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Submitted via Regulations.gov

Re: Poultry Grower Payment Systems and Capital Improvement Systems, AMS-FTPP-22-0046

The Open Markets Institute would like to thank the U.S. Department of Agriculture (USDA) for taking on the issue of unfair payment systems in the poultry industry. The current market structure and contracting norms of poultry production leave contract poultry growers vulnerable to financial ruin. The USDA must use its authority under the Packers and Stockyards Act to establish fair and open markets in this industry.

Live poultry dealers (LPDs) have vertically integrated nearly every step of the chicken production supply chain. The exception is a one to two month “grow-out” period, during which broiler chickens put on weight before slaughter. LPDs contract broiler grow-out to nominally independent farmers. These contract growers bear the risk of investing in company-specified chicken houses and equipment, which cost well over a million dollars for the average-sized grow-out operation. LPDs provide growers with chicks, feed, and veterinary care, and growers provide daily maintenance and monitoring of the flock and facilities.¹

LPDs designed this system to deliver a uniform supply of broilers, while externalizing the least profitable and most unpredictable parts of production to third parties. Under this system, farmers bear the responsibility for how efficiently birds put on weight, even though the LPDs control the most important factors that influence feed conversion, such as bird genetics and feed quality. The unfairness is clear: Growers’ pay varies largely based on the performance of LPD-provided inputs. It’s even more unfair that growers’ pay varies dramatically due to a comparison-based, zero-sum-game tournament payment system through which minor differences in performance can result in a massive difference in pay. A survey by the USDA found that, in 2020, the top 10 percent of poultry growers received more than twice as much per pound as the bottom 10 percent of growers.² That’s a maximum of 125 percent difference in pay even though broiler feed conversion, the metric by which

¹ Janet Perry, David E. Banker, and Robert Green, *Broiler Farms’ Organization, Management, and Performance*, Agriculture Information Bulletin No. 748, Economic Research Service, U.S. Department of Agriculture, at 12-14 (1999), <https://www.ers.usda.gov/publications/pub-details/?pubid=42211>.

² Economic Research Service, U.S. Department of Agriculture. *Fees Paid to Growers for Raising Broiler Chickens Varied Widely in 2020* (Sept. 8, 2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=104642>.

most farmers are ranked, generally varies just 20 percent between the most and least efficient birds.³ Feed conversion performance is only minorly a function of grower diligence and ingenuity.

Contract growers cannot reasonably avoid this unfair payment system, as most LPDs use some version of tournament payment. High levels of regional concentration among LPDs leave growers with little choice between companies to work with and no bargaining power over contract terms. This concentration compounds what is already an unequal relationship. Growers are dependent on LPDs to access markets. LPDs can easily recruit new growers to raise chickens for them, and growers have virtually no bargaining power to negotiate their pricing or contract terms. Integrators maintain unequal power over growers during the contract relationship because growers must continue to raise chickens for them to pay off their debts. Due to the inherent imbalance of power between contract growers and poultry corporations, the USDA should use its authority under the Packers and Stockyards Act to protect farmers from deceptive, abusive, and unfair contracts and payment terms.

Congress passed the Packers and Stockyards Act to exercise “the fullest control of packers and stockyards which the Constitution permits.”⁴ In writing and passing the law, Congress wanted to “be more aggressive than all previous antitrust or trade regulation” in dealing with meatpackers.⁵ The plain text and legislative history of the Packers and Stockyards Act give the USDA a broad authority to combat both anticompetitive tactics and unfair dealing. Clarifying how to determine when a meatpacker violated the Act’s Section 202 prohibition on “unfair, deceptive, or unjustly discriminatory practices” falls squarely within the USDA’s authority as delegated by Congress.

In previous comments to the USDA, the Open Markets Institute presented legal justifications for banning tournament payment systems under the Packers and Stockyards Act.⁶ We support the comment submitted by Farm Action that also argues that tournament payment systems violate the Act. We still believe that it is fundamentally unfair to pay farmers based on the performance of inputs and management decisions that they do not control. That said, the arguments and evidence presented in our previous comment also support the USDA’s proposal to regulate comparison-based payment systems under the Poultry Grower Payment Systems and Capital Improvement Systems rule. We also support Food & Water Watch’s legal analysis illustrating that the USDA has ample legal authority to enact this regulation.

