

**Before the
UNITED STATES DEPARTMENT OF AGRICULTURE
Washington, D.C. 20250**

**Poultry Growing Tournament Systems:
Fairness and Related Concerns**

Docket No. AMS-FTPP-22-046

**WRITTEN SUBMISSION OF
FEDERAL TRADE COMMISSION CHAIR LINA M. KHAN**

I. Introduction¹

I appreciate the opportunity to respond to the Department of Agriculture's request for comments on the Advance Notice of Proposed Rulemaking, "Poultry Growing Tournament Systems: Fairness and Related Concerns."² The FTC has a special interest in rulemaking under the Packers and Stockyards Act, given that the Packers and Stockyards Act was modeled in part on the Federal Trade Commission Act, and that both statutes seek to promote fair competition.³

The USDA's proposed rule on transparency in poultry grower contracting and tournaments⁴ is an important first step toward a more fair, competitive, and resilient food system. However, in light of the severe degree of concentration in local markets for poultry grower services, additional rulemaking that involves specific prohibitions and limitations on deceptive, unfair, and discriminatory contract terms and business practices is needed to supplement any disclosure rule. I appreciate that the USDA is studying these issues and recommend further policy development and rulemaking aimed at the substantive issues of unfairness, deception, and discrimination in the poultry sector.

II. Monopsony, Oligopsony, and Market Power in the Poultry Sector

The poultry sector has become increasingly concentrated in recent decades and is one of the most vertically integrated parts of the food system.⁵ Poultry companies own and control the production process from start to finish. The top four companies control 54% of the market.⁶ Many local markets for poultry growers are significantly more concentrated. Fully half of poultry growers have a choice of only one or two poultry companies with which they can work.⁷

¹ The views expressed in this comment are my own and do not necessarily reflect the views of the Commission or any other Commissioner. This comment is in reference to Document Number: 2022-11998.

² See Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814-01 (proposed June 7, 2022). This advanced notice of proposed rulemaking is hereinafter referred to as the "ANPR." The Department of Agriculture is hereinafter the "USDA." The Federal Trade Commission is hereinafter the "FTC."

³ In 1919, the FTC published a series of reports describing a variety of anticompetitive practices that were common in the meatpacking and meat-processing industry. See Fed. Trade Comm'n, *Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part I (Extent and Growth of Power of the Five Packers in Meat and Other Industries)*; Fed. Trade Comm'n, *Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part II (Evidence of Combination among Packers)*; Fed. Trade Comm'n, *Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part III (Methods of the Five Packers in Controlling the Meat-Packing Industry)* (1919). These reports presaged the passage of the Packers and Stockyards Act in 1921 to protect farmers from abusive business practices. The Packers and Stockyards Act's proscriptions on "unfair, unjustly discriminatory, or deceptive practice[s]" closely parallel the Federal Trade Commission Act's proscriptions on "unfair or deceptive acts or practices[.]" See 7 U.S.C. § 192 (a); 15 U.S.C. § 45(a).

⁴ Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980-01 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201). This rule is referred to as the "proposed rule" herein.

⁵ Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop at 10-11 (May 21, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf>.

⁶ *FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, The White House (Jan. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>.

⁷ James M. McDonald and Nigel Key, *Market Power in Poultry Production Contracting? Evidence from a Farm Survey*, 44 J. AGRIC. AND APPLIED ECON. 477 (2012).

Evidence suggests that the market power that poultry companies wield is significant. Research shows that these poultry processors can dictate price, quantity, and the minutest operational details of how poultry growers do business, and that they have created a system that shifts the economic risks of chicken production onto poultry growers, increasing their own share of the gains in the system.⁸ Farmers have also shared how poultry companies have wielded their market power to control growers through both the threat of and actual retaliation.⁹

Raising chickens is the riskiest step in the poultry-production process—and it is the single step that poultry companies contract out. Poultry growers work on contract and do not own the chickens they raise or the food or medicine they use in their trade. Instead, poultry companies provide these items, maintaining tight control over the inputs into the chicken-rearing process, including the age and breed of flocks, quality of food, quality of medicine, and timing of delivery for processing.¹⁰

Once a flock of chickens is fully grown, the growers return the chickens to the companies for processing. The companies evaluate the chickens and determine the price for each flock through using the “tournament” system, which pays farmers according to their relative rankings, effectively pitting farmers against one another. This “tournament” system also enables the companies to maintain wide discretion over the prices they pay and keep growers largely in the dark about how those prices are set. These prices can vary significantly from year to year, having a large impact on growers’ year to year earnings.¹¹ One study found that growers lose money two years out of every three,¹² while another found that prices are set so low that that nearly three quarters of growers whose sole source of income is chicken farming live below the poverty line.¹³

⁸ Brian Deese, Sameera Fazili, and Bharat Ramamurti, *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, THE WHITE HOUSE (Dec. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/>.

