



September 26, 2022

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

*Submitted via regulations.gov*

**Re: Advanced Notice of Proposed Rulemaking on Poultry Growing Tournament System: Fairness and Related Concerns, AMS-FTPP-22-0046**

Dear Secretary Vilsack,

Farm Action respectfully submits this comment to the United States Department of Agriculture (“USDA”)<sup>1</sup> regarding the advance notice of proposed rulemaking “Poultry Growing Tournament Systems: Fairness and Related Concerns” (“ANPRM”).<sup>2</sup>

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

We address the ANPRM in two parts. First, we offer an overview of the tournament system’s operation and explain its incompatibility with the ban on unfair practices within the Packers and Stockyards Act (“P&S Act”). Second, we respond to several of the specific questions raised in the ANPRM.

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<sup>1</sup> Farm Action thanks Maher Mahmood, Robin Thurston, and Will Bardwell of Democracy Forward for their assistance in preparing this comment.

<sup>2</sup> Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (proposed June 8, 2022) (to be codified at 9 C.F.R. § 201).

## **I. The Tournament System is Unfair.**

Poultry growers have long endured deceptive, unfair, and abusive practices by vertically integrated poultry processors, also referred to as “dealers” or “integrators.” Frequently, that deception begins even before poultry growers sign their contracts. It is a common story for growers to be attracted by unrealistic financial models and integrators’ promises of support. Once the contracts are signed, though, growers find themselves on the short end of a massive power imbalance. Poultry integrators control almost every aspect of a grower’s production, putting growers at the mercy of integrators’ decisions, no matter how arbitrary. Because they have little bargaining power, growers are often forced either to accept unfavorable terms or to lose their livelihoods.<sup>3</sup>

No element of the relationship between poultry integrators and growers demonstrates that power imbalance more than the tournament system. The tournament system is a ranking system under which poultry growers’ compensation is determined by comparing a grower’s performance (roughly speaking, the weight of a grower’s delivered flock, measured against the amount of feed it consumed) against the performances of other growers. Under the tournament system, growers have no base price guarantee. The highest performers are paid more per pound than the lower performers – even though nearly all the factors affecting the final results (such as inputs, like the food and medicine that birds receive, and the health or gender composition of flocks) are outside a poultry grower’s control. The lower performers receive reduced pay-rates, despite having no control over any of the inputs they use, and consequently foot the bill of the bonus given to the higher performers. Growers paid under the tournament system endure unfair results, such as receiving less money for developing a good, healthy flock, simply because another grower received better inputs (whether through preferential treatment or happenstance) or had more luck. Ultimately, regardless of how a grower finishes in a given tournament, the tournament system results in poultry growers having no control over how much they will be paid at the end of the process.

### **1. The Tournament System Exacerbates a Fundamental Power Imbalance Between Poultry Growers and Integrators.**

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<sup>3</sup> Some of these points appeared in our comment responding to USDA’s Proposed Rulemaking on Transparency in Poultry Grower Contracting and Tournaments, AMS-FTPP-21-0044.

In 2018, an investigation by the Small Business Administration’s Inspector General found that the control imposed by integrators “overcame practically all of a grower’s ability to operate their business independent of [them].”<sup>4</sup> Integrators exercised control through “a series of contractual restrictions, management agreements, oversight inspections, and market controls.”<sup>5</sup> Growers’ economic viability depended on a “steady” and “predictable” supply of flocks from the integrator.<sup>6</sup> Failure to comply with integrators’ demands could result in a decrease in payments, flock placements, withholding the flocks, and canceling of contracts.<sup>7</sup>

Integrators have largely divided up the U.S. into regions, and as a result more than 50% of growers have only one or two integrators that they can work with.<sup>8</sup> As growers have told us, this leaves them with limited options: either accept the unfavorable contract or stop growing chickens.<sup>9</sup> Growers do not have the opportunity to negotiate the amount and quality of the very inputs that determine their pay. They are subject to the integrator’s decisions, which are often unpredictable and can be retaliatory.

