require dealers to disclose their data about the optimal pickup age for a flock's breed on flock placement sheets, and to disclose on settlement sheets the flock age at pickup as an impactful variable. Integrators should then have to include a mechanism within their comparison formula to compensate growers for efficiency losses caused by suboptimal flock pickup times under this rule.

It should be noted that in order for this rule to effectively reduce unfairness and deception, this approach will require significant AMS effort in enforcement. A thorough and comprehensive analysis of each LPD's plan for fair comparison will be necessary to assess compliance and reasonably enforce duty of fair comparison.

CCAR is also concerned by the exclusion of contract turkey producers from the protections provided by this proposed rule – and their exclusion from the finalized rule "Transparency in Poultry Grower Contracting and Tournaments." In many cases, turkey and broiler production contracts and operational requirements are similar. In cases where turkey producers face similar conditions and challenges faced by broiler producers, the same protections that apply to broiler producers should apply to turkey producers. Many contract turkey producers face unfairness arising from the use of poultry grower ranking systems, including lack of transparency and fairness regarding payments under tournament pay systems. Turkey producers should not be ignored by this proposed rule. We urge USDA to more thoroughly evaluate how to appropriately ensure fairness in ranking systems in turkey production – and to incorporate provisions with respect to turkey production as appropriate in the final rule.

Question 2

Are the duty of fair comparison and the factors for evaluating whether the LPD reasonably designed its ranking system to deliver fair comparison appropriately designed? If not, how should they be changed?

Yes, with one exception. As explained in greater detail above in our response to question IV(1), this rule should be more explicit in including more integrator-controlled operational factors outside of inputs and growing practices, such as timing of regular feed delivery and flock pick-up.

Question 3

Are the policies and procedures and the compliance review requirement effective and appropriate tools for documenting and enhancing compliance with the fair comparison duty? Why or why not? If not, what additional tools are needed? Is additional documentation on the inputs provided, timing of input delivery, and requirements for growing methods needed? Why or why not?

The requirement for compliance review of policies and procedures is an effective and appropriate tool for documenting and enhancing compliance with the fair comparison duty. However, this will require significant investment of time and labor by the USDA to analyze documentation for compliance and enforce this rule appropriately. Consistent and reliable enforcement may also require more frequent compliance review. Review not less than once a year rather than once no less than every two years may be more appropriate for effective enforcement. More frequent reviews will also require more investment.

Additional documentation regarding inputs and growing methods would shed light on dealer actions to shift risks of inferior inputs from themselves to growers, helping prevent deception. This transparency would also help poultry dealers better understand the impact of variable quality inputs on growers and creates an incentive for them to use better practices to help minimize input variability. In surveys conducted by RAFI in 2022, growers heavily cite the discrepancies in the timing of input deliveries. One North Carolina poultry grower notes that "feed outages happen regularly, birds going hours without food, but you sell against a farm that never ran out of feed and their birds grew fine, it just is not fair." Another remarks that the timing and quality of feed directly impacts how they will perform in the tournament:

"There is no way possible to make sure all growers get the same amount or percentage of starter feed, grower feed and finisher feed. Each of these feeds have different protein and fat content. The finisher feed has a higher fat content. If another grower goes on finisher feed 2 days before I do his birds will gain more weight. So he will make more money. There is no way I as a grower can control when someone gets feed at the incorrect intervals."

Documentation of chick quality would also create accountability and fairness while preventing deception. Several growers from Alabama referenced the variability in health and quality in chicks they receive from hatcheries and how it creates conditions that make fair comparison impossible:

"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 versus those who get all the culls."

Requiring dealers to disclose information about the chicks growers receive will create more transparency around unequal inputs that are beyond grower control, and will further emphasize the need for non-comparison compensation. It will also incentivize dealers to develop better practices managing hatcheries and distributing chicks.