The Poultry Grower Payment Systems and Capital Improvement Systems rule would be an important step in the right direction and the USDA must finalize this rule promptly. However, the Department has asked important questions about how to clarify and strengthen this proposal. As an organization of antitrust legal experts who have studied and investigated poultry payment systems for over a

³ Ethan Brown, *Feed Conversion Ratios Help Explain Meat’s Outsized Climate Impact*, PBS (Mar. 20, 2022), <https://www.pbs.org/wnet/peril-and-promise/2022/03/feed-conversion-ratios-help-explain-meats-outsized-climate-impact/#:~:text=In%20an%20ideal%20world%2C%20it,the%201.5%20to%201.9%20range.>

⁴ Michael Kades, *Protecting Livestock Producers and Chicken Growers: Recommendations for Reinvigorating Enforcement of the Packers and Stockyards Act*, Washington Center for Equitable Growth, 7-8 (May 2022); *The Packers and Stockyards Act*, H.R. Rep. 67-324, at 3 (1921).

⁵ Michael C. Stumo & Douglas J. O’Brien, *Antitrust Unfairness v. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 Drake J. Agric. L. 91, 93–94 (2003) (arguing from legislative context and history that Congress intended the PSA “to be more aggressive than all previous antitrust or trade regulation”).

⁶ Open Markets Institute, *Comment to USDA on Poultry Growing Tournament Systems: Fairness and Related Concerns*, (Sept. 21, 2022), <https://www.openmarketsinstitute.org/publications/poultry-growing-tournament-systems-fairness-and-related-concerns.>

decade, the Open Markets Institute respectfully submits the following responses to some of the USDA's questions which we believe will help ensure that the USDA's proposal meets its stated goals.

The recommendations we make in this comment will help transform the current poultry tournament system from one in which growers lack the knowledge and power to sustain their operations, to one in which farmers can make informed financial decisions and receive fair payments. Most importantly, we urge the USDA to take the steps necessary to guarantee all poultry contracts offered by LPDs include a fair minimum base pay rate. First, this rate should generate enough revenue to service a grower's poultry-related debt. It should also allow the grower to cover their operating costs, including the cost of on-farm labor. Finally, the minimum base pay rate should allow growers to make a reasonable return over the course of their contract, assuming the grower follows the LPD's required management practices and receives the minimum number of annual flock placements at the minimum stocking densities guaranteed in their contract. A minimum base pay rate that does not meet these criteria should be considered unfair under the Packers and Stockyards Act.

In addition to ensuring fair base pay rates, the Open Markets Institute suggests that the USDA:

- Limit the portion of pay that can come from performance-related bonuses or restrict the variance in performance-related pay between growers, *if* a fair minimum base pay is established.
- Establish that contracts that are not long enough or do not compensate farmers enough to pay off additional capital investments demanded by the LPD over the length of the contract are unfair or deceptive.
- Establish certain situations or thresholds that would guarantee growers a non-comparison-based payment option if they desire.
- Establish that a pattern of unequal input distribution by LPDs violates the Act.
- Review all new representative contracts from LPDs to ensure compliance and fair terms.

Finally, we support the USDA's proposal to disclose minimum pay rates in contracts.

Disclosing Minimum Payment Rates

The USDA asks if its proposal requiring LPDs to disclose their minimum price-per-pound payment rates in their grower contracts would make contracts fairer and more transparent. We believe it would. Section 202(a) of the Packers and Stockyards Act bans deceptive practices.⁷ In most poultry grow out contracts, the base pay reflects the average pay, and approximately half of growers' pay is docked from the base pay value, while others receive a bonus. Growers' uncertainty around the true minimum payment they may receive can make financial planning difficult and ultimately inaccurate.

For many growers, the absence of a true, disclosed minimum payment is further compounded by the variance in payment rates, along with unexpected but mandated capital investments. Requiring LPDs to establish and disclose minimum payments does not address the uncertainty created by pay variance or the cost of unplanned capital investments, however, this single change would go a long way toward helping growers determine whether they will be able to make their loan payments—even if they find themselves at the bottom the tournament.