## **2. The Tournament System Provides Poultry Integrators an Easy Avenue for Retaliating Against Poultry Growers.**

Poultry growers who speak out against integrators’ unfair practices have suffered retaliation, including dealers delaying shipment, providing defective inputs, canceling contracts, and threatening to report health and animal welfare violations.<sup>10</sup> Many farmers,<sup>11</sup> including those in our network, have experienced these retaliatory actions. For instance:

- In 2019, a farmer purchased an eight-house chicken farm for approximately \$2 million. Sanderson Farms contracted with the farmer and provided no indication that any upgrades to the chicken farm would be necessary, other than digging an additional well. Later that year, the

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<sup>4</sup> U.S. Small Bus. Admin., Rep. No 18-13, EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS, at 7 (2018), <https://www.sba.gov/sites/default/files/2019-07/SBA-OIG-Report-18-13.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.*

<sup>8</sup> James MacDonald, ‘*Technology, Organization, and Financial Performance in U.S. Broiler Production*,’ *USDA, Economic Research Service (2014)*.

<sup>9</sup> Audio recording of Trina M. and Eric S.

<sup>10</sup> Michael Sainato, ‘*I can’t get above water’: how America’s chicken giant Perdue controls farmers*,’ *The Guardian* (Mar. 14, 2020),

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

<sup>11</sup> Food Integrity Campaign, *Whistleblower Profiles*,

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

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

- A top poultry grower for Perdue Farms was vocal with public health advocates, lawmakers, regulatory agencies, and the media about receiving “poor quality feed” and “sickly chicks.”<sup>12</sup> He also spoke out about unsanitary conditions and threats to flock health.<sup>13</sup> Perdue Farms became aware of the poultry grower’s involvement with the media and public. Without any prior warning or discussion, it terminated his 25-plus year relationship, reasoning that he had “materially breached” his contract by allowing visitors to tour inside of his poultry houses, although the contract made no mention of visitors.<sup>14</sup>
- Another poultry grower took out a \$500,000 loan to build a chicken house on his farm, but refused to add in additional equipment, despite Tyson’s request.<sup>15</sup> Shortly thereafter, Tyson provided him with sick chickens and ultimately terminated his contract.<sup>16</sup> He sued Tyson, alleging that his contract was terminated because he encouraged other poultry growers to file complaints against Tyson for various mistreatment tactics. In response to his suit against Tyson, the court ruled in favor of the poultry company, reasoning that, although Tyson’s actions were wrongful, it did not violate the P&S Act because Tyson’s treatment of the poultry grower did not hurt the competition within the industry as a whole.<sup>17</sup> The U.S. Court of Appeals for the Sixth Circuit affirmed,<sup>18</sup> and the U.S. Supreme Court declined to hear a

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Alison Moodie, *Fowl play: the chicken farmers being bullied by big poultry*, The Guardian, (Apr. 22, 2017), <https://www.theguardian.com/sustainable-business/2017/apr/22/chicken-farmers-big-poultry-rules>.

<sup>16</sup> *Id.*

<sup>17</sup> See *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010).

<sup>18</sup> *Id.*

petition to review the circuit court's decision.<sup>19</sup> In the end, the poultry grower was forced to declare bankruptcy.<sup>20</sup>

These retaliatory practices can and have cost farmers their livelihood and their farms, and the threat of such retaliation silences other farmers.

### **3. The Tournament System Gives Poultry Integrators Significant Power Against Overleveraged Growers, Who Incur Massive Debts to Enter and Stay in Contracts.**

To entice farmers to invest in at least one poultry house to raise the integrators' chicks, the integrator provides the farmer and the farmer's lender with financial modeling that far too often demonstrates a consistent stable return on the farmer's investment, labor, and manure management for the facility. Lenders, often eager to lend government guaranteed funds to the farmer, quickly approve the loan application, locking the farmer into a nearly untenable business position. Contract growers invest significant amounts of money in poultry houses and then add technology modifications and upgrades, as frequently required by the integrator as a condition of renewing a contract.<sup>21</sup> Since poultry growers have virtually no leverage to negotiate favorable contract terms, they often incur substantial debt loads in making these purchases. If a contract is not renewed, poultry growers are stuck paying back the loans from other sources of revenue or turning the farms and their homes over to the bank and filing bankruptcy. This vicious cycle has led to massive accumulations of debt, resulting in numerous bankruptcies. Just last year, Tyson and Perdue reached a \$35 million settlement in a lawsuit brought by farmers alleging that the companies pushed them into debt and locked their compensation at a low rate.<sup>22</sup>

American contract poultry growers' total debt is staggering. Farm sector debt in 2022 is forecast to increase 4.6% to \$496.0 billion.<sup>23</sup> Construction of two poultry houses now costs about \$1.5 million,<sup>24</sup>

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<sup>19</sup> Nat'l Sustainable Agric. Coal., *U.S. Supreme Court Declines to Review Jury Award to Poultry Growers*, NSAC's Blog, (May 6, 2011), <https://sustainableagriculture.net/blog/poultry-growers-win/>.