⁹ Isaac Arnsdorf, *How a Top Chicken Company Cut Off Black Farmers, One by One*, PROPUBLICA (June 26, 2019), <https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one>.

¹⁰ *The Business of Broilers: Hidden Costs of Putting a Chicken on Every Grill*, PEW CHARITABLE TRUSTS at 16-19 (2011).

¹¹ Farmers have explained how the system is rife with opacity and arbitrariness. For example, poultry growers have no opportunity to verify the weights that poultry companies claim to use in determining grower compensation. *See, e.g.*, Hiba Hafiz and Nathan Miller, *Big Ag’s Monopsony Problem: How Market Dominance Harms U.S. Workers and Consumers*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Feb. 18, 2021), <https://equitablegrowth.org/competitive-edge-big-ag-s-monopsony-problem-how-market-dominance-harms-u-s-workers-and-consumers/>.

¹² C. Robert Taylor & David A. Domina, *Restoring Economic Health to Contract Poultry Production*, U.S. Department of Justice and U.S. Department of Agriculture Public Workshop on Competition Issues in the Poultry Industry Report (May 21, 2010).

¹³ *The Business of Broilers*, *supra* note 10 at 1. Data show that in addition to driving down earnings for poultry growers, poultry companies have driven up prices for consumers. Brian Deese, Sameera Fazili, and Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, THE WHITE HOUSE (Sep. 8, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

Poultry companies require growers to bear most of the capital costs of production, including land, buildings, and equipment.¹⁴ They mandate detailed and unique specifications for poultry houses and equipment, including square footage, ventilation capacity, watering systems, waste management, and more. Farmers have noted that these requirements often have the effect of locking growers into exclusive relationships with particular firms.¹⁵ Processors also regularly require growers to update their facilities and equipment.¹⁶ Research has shown that many growers take on substantial debt to cover the upfront capital costs of a poultry-growing operation and that they struggle or fail to repay that debt.¹⁷

In addition to setting up a system that extracts maximum value, poultry processors have reportedly exercised their power through retaliatory business practices, chilling free speech and core liberties. Farmers recounted to government officials how poultry companies threatened to retaliate against growers who attended and spoke at a USDA-DOJ workshop, noting that the opacity of the tournament system provided the companies with a range of subtle means to do so.¹⁸ Reporting has also shown that poultry companies have manipulated the inputs of the production process to punish growers who speak out about industry abuses, including retaliating against farmers of color.¹⁹

The ANPR and proposed rule reflect a keen understanding of these market dynamics, and USDA rightly acknowledges that poultry companies often function as local monopsonists or oligopsonists with the power to control prices, prescribe contract terms, and retaliate against growers who object to these tactics. Few growers would accept these unfair contract terms, punitive business practices, and substandard economic outcomes if they had meaningful choice.

III. The Problem of Asymmetrical Information and the Proposed Rule's Remedy

The proposed rule identifies numerous information asymmetries that exist between poultry companies and poultry growers. For example, growers generally lack information on the wide range of payments available in the tournament system, which frustrates their ability to project earnings.²⁰ Growers also lack reliable information on the income effects of input quality

¹⁴ See generally Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop (May 21, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf>.

¹⁵ *Id.*

¹⁶ *Id.* at 105-106. A USDA survey revealed that 49% of growers were required to make one-time capital investments in 2004 and that the average amount for a single-year investment was \$49,037 per grower. *Technology, Organization, and Financial Performance in U.S. Broiler Production*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERVICE, Economic Information Bulletin Number 126 at 12 (June 2014).

¹⁷ James M. MacDonald, *The Economic Organization of U.S. Broiler Production*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERVICE, Economic Information Bulletin Number 38 at 8 (June 2008).

¹⁸ Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop at 165 (May 21, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf>. ("Let me say that numerous growers are not attending these workshops because of being afraid of retaliation on them by their integrator. A grower this morning has already been threatened by his service person if he attends and speaks at this forum.")