Question 4

What means exist for LPDs, growers, and AMS to evaluate performance differences stemming from inputs and production practices? To the extent that information asymmetries continue to exist, please offer any views or suggestions on ways to address them.

We feel confident that poultry integrator corporations are well positioned to aggregate data on the relative performance differences across the inputs they provide to growers. Integrators are already required to disclose much of this information under USDA's new transparency rule. AMS could require integrators to report on the performance of their inputs across different variables, which AMS could aggregate to better understand the factors that impact relative flock performance across the industry.

Question 5

How should the non-comparison methods of compensation be set to ensure that growers are fairly compensated outside of the tournament system, if needed? Should the proposed rule permit other non-comparison methods of compensation that are not specified in the broiler grower contract to be used as long as they are mutually agreed upon by both parties (i.e., both the affected grower and the LPD)?

The non-comparison methods of compensation should be an option that is automatically triggered by disparity of inputs that are out of the grower's control. These inputs include mortality rate and health of chicks delivered from the hatchery, feed disruption, and late pick up times. Consistent disputes between growers and their broiler plant manager should also create a non-comparison compensation opt in should there be no reasonable efforts made to resolve the dispute on behalf of the LPD.

Discrepancies and disputes surrounding feed quality and delivery was one of the most consistently reported issues highlighted by the growers who completed RAFI's 2022 broiler 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. Contract growers are best positioned to identify when these issues arise given their on-the-ground vantage point, and feed issues in particular are pervasive in the results of RAFI's survey of broiler growers. 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 a flock's growth stage during grow-out (75%)
- Receiving less feed than stated on a feed load receipt (59%)

Growers also have cited inconsistencies in feed delivery as a result of transportation issues. Trucks that do not fully empty their auger of feed cost growers thousands of pounds of feed that an LPD assumes that they receive, negatively impacting their performance in the tournament.

Transportation delays due to trucks breaking down or simply being unable to deliver causes significant negative impact on growers, and should automatically trigger a non-competition compensation for growers. A Mississippi grower describes an example of these discrepancies in delivery through the context of a "split dump" or "split catch"– when a flock drop off or pick up is broken up by a weekend:

> "When you get a split dump or split catch flock, the age of your flocks is averaged across all of your barns in the tournament. On a small bird flock, if one house carries over the weekend it makes your flock look like they are 34 plus days old when in reality most of the farm was caught at 32 days. In that situation you never rank well because the younger birds haven't put on as much weight - but because of the overall averaging they appear older on paper."

It is out of a grower's control when fragmented pick-ups or drop-offs like this happen, and LPDs take advantage of this position by averaging flock statistics rather than addressing the dispute with a non-comparison method of compensation, ultimately extracting more profits from growers. Another grower in Georgia recalls instances in which the truck that picked up their broilers for weighing broke down and did not make it to the plant at all, resulting in a delay that cost them a higher placement in the tournament. Though the truck and the pick-up was the responsibility of the integrator, it was the grower who was penalized, a standard that makes it impossible to assure fair competition within a tournament.

Mortality of chickens during growout tend to reflect the health and disease problems that originate from the hatchery, prior to bird placement in the growers' chicken houses. This is especially true of bird mortality in the early weeks of the growout. As a West Virginia grower notes, growing out chicks that are unable to grow properly or must be culled skews the average performance of the entire flock:

"We are sent substandard birds with the likelihood of having some sort of disease that will affect growth and mortality later in their growout. During growout time period I have to cull out thousands of birds because the difference in sizes has a big impact on my final paycheck if I would leave all of the smaller birds in with the rest of the flock when they go to slaughter. Have birds that are a foot tall and birds half that size, can't have a good performance when you have to deal with that problem in every flock."

Another grower in Georgia recalls how deeply inconsistent the health and mortality rates of their chicks could be, describing an instance in which they had more than half of their chicken houses filled with chicks that were half the size of healthy chicks. They note how LPDs would deliver chicks that ultimately had to be culled and disposed of, all at the expense of the grower. We recommend that USDA require LPDs to automatically apply a non-comparison method of compensation when chicks they deliver must be culled due to disease and poor health, or when the sub-par health of chicks will negatively impact the grower's performance in the tournament.