<sup>20</sup> Moodie, *supra* note 14.

<sup>21</sup> Audio recording of Trina McClendon and Eric Shafer.

<sup>22</sup> The Associated Press, *Tyson Foods, Perdue Farms to pay \$35 million to settle lawsuit with chicken farmers*, AL.com, (Sep. 3, 2021, 9:06 AM),

<https://www.al.com/news/2021/09/tyson-foods-perdue-farms-to-pay-35-million-to-settle-lawsuit-with-chicken-farmers.html>.

<sup>23</sup> USDA Econ. Rsch. Serv., *2022 Farm Sector Income Forecast*, (Feb. 4, 2022),

<https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-sector-income-forecast/>.

<sup>24</sup> Patti Anderson & Mike Weaver, *Op-ed: Monopolies are Giving Chicken Farmers a Raw Deal. We're Urging States to Act.*, Civil Eats, (May 2, 2022),

plus company-required upgrades that are around five to six figures.<sup>25</sup> If growers' cumulative debt continues to increase, the result will be further economic damage to rural communities.

#### **4. Research Finds that the Tournament System Violates the Packers and Stockyards Act's Ban on Unfair Practices.**

The tournament system is fundamentally at odds with the P&S Act's ban on unfair practices. Section 202(a) of the P&S Act forbids poultry integrators from engaging in or using unfair practices or devices.<sup>26</sup> That protection cannot be squared with a ranking system that lacks a base pay guarantee. Without a base price guarantee, the grower bears all the risk associated with the integrators' inputs without any guaranteed return.

Even more perversely, growers' payouts remain outside their control even if inputs do not negatively affect their work, because the tournament system conditions payouts on a grower's performance *relative to other growers*. In other words — as a recent USDA proposed rule put it — “[g]rower pay rates vary depending on the performance of other growers, even if a specific grower's performance remains unchanged or even improved compared to their performance in previous growout periods.”<sup>27</sup>

The unfairness of these results is supported by scholarship. In a 2018 article, a group of University of Missouri scholars proposed a framework for evaluating claims of unfairness in agriculture. “Fairness,” they explained, “is the perception that rules, practices or outcomes are consistent with one's expectations.”<sup>28</sup> They explained that poultry growers and integrators exist within a “network,” wherein an actor's power is evinced through the number of “links” that actor enjoys to other actors within the network.<sup>29</sup> If one actor (such as a buyer) has links to many other actors (such as sellers), then the buyer has many options for purchasing; on the other hand, if actors have few links to sellers, then they have fewer options and are comparably beholden. “In other words, if a buyer can choose from many possible sellers, then the buyer's dependence on a particular seller will be small. Thus, for power to exist in an exchange network, at least one actor must have an excess of available partners with which to trade.”<sup>30</sup> Conversely, “the dependence of [one actor upon another] is directly proportional to the perceived value of [the other] of the exchange with the [actor] or, in other words, with [the other]’s

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<https://civileats.com/2022/05/02/op-ed-chicken-farmers-raw-deal-monopoly-consolidation-meat-industry-beef-pork-price-inflation/>.

<sup>25</sup> *Id.*

<sup>26</sup> 7 U.S.C. § 192(a).

<sup>27</sup> 87 Fed. Reg. at 34,989.

<sup>28</sup> Mary K. Hendrickson, et. al, *The assessment of fairness in agricultural markets*, 96 *Geoforum*, 41, 44 (2018).

<sup>29</sup> *Id.* at 42.