⁷ Section 202 (a), Packers and Stockyards Act, 7 USC §192 (a).

In our response to the USDA's Advance Notice of Proposed Rulemaking (ANPR), we advocated for the Department to require LPDs to guarantee growers a minimum price floor and end base pay deductions. We commend the USDA for incorporating this policy into the proposed rule and urge the Department to maintain the strength and clarity of these provisions.

When the USDA finalizes this proposed rule, LPDs will be required to provide their growers with new contracts that comply with the updated provisions included in the rule. The USDA should make explicit in the final rule that, when LPDs update existing contracts or form new contracts with growers, the LPDs must clearly disclose the minimum pay rate that they offer in the terms of the contract. Without clear disclosure of the rates in writing, LPDs could still engage in the deceptive behavior banned under Section 202(a) of the Act.

Ensuring Minimum Pay Rates are Fair and Reasonable

By requiring LPDs to post their minimum pay rates as base pay, the USDA recognizes the risk that LPDs will lower base pay below what growers expect, to comply with this new rule. LPDs may also post base pay rates that are so low that farmers must receive bonus pay to maintain financial viability. Withholding essential bonuses would functionally have the same effect as current base pay deductions. The USDA asks commenters how to minimize risks for growers during this transition and if the agency should establish guidance for fair minimum base pay rates. We strongly urge the USDA to closely monitor the industry's transition and establish fair minimum rates.

To prevent LPDs from abusing their market power and depressing grower payments, the USDA should use its existing data on grower pay to set regional minimum price floors for poultry contracts. Unfortunately, due to the ubiquity of contracts in the poultry industry, there is no alternative, healthy cash market for broiler chickens and thus no well-established "fair market price" to peg poultry contracts to. The USDA must take steps to reestablish one.

The USDA must ensure that the minimum price floor for poultry contracts is responsive to inflation over time, covers the costs of production, provides an opportunity for growers to make a reasonable return, and remains within an equitable spread relative to chicken wholesale and retail prices. This price floor may vary across regions.

To ensure the minimum price floor covers the cost of production, the USDA must require that it is high enough for growers to service their poultry-related debts and cover their operating costs. Growers' operating costs include their labor, land and housing facilities, and utilities. Under some contracts, growers—rather than LPDs—also cover the cost of repairs and manure disposal.⁸ An LPD's minimum price floor must accommodate the specific set of operating costs it requires growers to assume. Any price floor that does not allow growers to cover their operating costs, service their poultry-related debts, and make a reasonable return from raising the minimum number of flocks guaranteed by the poultry contract should be considered presumptively unfair. The USDA could define a reasonable return as, at a minimum, enough net income to compensate poultry growers' labor hours at the state minimum wage rate.

⁸ Janet Perry, David E. Banker, and Robert Green, *Broiler Farms' Organization, Management, and Performance*, Agriculture Information Bulletin No. 748, Economic Research Service, U.S. Department of Agriculture, at 12-14 (1999), <https://www.ers.usda.gov/publications/pub-details/?pubid=42211>.

A fair base pay rate needs to provide growers with enough return to service the debts that LPDs require growers to incur to obtain a contract. Securing a poultry contract is extremely capital-intensive. To enter the business, LPDs require growers to own highly specialized chicken houses built to the LPDs' specifications. These structures have little value outside the chicken industry.⁹ Today, the AMS estimates construction costs at nearly \$500,000 per poultry house. Average chicken farms have at least four houses, though the current trend is to build new farms with many more. On top of these costs, some growers invest hundreds of thousands of dollars, or more, in site preparation, construction, and equipment.¹⁰ Starting a chicken farm, thus, typically requires millions of dollars of upfront investment. Few farmers have this type of cash on hand, so the vast majority must seek out loans to participate in the business. Most poultry loans mature in 15 to 20 years and hold growers' homes or land as collateral.¹¹

The minimum price floor must account for the full set of costs for raising chickens, ensuring that growers who receive the minimum rate for their flocks can still make their loan payments and cover their operating costs. Because each LPD has unique capital requirements and makes its own decisions around which operating costs it will cover, the USDA may have to assess the necessary minimum on a regional or case-by-case basis. We prefer the latter approach, but if the USDA needs to streamline the process, it can also take on a regional approach to setting minimum pay thresholds.