While LPDs will be required to disclose input quality variables and feed discrepancies within tournament groups and how their ranking formula accounts for these variables, duty of fair comparison must allow for growers to elect a non-comparison form of compensation when their disputes with broiler plant managers regarding inputs go unresolved. Growers have vehemently noted how inconsistent their inputs can be from timing to delivery to pick-up to mortality rate, and how LPDs profit off their inability to fairly compete in the tournament. Requiring LPDs to create avenues for dispute resolution that include non-comparison forms of compensation will incentivize LPDs to be more efficient and consistent in their inputs, and more communicative with growers in the circumstances that consistency is unattainable.

Question 6
Should AMS be more specific regarding what constitutes "reasonable efforts" made by the LPD to resolve disputes, and if so, for which circumstances and how?

There are several ways AMS can be more specific regarding an LPD's "reasonable efforts" to resolve disputes. In a RAFI 2022 survey of broiler growers, one of the most overwhelmingly supported improvements growers cited was the right to install feed scales. Protecting a grower's right to install scales will protect them from deception and unfair conditions. One story relayed by a poultry grower perfectly exemplifies the need for further structures and protection from inefficiencies that result in unfair assessment under a comparison compensation model. This grower observed an issue with one of his feed deliveries in which 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. The grower placed last in his tournament, despite the efficiency with which his birds reached weight despite missing thousands of pounds of feed. When the grower asked an LPD representative if there was any way to address this miscalculation, he was told that there was no recourse for the issue. LPDs must be required to allow farmers the agency to install feed scales at their own farms. This way, growers can more clearly determine the discrepancies in feed delivery that will impact their performance in a tournament. In the event that performance is impacted negatively, LPDs must give growers the option to opt for non-comparison compensation.

Another way LPDs can demonstrate reasonable effort to resolving disputes is to create policy allowing growers to select a third-party, unaffiliated veterinarian in the event that they receive a sick flock that will impact their performance in the tournament. Growers in RAFI's 2022 survey cite the health of their chicks as a factor that massively impacts their performance in a tournament, and that there is no recourse when LPDs deliver unhealthy chicks. One Alabama poultry grower notes,

"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."

This lack of support or often even acknowledgment from LPDs leave growers powerless to compete in their tournaments. The experience of a Georgia poultry grower illuminates how little effort LPDs allocate toward addressing these disputes from growers:

"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."

By allowing growers to seek the expertise of a third-party veterinarian, LPDs create an avenue by which growers can more reasonably determine if their flock will be competitive within a tournament and seek non-comparison compensation if it is determined that they cannot.

LPDs must make a reasonable effort to resolve disputes based on integrator-controlled inputs by providing growers options to assess for themselves whether they are able to reasonably compete in the tournament system. This includes input quality discrepancies like feed delivery, health and mortality issues, and pick-up times. A paper trail will allow for a more reliable analysis determining how a grower will perform in the tournament and mitigate disputes between LPDs and growers. In order to demonstrate reasonable effort to solve disputes, LPDs must allow growers the option of receiving non-comparison compensation without fear of contract termination or retaliation, in accordance with the Inclusive Competition and Market Integrity rule that prohibits retaliation against growers for engaging in protected activities.

Question 7
What specific burdens might LPDs face in complying with this proposed rule? Would this require LPDs to substantially modify their business model? What specific modifications would be required and why?

While this rule will require many LPDs to modify their business model, we believe the clear "rules of the road" laid out in this rule will free LPDs up to focus on efforts to compete fairly with each other toward production of the best product possible, while treating poultry growers as valuable business partners.

Question 8
Is this proposal's standard for determining if a difference in inputs was material to grower performance—i.e., whether it meaningfully impacts pay from the perspective of the grower—appropriately designed? Should the Agency set a threshold for change in pay (e.g., a percentage) that is always material? If so, what threshold?