<sup>30</sup> *Id.* at 43.

motivational investment in the relationship with [the actor]. The more value an actor places on the relationship or the more motivated an actor is to obtain resources or access to exchange partners, the more dependent that actor will be.<sup>31</sup>

This paints an accurate picture of the relationship between poultry growers and integrators. As USDA’s proposed rule acknowledges, integrators “exert significant power over contract poultry grower operations,”<sup>32</sup> because consolidation within the poultry industry leaves growers with “few or no alternatives” and has created a climate in which “growers lack the bargaining power to negotiate . . . .”<sup>33</sup>

This limited universe of market opportunities for poultry growers is not the only unfair aspect of their relationship with integrators. The University of Missouri scholars also observed that “a reduction in the set of exchange opportunities within a network structure in which one’s exchange opportunities is less than another’s can be a *prima facie* case for a claim of unfairness.”<sup>34</sup> For instance, “an agent within a network that sees a reduction in exchange opportunities *or available resources* could be at a power disadvantage, thus creating the possibility for a claim of unfairness, other things being equal.”<sup>35</sup> As the proposed rule explains, the complete lack of control over inputs harms poultry growers, whose performance rises and falls on the quality or inferiority of elements outside their control: stocking density, flock age, flock health, feed disruptions, and medicines, among others.<sup>36</sup> Any inequality among these inputs places growers at a competitive disadvantage over which they have no control. This is a wide power imbalance, by any definition. A legal framework that prohibits unfair trade practices between poultry growers and integrators should not tolerate this practice.

## **5. The Tournament System’s Unfairness is Underscored by Its Conflicts with Traditional Notions of Contract Law.**

The tournament system’s inherent unfairness also is illustrated by its conflict with principles of contract law. It is fundamental to the validity of contracts that agreements not be unconscionable, in either their substance or the procedures leading to assent.<sup>37</sup> That is, a contract is invalid if “fundamentally unfair or unreasonably one-sided,” and if its formation “results in unfair surprise or results from the absence of meaningful choice.”<sup>38</sup> Terms of contracts also may be unenforceable when

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<sup>31</sup> *Id.*

<sup>32</sup> 87 Fed. Reg. at 34,982.

<sup>33</sup> *Id.*

<sup>34</sup> Hendrickson, *supra* note 27, at 43.

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> 87 Fed. Reg. at 34,990.

<sup>37</sup> *Restatement of the Law, Consumer Contracts* § 5 (A.L.I., Tentative Draft 2019).

<sup>38</sup> *Id.* at (b)(1-2).

they contravene public policy, such as when enforcement of the contract violates “the parties’ justified expectations” and when enforcement lacks “any special public interest.”<sup>39</sup>

Without a base pay guarantee, a ranking system denies growers basic fairness. It creates an oppressive power dynamic under which growers take what they get because they must, and under which integrators pay what they want, because they can — and all of it by design. Growers typically begin their contractual relationship with an integrator by financing and constructing expensive, single-use facilities according to an integrator’s specifications. Since these facilities typically have no plausible use except for growing chickens, poultry growers cannot get out of the poultry business and transition their facility to another use; if they leave the business, then they will default on the debt they incurred to build the facility. This problem is exacerbated by the fact that, without a base pay guarantee, growers enter the contract with no idea what they will be paid — making an integrator’s “offer” impossible to understand, much less assent to.<sup>40</sup> Moreover, contracts between growers and dealers carry all the trappings of unconscionability: unfair (growers manage the facilities, provide the labor, manage the poultry waste, and grow the integrators’ flocks without any idea how much they’ll be paid<sup>41</sup>) and unreasonably one-sided (growers’ pay depends heavily on inputs over which the integrator has sole control<sup>42</sup>), resulting in unfair surprise (growers frequently earn less than they are led to believe they’ll earn<sup>43</sup>), and deprived of meaningful choice.<sup>44</sup> There is simply no way to square this with a provision of law that forbids integrators from “engag[ing] in or us[ing] any unfair . . . practice or device[.]”<sup>45</sup> Indeed, the Department of Justice’s recent lawsuit alleging that two prominent integrators, Sanderson Farms and Wayne Farms, violated the P&S Act through their tournaments (albeit on different grounds

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<sup>39</sup> Restatement (Second) of Contracts § 178(2) (Am. L. Inst. 1981).