¹⁹ Arnsdorf, *supra* note 9.

²⁰ See 87 Fed. Reg. 34986-89.

variability, including poultry breed, poultry flock origin, gender ratio, health, feed quality, and medicine quality.²¹ Other examples abound.

The proposed rule creates disclosure requirements to address these information asymmetries. For example, the proposed rule requires poultry companies to disclose the income range of poultry growers in a prospective grower's region; information about the origin, breed, gender ratio, and health of the flock placed with the grower within 24 hours of delivery; and much more.²² The proposed rule also requires CEOs of poultry companies to certify the accuracy of these required disclosures and cooperate with USDA audits of disclosed information.²³

IV. The Need for Substantive Limits in Poultry Grower Contracts

Mandatory disclosure requirements are an important first step toward addressing the information asymmetries that the USDA has identified. However, while disclosure rules can address deception, they cannot address unfairness if growers lack robust competition for their services or any meaningful choice. Put another way, it only helps to know you are getting a bad deal if someone else is offering a better one.²⁴

Some economic models posit that equipping chicken growers with more information could lead to improved economic outcomes.²⁵ As a general matter, these models presume that market participants will seek out information and comparison shop when they believe that they can benefit from such activities. As disclosure makes pricing arrangements and contract terms more transparent and widely understood, these models predict that companies will find new ways to compete to attract informed customers. In other words, these models posit that in an ideally functioning market, where perfect information is available at no cost to each market participant, fully informed actors will make rational choices that are optimized for their financial circumstances and lifestyles.

This theoretical account of market behavior breaks down in an oligopsonistic (and in some localities, monopsonistic) market like the poultry sector. The availability of disclosures may greatly affect market behavior in competitive markets, but the degree of concentration in this sector severely diminishes poultry growers' ability to choose to do business with competing poultry processors. The premise of disclosure regulation is to improve market participants' ability to make informed choices. It follows that a standalone disclosure regime cannot be effective when market participants lack meaningful choice.²⁶

²¹ *See id.*

²² *See id.* at 34991-96.

²³ *See id.* at 34996.

²⁴ While disclosure of unfair terms may dissuade new entry into the poultry sector, those that have already invested significantly in growing operations can make limited use of such information absent competition.

²⁵ *See, e.g.,* Michael J. Fishman & Kathleen M. Hagerty, *Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Consumers*, 19 J.L. ECON. & ORG. 45-46 (2003); Paul H. Rubin, *Information Regulation (Including Regulation of Advertising)*, ENCYCLOPEDIA OF L. AND ECON. 271-73 (2000 ed.).

²⁶ As noted above, standard economic models posit that disclosure generally provides an incentive to companies to compete for better informed customers. This logic also fails in markets where producers lack meaningful choice among competing buyers.

While disclosure is an important step, the severe degree of concentration that typifies local and regional poultry markets requires more. For these reasons, I strongly support USDA's plan to pair its disclosure rule with further policy development and rulemaking that addresses unfair, deceptive, and discriminatory contract terms and business practices through specific prohibitions and limitations.²⁷

V. Remediating the Harms Caused by Unfair Contract Terms

As noted above, the FTC Act implicates many of the same concerns as the Packers and Stockyards Act. In particular, the FTC Act bans “unfair methods of competition in or affecting commerce, and unfair . . . acts or practices in or affecting commerce.”²⁸ The Packers and Stockyards Act makes it unlawful for packers, swine contractors, and poultry dealers to “engage in or use any unfair . . . practice or device.”²⁹ Below, I highlight several examples where the FTC has used its unfairness authorities, both through rulemaking and enforcement actions, to remediate the harms caused by unfair contract terms.

First, the FTC has used rulemaking to prohibit certain one-sided contract terms where competition failed “to produce the mix of standardized contract terms that would best satisfy borrower preferences” and therefore where there existed “no bargaining over the boilerplate contract terms.”³⁰ Finding that these conditions produced contracts that substantially injured consumers, the FTC promulgated its Credit Practices Rule to protect consumers from unfair terms and conditions in credit contracts.³¹ For example, companies once used contracts that routinely authorized creditors collecting defaulted loans to seize and sell the borrowers' clothing, furniture, and other belongings.³² Wage-assignment provisions were another common feature of consumer credit contracts. A wage assignment permits a creditor, upon filing with the debtor's employer, to take all or a portion of the debtor's wages directly from his employer.³³ The Credit Practices Rule prohibits certain lenders and retailers from including these and other onerous remedies in consumer credit contracts.³⁴

²⁷ 87 Fed. Reg. at 34815.