High levels of regional concentration are also a relevant indicator that LPDs could be abusing their market power to unlawfully suppress pay below a fair and reasonable market rate. However, even in markets where growers appear to have four or more choices between LPDs, it is still possible that growers are not paid a fair market rate. For one, the USDA's data suggests that even in areas where growers have access to multiple integrators, growers face substantial barriers to switching between integrators. Further, the poultry industry has a track record of collusion to suppress prices paid to farmers, even in markets where farmers have multiple integrators to work with. A class of poultry growers recently passed a legal hurdle in their lawsuit alleging that Pilgrim's Pride and other LPDs colluded together to hold down growers' wages by sharing detailed information about farmer pay and agreeing not to poach or recruit growers from one another.¹² This suit follows a series of allegations that poultry integrators also colluded to raise prices for consumers and lower wages for workers. These past and ongoing antitrust cases demonstrate that the poultry and broader meat processing industry remain rife with collusive behavior, and the presence of multiple firms provides little assurance to growers that they will receive a true, fair market price for their products.

Despite these challenges, the average base price in markets with four or more integrators can still provide the USDA with a helpful metric to determine whether a minimum price is unfair. Specifically, if rates in areas with three or fewer integrators are substantially lower than rates in areas

⁹ William G. Whittaker, *Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview*, Congressional Research Service, at 5-6 (Oct. 27, 2006).

¹⁰ *Transparency in Poultry Grower Contracting and Tournaments*, 88 Fed. Reg. 83210 (Nov. 28, 2023) (codified at 9 C.F.R. 201), <https://www.federalregister.gov/documents/2023/11/28/2023-24922/transparency-in-poultry-grower-contracting-and-tournaments>.

¹¹ Small Business Administration, *Evaluation of SBA 7(a) Loans Made to Poultry Farmers*, (Mar. 2018), <https://www.sba.gov/sites/default/files/2019-07/SBA-OIG-Report-18-13.pdf>.

¹² Mike Scarcella, *Pilgrim's Pride Loses Bid to Block US Chicken Growers' Class Action*, REUTERS (May 9, 2024), <https://www.reuters.com/legal/litigation/pilgrims-pride-loses-bid-block-us-chicken-growers-class-action-2024-05-09/>; Claire Kelloway, *Chicken Farmers' Antitrust Suit Clears Hurdle, Plus New Data on Agribusiness Might*, FOOD AND POWER (May 15, 2024), <https://www.foodandpower.net/latest/broiler-growers-class-cert-ucs-lobbying-spend-report-may-24>.

with four or more integrators, the USDA could treat this discrepancy as an indication that the former rate is too low and therefore unreasonable, unfair, and an abuse of market power.

However, the USDA should not presume that the base price in markets with four or more integrators is fair. Ultimately, it is most important that the base price allows farmers to cover their production costs, service their poultry-related debt, and make a reasonable profit to compensate their labor. Any base price that does not afford farmers this opportunity is unfair and deceptive.

Payment Variance Caps

If, and only if, the USDA can guarantee (in writing) and enforce (in practice) the type of transparent, reasonable, fair market minimum pay rates described above, the proposed rule should incorporate the Department of Justice's (DOJ's) approach to capping bonus payments, as outlined in the Department of Justice's Final Judgement in *United States v. Cargill Meat Solutions Corp.* Through this decision, the processors subject to the DOJ's Consent Decree must provide their growers with a true, guaranteed base payment, with the option of adding incentive payments based on performance.¹³ Notably, the total incentive payments for flocks processed at a single complex cannot exceed 25 percent of the sum of total base payments and total incentive payments paid for flocks proceed at that complex on an annual basis.¹⁴

Existing data on the range of payments under the system suggest that a true minimum "base" payment, coupled with a maximum payment "cap" equivalent to 25 percent of the sum of the performance payments and base payments, can improve equity and provide farmers with more security, if mechanisms are in place to prevent unjustifiably low base payments. If the base pay is too low, limiting performance-based payments could decrease overall income for growers.