<sup>40</sup> 87 Fed. Reg. at 34,986 (“[P]oultry production contracts often do not guarantee the number of flocks a grower will receive, even under long-term contracts, although this is a critical datapoint for understanding the value of the contract to the grower.”).

<sup>41</sup> *Id.* at 34,989 (in a tournament system, “[g]rower pay rates vary depending on the performance of other growers, even if a specific grower’s performance remains unchanged or even improved compared to their performance in previous growout periods.”).

<sup>42</sup> *Id.* at 34,991 (“Pay systems highly correlated with individual input variability may be inconsistent with the merit premise and demonstrate misrepresentations and deception in the operation of tournament pay systems.”).

<sup>43</sup> *Id.* at 34,986-87 (“The structure of the contracts themselves results in such a wide range of potential grower financial outcomes that it is difficult for growers to make reliable profitability projections.”)

<sup>44</sup> *Id.* at 34,986 (“[G]rowers entering the market are tied to growing poultry to pay off the financing of the capital investment. Growers have reported that they must accept unfavorable contract terms because they are tied to production to pay off lenders and they have few, if any, alternative dealers with whom they can contract.”).

<sup>45</sup> 7 U.S.C. § 192(a).



than those raised here)<sup>46</sup> proves there is a sound basis to believe that the Act and the tournament system cannot both stand.

## **6. Replacing the Tournament System with a Fixed-Performance System Would Cure the Tournament System's *Per Se* Unfairness.**

The tournament system's unfairness would be ameliorated substantially by a requirement that integrators implement a base pay guarantee into payment systems. The proposed rule itself notes that a minority of poultry grower pay systems currently operate under a principle of "fixed performance."<sup>47</sup> In a fixed-performance system,

growers are paid a base rate for each animal or for the farm weight delivered to the processor. These contracts generally adjust payments based on fixed performance standards. For example, farmers with lower animal mortality or higher conversion of feed to live weight might receive higher pay. These are called fixed performance contracts because although compensation might fluctuate, the performance elements are tied to fixed standards.<sup>48</sup>

In contrast, a ranking system without a base pay guarantee deprives poultry growers of these protections by punishing them for circumstances fully under the control of the integrator. This is at odds with basic concepts of contract law, basic concepts of fairness, and the most basic requirements of the P&S Act.

## **II. Responses to Questions posed by the ANPRM.**

The conclusions above inform our responses to some of the questions posed in the ANPRM:

1. *What is the tournament system's intended purpose and does the system achieve its intended purpose?*

The tournament system is a ranking system under which a poultry grower's compensation is determined by comparing a grower's performance (roughly speaking, the weight of a grower's delivered

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<sup>46</sup> U.S. Dept. of Just., *Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers*, (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

<sup>47</sup> 87 Fed. Reg. at 34,988.

<sup>48</sup> *Id.*

flock, measured against the amount of feed it consumed) against the performances of other growers. Under the tournament system, growers have no base price guarantee. The highest performers are paid a bonus rate and the lowest performers receive a docked pay rate, with the middle tier receiving the standard price per pound — even though nearly all the factors affecting the final results (such as inputs, like the food and medicine that birds receive, and the health or gender composition of flocks) are outside a poultry grower’s control. Purportedly, the tournament system empowers growers by fostering competition. In reality though, the tournament system does precisely the opposite: it weakens growers by giving integrators full control over every meaningful part of the grower-integrator relationship. Growers have no idea how much money they will make off their flocks, and must accept whatever integrators offer because they have no choice. And rather than fostering competition among growers, it enables a great imbalance of power between the parties, granting nearly untethered power and control to the integrator. Even if the tournament system produced modest pro-competitive benefits, they are badly outweighed by the unfairness heaped on growers.

...

*(c) Additionally, please describe what you believe should be the purpose of a payment and settlement system between integrators and growers?*

A fair system of compensation would bring growers one step closer to a level playing field — that is, a dynamic in which neither party can exploit an unfair imbalance of power, and both enjoy a stable, fair, competitive marketplace. But the tournament system undermines all those goals, because it forces growers into a dynamic that is unstable (i.e., growers grow their flocks without any idea how much they will be paid), unfair (input variability and performance of tournament competitors leave growers at the mercy of factors outside their control), and anti-competitive (risk-taking is disincentivized). Requiring a fixed base price would alleviate all these concerns: it would allow growers a minimum guaranteed return during the contract period for their financial investment, labor, and waste management, which would protect growers from unforeseeable and uncontrollable actions by the integrator, and also provide a “safety net” for growers to experiment with new strategies.