No response

Question 9
Are there simpler means to achieve the ends proposed in § 201.110? For example, would a limitation on the proportion of comparison-based compensation to total compensation—like comparison-based compensation limited to 10 percent of total compensation—be sufficient to provide flexibility to LPDs and protect growers from variability in inputs and flock production practices?

Of course, the simplest way for LPDs to compensate growers would be using a non-comparison-based payment mechanism, such as a square footage contract, and if they want to include a performance-bonus, it should be based on factors within the growers control. If LPDs are going to continue to use a comparison-based grower payment system, the regulation of that system to ensure fairness will be more complicated, by necessity.

Question 10

Should AMS's final rule expressly clarify that a pattern or practice (including, but not limited to, intentional, arbitrary, or punitive distribution) of unequal, dissimilar, or inappropriate inputs or flock production practices would be an unfair practice under the Act under any payment system that relies upon grower performance relative to inputs or production practices provided by the LPD (such as feed efficiency) irrespective of whether the payment system was a tournament? In particular:

a. *Please explain why or why not or suggest alternative approaches to address particular concerns with non-tournament pay systems that rely on grower performance.*
b. *Would some or all of the criteria with respect to the duty and the requirement for written processes set forth in § 201.110 be useful to address concerns with these non tournament performance pay systems? If so, please explain under what circumstances and how.*
c. *Are there specific circumstances where AMS should articulate additional protection for growers against punitive actions by LPDs through the differential provision of inputs or other processes?*

Yes.

Building off our response to question IV(9) above, the simplest way for LPDs to compensate growers would be using a non-comparison-based payment mechanism, such as a square footage contract. But even with a non-comparison based payment system, if the LDP wants to build a bonus system on top of that, the bonus should be based on factors that the grower can control, and not based on the quality of company-supplied inputs or based on company decisions that apply inequitably between growers.

Question 11

Should AMS make the effective date for the provisions of this proposed rule 180 days following publication of the final rule in the Federal Register? If you recommend shorter or longer for some or all of the provisions, please explain why.

Once the rule goes final, it should become effective as soon as possible. However, a 180-day phase-in period for LPDs to come into compliance seems reasonable.

Questions Regarding the Broiler Grower Capital Improvement Disclosure Document

Question 1

Do the Capital Improvement Disclosure Document provisions of the proposed rule assist growers in identifying and appropriately addressing concerns that growers have expressed relating to ACIs? If so, why? If not, what ways can it better do so?

The Capital Improvement Disclosure Document provisions of the proposed rule recognizes and addresses concerns that growers have about ACIs. By requiring the disclosures outlined in this proposed rule, AMS and growers will be more able to identify circumstances in which integrators attempt to shift or hide costs to growers through ACI practices. Clear disclosures will empower growers to enforce their rights of reasonable recoupment or refusal to make an ACI, which already exists under the Packers and Stockyards Act (§201.216). Of note are sections (a) and (b) of §201.216 that will require particularly focused enforcement:

"(a) Whether a packer, swine contractor, or live poultry dealer failed to give a poultry grower or swing production contract grower discretion to decide against the additional capital investment requirement;
(b) Whether the additional capital investment is the result of coercion, retaliation or threats of coercion or retaliation by the packer, swine contractor or live poultry dealer."

Dealers compel growers to make ACIs but fail to inform growers of the purpose, design, risks, or financial impacts of making an additional capital investment, a practice that directly defies §201.216(a). Further, growers face the threat of losing their contracts entirely if they refuse to make an additional capital investment regardless of their performance or needs. As one North Carolina poultry grower states in RAFI's 2022 survey of growers:

"I am not a fan of the integrators…requiring very costly capital investments for upgrades at anytime on farms that are consistently above average farms"

Growers that resist opaque requests from dealers to make ACI's are not making the decision of whether or not to invest in infrastructure, but are making the decision to keep their contract or lose it based on a dealer's whims. With the proposed disclosures, AMS will be much better positioned to perform investigations and streamline aggressive enforcement of the existing requirement that there must be a reasonable expectation of recoupment when ACIs are requested or required, and reduce opportunities for dealers to retaliate or threaten growers into making additional capital investments that are not in their best interest.