Under the current tournament system, in which LPDs largely determine the success of the flocks in the system, the variance between grower pay that exceeds 25 percent is unreasonable and unfair. It is reasonable to reward growers for hard work and superior management practices; however, as it stands, the tournament system does not award bonuses based on growers' efforts. Both the final weight and the feed conversion efficiency of a broiler chicken depend mainly on the initial health and gender of the chicks, the quality and reliable availability of their feed, and the time of flock pick-up—all factors that are controlled by the integrator, not the contract grower.¹⁵ When growers follow the company's rules, they should not experience significant variance in their ultimate pay rates.¹⁶

Data on feed conversion ratios (FCRs) for chickens further supports a policy that reduces variance in grower payments. Compared to other livestock, chickens are all quite efficient.¹⁷ They achieve FCRs

¹³ Claire Brown, *The Chicken Tycoons vs. The Antitrust Hawks*, NEW YORK TIMES MAGAZINE (Nov. 29, 2023), <https://www.nytimes.com/2023/11/29/magazine/chicken-industry-antitrust.html>.

¹⁴ *United States of America v. Cargill Meat Solutions Corp., et al.*, No. 1:22-cv-01821, District of Maryland, Final Judgement entered June 5, 2023.

¹⁵ Rural Advancement Foundation International, *RAFI Praises USDA's Proposed Rule on Poultry Tournament Systems*, Press Release (June 3, 2024), <https://www.rafiusa.org/blog/rafi-praises-usdas-proposed-rule-on-poultry-tournament-systems/>.

¹⁶ Farmers Legal Action Group, *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, (Sept. 2001), <http://www.flaginc.org/wp-content/uploads/2013/03/poultryrpt.pdf>.

¹⁷ National Agricultural Statistics Service, U.S. Department of Agriculture, *Trends in U.S. Agriculture: Broiler Industry* (2018), https://www.nass.usda.gov/Publications/Trends_in_U.S._Agriculture/Broiler_Industry/index.php.

in the 1.5-1.9 range.¹⁸ This means that, for a chicken with an FCR of 1.5, the chicken grows one kilogram for every 1.5 kilograms of feed it intakes (by comparison, the much higher and broader range for live cattle is 4.5-7.5). Given the tight FCR range for broiler chickens, it is safe to say that, even the most efficient chickens are not more than “25 percent better” (in terms of an FCR) than the “worst chickens.” Further, as previously stated, LPDs control many of the influential factors that determine this FCR variance. Considering that feed conversion varies less than 25 percent, it does not make sense that farmers’ pay varies more than 25 percent, especially when grower efforts are just one of many other factors that impact a broiler’s final FCR.

Ultimately, provided the USDA can require LPDs to set clear, fair minimum pay rates, the USDA should follow the DOJ’s lead in providing for a reasonable cap on the proportion of grower payments that come from bonuses, ensuring that no positive performance adjustment exceeds 25 percent of the minimum payment.

Repayment Assurances on Mandatory Capital Investments

The USDA rightfully recognizes that LPDs can coerce growers to make additional capital investments that do not always benefit them. Given high switching costs and existing debt obligations, growers have little power to challenge additional capital investments demanded by their LPD or negotiate for sufficient bonuses or incentive payments to cover the cost of additional capital investments. LPDs often request that growers make additional capital investments before the growers have paid off the loans that they took out to obtain their first poultry growing contract. Accordingly, growers feel pressure to accept LPDs’ terms to receive another contract and maintain their revenue stream to finance existing debt obligations. This issue of fairness and transparency in mandatory capital investments is relevant to issues in comparison-based payment methods because, without a clear minimum pay, farmers are unable to project their earnings and assess if they can pay off an additional capital investment.