*2. What specific practices under the tournament system are the most problematic, and why?*

As discussed above, the tournament system’s most problematic elements are the lack of a fixed base price and a grower’s uncertainty about how much they will be paid for the use of their facilities, labor, and poultry waste management. This uncertainty impairs growers’ ability to make plans for their businesses, and negatively impacts growers’ quality of life and ability to provide for themselves and their families. Without a fixed base price, once the grower signs the contract and borrows the money to

build the chicken house(s), they are trapped in an abusive relationship with what is far too often the only tenant (integrator) that wants to “rent” the facilities the grower has built.

3. *What practices should be addressed through regulatory or other administrative steps? Are regulatory steps the only path to curbing these practices?*

The most straightforward and certain path to ending the tournament system would be through a rulemaking to effectuate the P&S Act’s prohibition on unfair practices. Such a rule would end, once and for all, any lingering doubt about the tournament system’s permissibility among both integrators and growers. In order to be effective, the rule would have to ban any ranking system that exists without a fixed base price. Anything short of that will leave the tournament system’s fundamental power imbalance intact.

As a roadmap, USDA should look to the “GIPSA Rules” drafted and issued for public comment in 2010.<sup>49</sup> These rules would have required integrators under the tournament system to pay growers the same base pay for growing the same type of poultry.<sup>50</sup> Poultry growers hoped these rules would provide them protection by establishing a uniform base pay for each chicken and prohibiting any poultry grower from receiving anything less than that base pay.<sup>51</sup> These proposals were robust and would have promoted fairness for poultry growers.<sup>52</sup> USDA should strongly consider reissuing these proposals.

Alternatively, USDA should investigate and prosecute integrators that use the tournament system for violating the P&S Act, and regulatory action should be instituted to declare the tournament system *per se* violative of the P&S Act.

6. *With respect to the following areas, to what extent can the tournament system pay mechanisms be modified to achieve the following goals, while still retaining performance-based incentives? If so, how?*

...

*(b) Can they be modified to reduce variability or unpredictability in outcomes (at least over any short-term horizon)?*

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<sup>49</sup> See Implementation of Regulations Required Under Title IX of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,339 (Jun. 22, 2010).

<sup>50</sup> 87 Fed. Reg. 34,981.

<sup>51</sup> 75 Fed. Reg. 35,338, at 35,344.

<sup>52</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. at 48,594-602 (Oct. 18, 2020).

Any ranking system, including the tournament system, is *per se* unfair if it lacks a firm base price. Without a guaranteed base price, the system is inherently unpredictable and unavoidably reinforces a power imbalance that is anathema to the P&S Act. If integrators believe that a system of incentives is needed to foster competition among growers, then a layer of performance-based incentives on top of the firm base price would achieve that. But without a firm base price, any ranking system is fundamentally unfair.

*10. Are there other approaches or proposals pertaining to regulation of the tournament system that USDA should consider?*

The tournament system, as it is currently implemented, should be banned for violating the P&S Act's prohibition on unfair practices. Any ranking system that lacks a fixed base price is *per se* unfair. If an integrator determines it to be a good business practice, then it can implement a bonus system to reward higher-performing growers. In conjunction with transparency measures already under consideration by USDA, a system consisting of a fixed base price with performance-based bonuses would help balance power within the poultry grower system. But as long as growers are subjected to a system without a fixed base price, they will continue to suffer.

Farm Action is pleased by USDA's renewed interest in the tournament system's unfairness. It is a subject that has awaited action for too long. Farm Action is also encouraged by USDA's proposed rulemaking to promote greater transparency in the relationships between integrators and growers; still, all the transparency in the world cannot cure the tournament system's unfairness, because that unfairness is not the product of a lack of transparency. The unfairness of the tournament system is its central function. Until growers are guaranteed a fixed base price, that unfairness will continue.

Sincerely,



Sarah Carden  
Policy Advocate  
Farm Action