We recommend that AMS keep track of the frequency with which dealers request ACIs, and how often growers submit complaints of coercion, retaliation, or arbitrary investment requests. By creating standards by which dealers can request capital investments, this rule does empower growers to make more informed decisions about their own operations, and the effectiveness of this rule will rely on AMS performing consistent and focused enforcement of this rule and §201.216 to ensure compliance.

CCAR is also concerned by the exclusion of contract turkey producers from the protections provided by this proposed rule. In cases where turkey producers face similar conditions and challenges faced by broiler producers, the same protections that apply to broiler producers should apply to turkey producers. Many contract turkey producers face a lack of transparency and fairness with regard to capital improvement requirements. Turkey producers should not be ignored by this proposed rule. We urge USDA to more thoroughly evaluate how to appropriately ensure fairness with respect to capital improvement requirements for turkey producers – and to incorporate provisions with respect to turkey production as appropriate in the final rule.

Question 2

Are there specific ACI-related programs or other related conduct that LPDs engage in that are not solved by the proposed disclosures? If so, identify the conduct and whether additional disclosures, presumptions, or prohibitions would effectively address the harms from the conduct. Please explain both the problematic programs/conduct and any harms in detail.

No Response

Question 3

What considerations, if any, should AMS take into account with respect to the timing, delivery, or readability with respect to the Disclosure Document? For example, should AMS include a provision requiring that LPDs, at the time they deliver the Disclosure Document to the grower, make reasonable efforts to assist the grower in translating the Disclosure Document and to ensure that growers are aware of their right to request such translation assistance?

AMS should require that LPDs make options readily available for translation and readability of the Disclosure Document. A failure to ensure that all parties are able to receive a fully understood Disclosure Document in a timely manner is equivalent to not providing one at all. We recommend that AMS also standardize the delivery expectations of the Disclosure Document so that growers are informed of when they can expect to receive it, what it must contain, and require LPDs to have timely resolution strategies in place should these expectations fail to be met. Delivery expectations can include frequency and timing of a Disclosure Document, as well as making available translation needs. LPDs must also allow growers enough time to read and review the document, as well as ask any questions they may have that would impact their operation. We recommend that AMS allow growers to share these documents among other growers to achieve greater transparency and understanding of LPD practice without fear of retaliation.

Question 4
Should proposed §201.112(b)(5), which requires LPDs to disclose required or approved manufacturers or vendors, also require the disclosure of any material financial benefits that the LPD, or any officer, director, employee or family member of any such person, receives from the use of the required or approved vendor? If so, please explain why for each party recommended to be covered, including examples and explanation where available.

Yes, if a LPD, including senior officers of the LPD, have any direct or indirect financial interest in the manufacturers or vendors the LPD is requiring or recommending growers to use, there should be full disclosure of that fact. Ideally, LPDs would be restricted from holding financial interest in vendors and manufacturers, if they are requiring growers to use those businesses.

Question 5
Proposed § 201.112(b)(6) does not include a specific format for reporting projected returns. Should LPDs be required to follow a specific format for the analysis required in § 201.112(b)(6)? If so, what individual components would be most usual to growers contemplating ACIs?

No Response

Question 6
What other disclosures should be required of LPDs when they request or require broiler growers to make ACIs, and why? In particular, are there other disclosures that could enhance the Secretary's consideration of criteria in current regulations in §201.216?

LPDs should also be required to disclose whether other growers in the complex are also being requested or required to make ACIs. This transparency helps growers and the Secretary determine if some growers are being subjected disproportionately and unfairly to ACI requirements or requests by the LPD.