According to USDA data, between 2004-2006, chicken farmers spent over \$650 million on upgrades to their chicken farms, an average of \$38,000 per farm.¹⁹ In a different survey, the USDA found that over three years from 2009-2011, 50 percent of contract poultry growers reported making an upgrade, and the majority of those (29 percent) were required to do so by their integrator.²⁰ When farmers are unable to service their existing loans because of lower-than-expected flock payments and mandatory upgrades, many are forced to refinance. For many farmers, this means carrying a risky loan for additional years—even decades. Poultry loans often hold farmers’ land and homes as collateral, which raises the stakes of default.

It is unfair for LPDs to require growers to make additional capital investments to maintain a poultry contract without also providing contracts that are long enough to allow them to pay off these required investments. Most broiler contracts are too short for growers to pay off the debts that LPDs require them to incur over the length of the contract. Thus, the USDA should consider it presumptively unfair

¹⁸ Ethan Brown, *Feed Conversion Ratios Help Explain Meat’s Outsized Climate Impact*, PBS (Mar. 20, 2022), <https://www.pbs.org/wnet/peril-and-promise/2022/03/feed-conversion-ratios-help-explain-meats-outsized-climate-impact/#:~:text=In%20an%20ideal%20world%2C%20it,the%201.5%20to%201.9%20range.>

¹⁹ Rural Advancement Foundation International, *What Debt in Chicken Farming Says About American Agriculture*, Contract Agriculture (July 12, 20106), <https://www.rafiusa.org/blog/what-debt-in-chicken-farming-says-about-american-agriculture/>

²⁰ Ibid.

if an LPD offers a contract that is shorter than the loan period for the capital investment they are demanding farmers to make. LPDs cannot demand that farmers take out substantial debt to do business with them without providing growers the reasonable opportunity to continue doing business with them during the investment's repayment period. This protection is particularly important and reasonable for the poultry industry because mandatory capital investments may be specific to just one LPD. If growers want to switch to a competing LPD or if their LPD drops their contract, they may not be able to repay their debt obligation on all mandatory capital investments.

In this same vein, the USDA should add language clarifying 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.” It is unfair for an LPD to require a grower to take on unsustainable debts to continue working with them. If an LPD believes a capital investment is necessary, but the LPD is not willing to offer growers enough compensation to pay off that investment, then the LPD should have to bear a larger part of the capital costs of the investment. LPDs structure their supply chains to closely control all factors of production without taking on the risks of owning certain depreciating assets including poultry barns. If LPDs want to control the type of capital that farmers invest in, they must allow farmers the opportunity to make a reasonable recoupment on that investment.

The USDA should define a reasonable opportunity for recoupment based on a farmer's ability to pay off a required capital investment, assuming they do not violate the terms of their contract and receive the minimum per pound payment 100 percent of the time over the course of their loan period and receive the minimum number of flocks annually at the minimum stocking density guaranteed in their poultry contract. If growers would be unable to make enough revenue at these rates to pay off the additional capital investment and earn a net income equal to their state minimum wage, then that required capital investment or contract should be considered unfair under the Packers and Stockyards Act. LPDs must either change the terms of their contracts or abandon the required capital investment to come into compliance.

Enforcing a Duty of Fair Comparison

By mandating that LPDs uphold a duty of fair comparison for performance-based payment methods, the USDA attempts to root out the central cause of unfair compensation in the tournament system, which is the fact that growers are paid based on the quality of inputs—a variable controlled exclusively by LPDs, not the growers themselves.

LPDs claim to provide growers with identical inputs and treatment, however, this is neither true nor biologically possible. The USDA cites a survey of 105 poultry growers that reveals imperfect and unequal treatment of growers by chicken companies is standard, with 92 percent of growers receiving chicks from a suboptimal layer flock, 83 percent going 12 hours without feed, and 75 percent receiving incorrect feed mix, among other issues. The USDA cites research showing that these factors impact feed conversion and other metrics that determine farmers' ranking in the tournament system, however, farmers cannot reasonably avoid any of these disruptions and disadvantages. Chick health, the age of the layer flock, feed mix and delivery, stocking, pickup, flock gender, tournament composition, and veterinary care are controlled by the LPD.

Chicken companies have a reasonable incentive to obtain the full value that they can with useable inputs, even inputs they know will not perform optimally (such as chicks from young layer flocks).

As such, farmers and their representatives report that input quality varies substantially and unfairly influences farmers' earnings. Some growers have alleged that LPDs actively manipulate their distribution of inputs to retaliate against farmers they dislike, especially farmers who attempt to organize.²¹

The current tournament payment system arguably violates the Packers and Stockyards Act's prohibitions against undue preferences and unfair treatment, which the Open Markets Institute illustrated in more detail in our previous comments to the USDA.²² The USDA must require LPDs to both equally distribute inputs and adjust performance-based pay for differences in inputs and treatment that LPDs could not or did not avoid.

The USDA's proposed duty of fair comparison in tournaments would require LPDs to implement systems that account for variable inputs and flock production practices. However, the USDA will need to take additional steps to ensure that growers are well educated about their new rights, that requests for non-comparison-based pay can be fairly adjudicated, and that LPDs' systems for fair comparison compliance are independently assessed.

To streamline enforcement, the USDA should outline specific instances of LPD-controlled issues that would automatically give farmers a right to non-comparison-based payment, if they desire it. This would include flock production decisions or input quality issues that are nearly certain to hurt farmers' performance and lower their pay in ranking-based payment systems. In all other instances, the LPD must report when they would like to deny a farmer's request for a non-comparison-based payment for the USDA to approve.

At a minimum, the USDA should guarantee that farmers can receive a non-comparison-based payment if they receive a diseased or otherwise highly deficient flock of chicks with a high early mortality rate. A typical mortality rate over the full life of a broiler flock is two percent to four percent, and most bird deaths happen near the end of a grow-out period.²³ Substantial bird mortality between 10 to 31 days of life is abnormal.²⁴ Of course, there are factors within a grower's control that could lead to mass mortality, such as improper ventilation, extreme barn temperatures, exposure to predators, or litter contamination. However, assuming a grower follows best management practices, they should not see high early mortality rates unless their LPD representative improperly adjusted the conditions in their barns or the grower received diseased chicks, genetically suboptimal chicks, poor medical treatment, or improper, insufficient, or contaminated feed.

²¹ Farm Aid, *Big Chicken: Poultry Growers Fight for Fairness*, Corporate Power (Nov. 14, 2023), <https://www.farmaid.org/blog/fact-sheet/big-chicken-poultry-growers-fight-fairness/>; Claire Kelloway, *Farmers Speak Out About Meatpacker Mistreatment, Call on USDA for Stronger Protections*, FOOD AND POWER (Jul. 18, 2019), <https://www.foodandpower.net/latest/2019/07/18/livestock-farmers-speak-out-about-meatpacker-mistreatment-call-on-usda-for-stronger-protections>

²² Open Markets Institute, *Comment to USDA on Poultry Growing Tournament Systems: Fairness and Related Concerns*, (Sept. 21, 2022), <https://www.openmarketsinstitute.org/publications/poultry-growing-tournament-systems-fairness-and-related-concerns>.

²³ USDA APHIS & Iowa State University, *US Poultry Industry Manual – Broilers: Grow Out*, The Poultry Site (Sept. 8, 2022), <https://www.thepoultrysite.com/articles/broilers-grow-out>; James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, Economic Research Service, U.S. Department of Agriculture (June 2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=4987.2 (USDA found an average 3.6% mortality rate in 2011).

²⁴ *Mortality in Broiler and Laying Hens*, Champrix (Aug. 8, 2022), <https://champrix.com/articles/mortality-in-broilers-and-laying-hens>.

LPDs have a reasonable financial incentive to grow out subpar flocks because many of those chicks will still yield valuable protein. However, it is unfair for farmers to bear the financial brunt of exceptionally subpar inputs. Some LPDs already offer farmers a non-comparison pay option when they must knowingly deliver them diseased or poor-performing chicks with high mortality rates, but the practice is not universal. The USDA should guarantee this option to all growers who receive a deficient flock with a high early mortality rate, or another indicator of an especially poor flock.