Question 7
What specific burdens or obstacles might LPDs face in complying with this proposed rule? Would this require LPDs to substantially modify their business model? What specific modifications would be required and why?

The clarity provided by this rule will be useful to both the regulated entities and the protected farmers. This rule will likely result in LPDs establishing a more business-like, fair, and transparent method of compensating growers, which will in turn result in a mutually beneficial business partnership between LPDs and growers, instead of the current adversarial model.

Question 8
Should disclosures or prohibitions be scaled based on the size of the investment? If so, how and based on what scaling? If so, please explain the reasons and implications for LPDs and growers?

No response

Question 9
What disclosures, forms, presumptions, or prohibitions could AMS require or incentivize of an LPD to align the length of any contract following an ACI with any debt that the grower undertook as part of the ACI? In particular:

a. *Should AMS establish a categorical presumption of unfairness when the duration of the contract is shorter than the duration of the loan or other similar requirement?*
b. *What other requirements or presumptions might be needed or useful to design or enforce such a presumption? Should these relate, for example, to a grower's assignment of payments from the LPD, monitoring practices by the LPD of the grower's farm financial circumstances, the timing of ACI programs with respect to the existing loans that grower holds, or the 5-year turnover rate of growers for the LPD?*
c. *To what extent might such a presumption give rise to disparate treatment between growers based on the particular financial circumstances of the farm, and if presented, how much those circumstances be addressed?*
d. *Please provide as much specificity as possible in your responses regarding why or why not to the above items, including examples and data if possible.*

The growout contracts growers sign with LPDs generally require growers to build expensive poultry houses to grow the chickens owned and supplied to the grower by the LPDs. The LPD requires the houses to be built to the company's own specifications, and high cost of those houses result in growers going deeply into debt to service their contracts. The high debts experienced by growers are directly related to LPD decisions about poultry house specifications, and therefore LPDs should bear responsibility in providing growers with contracts with durations that are at least as long as the loans the growers incur to service the contract. In fact, RAFI's 2022 contract grower survey found that he 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%)

AMS should absolutely establish a categorical presumption of unfairness when the duration of a broiler contract is shorter than the duration of the loan that a grower must service to fulfill the contract. Currently, flock-to-flock contracts are ubiquitous in the industry, and even for new growers on FSA guaranteed loans, integrators are only required to extend three year contracts, after which they are allowed to transition to a flock-to-flock contract. AMS should presume that a broiler contract is unfair unless an integrator is bound to the underlying contract for the entire length of the associated loan term.

Integrators' current ability to easily proliferate new poultry operations, often 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. One of the arguments put forward by poultry integrators and some lenders in support of the use of the FSA loan programs for poultry production loans is that it is very difficult for these operations to secure conventional loans. However, the reason for this is that the contracts of adhesion typical in the poultry sector are so economically unsustainable for the farmer that lenders are extremely reluctant to lend to these operations, unless there is a federal guarantee, either from FSA or the SBA. This itself is evidence of the problem. In a fully functioning capital market, the lenders' reluctance to finance contract poultry operations would put pressure on poultry integrators to improve terms of the production contracts to make them more economically viable for the farmer. However, the federal loan guarantees allow lenders to make very large loans for these operations, without the lender performing typical due diligence to scrutinize the contracts that underlie the loans.

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. 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. 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.