The Open Markets Institute believes it is important for the USDA to set out other clear indicators of when farmers are entitled to a non-comparison-based payment, if they desire it, to ease enforcement in the future. The USDA could consider additional, non-inclusive indicators, such as a feed disruption of more than 24 hours, a natural disaster that disrupts feed delivery or flock pickup, or improper or contaminated feed delivery (such as delivering a late-stage feed mix to a young flock).

To prevent LPDs from unfairly denying a request for non-comparison-based payment in situations where the USDA does not guarantee farmers a right to this option, the USDA should review all LPDs' requests to deny farmers' requests for a non-comparison-based payment.

The USDA should also expressly clarify that a pattern of unequal, dissimilar, or inappropriate inputs or production practices violates the Packers and Stockyards Act. This should hold across all types of payment systems in which the LPD controls key factors that can influence farmers' pay, including but not limited to tournament systems. Such a pattern could be considered both an unfair practice and an undue or unreasonable prejudice or disadvantage under the Act.

To further lower barriers to enforcement and quickly identify potential unfair or prejudicial treatment, the USDA should implement a precautionary three-strike principle. If a farmer receives unequal, dissimilar, or inappropriate inputs, or suffers from harmful production practices such as late feed delivery or pickup across three flocks in one year, that farmer should be entitled to an investigation into a pattern of unfair or prejudicial treatment. Poor treatment across three flocks should not be the minimum threshold that farmers must reach to merit an investigation into a pattern of unfair treatment, rather it should be a maximal threshold that triggers action by the USDA.

Required AMS Reviews

To effectively enforce this proposed rule the USDA must include language in the final rule that explicitly requires LPDs to submit to the AMS any contracts that it has modified or created to comply with the new provisions. The AMS must review each modified or new contract, on an individual basis, to ensure LPDs have not reduced total aggregated and individual grower payments in a way that indicates an abuse of monopsony power.

While such a review will require the AMS to engage in individual contract analysis, the burden on the agency is manageable. The AMS records demonstrate that 42 LPDs in the broiler chicken market filed fiscal year 2021 Annual Reports with the agency. The AMS also noted in the proposed rule that, currently, these 42 LPDs are the firms that would be subject to the proposed regulation. Because this known universe of LPDs provide growers with standard, boilerplate contracts, the AMS would not be overburdened by having to review each LPD's set of contracts to ensure it complies with the rule.

The USDA also has a history of engaging directly with distinct industries whose members require individual attention. Through its Pandemic Assistance for Producers initiative, the USDA provided industry-specific assistance to certified organic dairy producers, timber haulers and harvesters, West Coast ports that handled agricultural products, domestic cotton and wool apparel manufacturers, and spot market hog producers.²⁵ In each of these instances, USDA agencies worked to not only understand the nuances of a specific and oftentimes small domestic industry but also worked directly with individual members of these industries to ensure assistance was reasonable and meaningful. Frequently, aiding these groups meant engaging with every single member of the industry receiving assistance—i.e. the universe of organic dairy producers or the universe of domestic cotton and wool apparel manufactures. Similarly, here, growers and integrators alike will benefit from the AMS reviewing each revised and new contract to ensure it complies with the new rule and offers fair pay.

We otherwise believe the USDA has proposed a sensible system for documenting and ensuring compliance with its duty of fair comparison framework. An independent reviewer outside the LPD's chain of management should assess compliance. To strengthen review and compliance further, the AMS should require that the reviewer solicit feedback from a representative sample of growers during the review period, to include growers' perspectives in their final report. Responses should be anonymized, and growers should receive protection from retaliation. Additionally, LPDs should submit their bi-annual compliance reviews to the AMS, rather than conduct the entire process internally.

Conclusion

The Open Markets Institute commends the USDA for proposing this rulemaking and seeking public comment. We hope the USDA will strengthen its final rule to ensure that contract poultry growers finally have an opportunity to receive fair and transparent pay that covers their debts and costs of doing business. We support the proposed rule and urge the USDA to finalize it.

²⁵ U.S. Department of Agriculture, *USDA Pandemic Assistance for Producers*, <https://www.farmers.gov/coronavirus/pandemic-assistance>