Question 10

Should AMS amend §201.216 to revise or include additional criteria that may be considered as categorical presumptions of unfairness or otherwise as violations of the Act? Please provide as much specificity as possible in your responses regarding why or why not, including examples and data if possible. In particular:

a. *Should AMS revise or include as an additional requirement that "A live poultry dealer shall not mandate an additional capital investment unless the cost of the required additional capital investment can reasonably be expected to be recouped by the poultry grower"?*
b. *With respect to recoupment, how should AMS evaluate factors that go into an analysis of "reasonably be expected," such as: the costs of investments at a local complex; any*

variation between growers; the duration of likely borrowing by growers: the contractual terms including guaranteed and not guaranteed compensation rates and flock placements, etc.; and other factors including the extent to which they are known to the LPD?

c. *Should AMS set a standard or presumption for contracts in ACI circumstances such that no less than 85, 90, or 100 percent of the projected recoupment must come from compensation methods that are not based on performance? If so, at which level and why?*

Yes, it should be considered an unfair practice for a LPD to mandate that a grower make an additional capital investment unless there is a reasonable expectation that the grower be able to recoup their investment, including some return on that investment.

Recoupment should be evaluated based on 100 percent of projected base price earnings only, not on projected bonus earnings. Bonus earnings can be one way for a grower to receive some return on their investment beyond simple recoupment.

Question 11

Should AMS make the effective date for the provisions of this proposed rule 180 days following publication of the final rule in the Federal Register? If you recommend shorter or longer for some or all of the provisions, please explain why.

We do not object to giving LPDs a period of 180 days to comply with the final rule. However, the effective date of the final rule should be 60 days following the publication of the final rule in the *Federal Register.*

Appendix 1: RAFI Geospatial Analysis Methodology

The plant data from this dashboard comes from the FSIS (Food Safety & Inspection Service) Meat, Poultry & Egg Product Inspection Directory. We join the FSIS inspection records with historical business data from the NETS (National Establishment Time Series) database. We first filter the FSIS inspection data to include only parent corporations that operate plants classified as "Large" (500 or more employees) that engage in poultry slaughter. We then filter out plants known to slaughter only turkey. We also filter out NETS records for plants that closed before 2022 (2022 is the most recent year that we have data for).

We then match FSIS plants to NETS records using a multi-stage matching process. We are using a subset of the NETS data filtered to include only NAICS codes associated with animal processing and slaughter. Both the FSIS and the NETS data include latitude and longitude, so we start by matching FSIS plants to any NETS records that are located within 1000m. We exclude any NETS records with obviously incorrect names (cattle companies, restaurant supply, etc.). We then check multiple fields in all spatially matched records for a fuzzy string match: establishment name, address, and DBAs. We also check for a match on DUNS number. If we have multiple geospatial matches, we select the record that matches on the most fields. In the case of a tie, we select the NETS record with the highest estimated sales. (A NETS record is created for each unique DUNS number, so there are often multiple colocated records for large plants.) In practice, this works well and does not yield any spurious matches.

We use the best matched record NETS record for each FSIS plant to estimate that plant's sales. NETS uses reported sales at the establishment level when available — otherwise, they use firm-level or industry-level sales per employee to estimate establishment sales. We set a lower threshold of $50,000,000 for plant revenue. We replace any missing sales records or records with less than $50,000,000 with the median sales for plants with the same parent corporation. For parent corporations that have no match, we use the median of all plants. For plants classified as "small", we use the median of all small plants.

We then calculate a 60-mile driving distance around each plant using the Mapbox API. 90% of all chickens are raised within 60 miles of the plant where they are slaughtered (MacDonald, 2014). We then group plants by parent corporation and calculate intersections between the 60-mile driving radius around each plant to find areas that have access to one integrator, two integrators, and three or more integrators.

We also estimate the percentage of poultry barns that are in a captured area. We use data from Microsoft's computer vision model that classifies poultry barns in aerial photography from NAIP (National Agriculture Imagery Program). The raw data from Microsoft's model includes many false positives, so we filter out any barns that do not have a nearest neighbor within 50m (most poultry barns are in clusters of 2-4), and we exclude any points located within geospatial datasets for airports, hospitals, parks, railroads, coastlines, etc. We then calculate the percentage of barns in a selected area that have access to one, two, and three plus integrators.

Citations

MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production, EIB-126, U.S. Department of Agriculture, Economic Research Service, June 2014. https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=7182