²⁸ 15 U.S.C. § 45(a).

²⁹ 7 U.S.C. § 192 (a).

³⁰ 49 Fed. Reg. 7740, 7445-56 (1984).

³¹ See 16 C.F.R. § 444; 49 Fed. Reg. 7789. The market for consumer credit, and specifically for default remedies, is governed by standardized contracts that are not the product of consumer bargaining. For example, as the FTC's Statement of Basis and Purpose for the Credit Practices Rule explained, consumers do not comparison shop for credit based on remedial provisions in credit contracts. See 49 Fed. Reg. 7742-47. In addition, the contracts are written in obscure, technical language, and creditors have little incentive to provide remedial options that are attractive to consumers. See *id.*

³² 49 Fed. Reg. at 7761.

³³ Unlike wage garnishments, wage assignments may be filed without any judicial review of the creditor's claims. 49 Fed. Reg. at 7755.

³⁴ In its Statement of Basis and Purpose for the rule, the FTC noted that “in a well-functioning market, competition . . . would tend to produce the mix of standardized contract terms that would best satisfy borrower preferences.” 49 Fed. Reg. 7746. The FTC explained that “[i]n such circumstances, consumers could reasonably avoid undesirable contracts[.]” *Id.* The FTC acknowledged that “[a]lthough some options exist, and some consumers may search for contract provisions they prefer,” multiple factors made “comparison of competing contracts . . . difficult and costly.” *Id.* When the Credit Practices Rule was issued, the consumer credit market offered far more choice than contract growers encounter in the poultry sector. Nonetheless, the FTC found that the prevalence of take-it-or-leave-it contracts with oppressive boilerplate terms was a major factor that justified the issuance of the rule.

The FTC has also successfully challenged unfair contract terms where the material terms of a bargain changed and one party had little to no exit option. These terms have included a provision that offered “lifetime” annual renewal fees for guarantees of protection against termite damage that was later amended to raise those fees,³⁵ and a provision that warned customers, through package inserts included in product shipments, that they would owe hundreds of dollars to the company if they wrote negative reviews about its products.³⁶ The FTC has also challenged the unfair *use* of contract terms, as in a case where a company’s standard contract provided for confessions of judgment, and the company used confessions of judgment against consumers who had not breached their contracts or were current in their payments.³⁷

Finally, the FTC has exercised its authority to challenge coercive contracts in contexts where a dominant firm used its market power to force acceptance of other onerous terms that furthered its own competitive advantage. For example, the FTC stopped three major oil companies from forcing their service stations and dealers to buy tires and other products from tire companies where the oil companies took commissions on the sales of those products.³⁸

The examples of enforcement actions listed above do not feature precisely the same unfair contract terms or legal issues as those at issue in the ANPR. Nonetheless, the USDA could apply broadly similar reasoning to justify restrictions on unfair contract terms in the poultry sector.

VI. Conclusion

The USDA’s issuance of its proposed rule is an important and constructive step towards promoting a more fair, competitive, and resilient food system. I urge the USDA to build on this disclosure-based effort by promulgating rules that contain specific prohibitions and limitations on deceptive, unfair, and discriminatory contract terms and business practices. The FTC stands ready to engage with USDA staff to lend support to the agency’s rulemaking activities in this critical area.

³⁵ See *In re Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 (1986), *aff’d*, *Orkin Exterminating Co. v. Fed. Trade Comm’n*, 849 F.2d 1354, 1357 (11th Cir. 1988).

³⁶ See *Fed. Trade Comm’n v. Roca Labs, Inc.*, No. 8:15-cv-2231, ECF No. 253 (M.D. Fla. Jan. 4, 2019). The FTC has also prevailed in an unfairness case where the party with superior bargaining power included a fine-print provision that would have made enforcement of the contract far more difficult for the weaker party. In *Fed. Trade Comm’n v. NorVergence*, No. 2:06-cv-2883, ECF Nos. 3, 4, 6 (D.N.J. Jun. 29, 2006), the court found that a telemarketing services provider’s use of a fine print forum-selection clause was unfair within the meaning of the FTC Act.

³⁷ See *Fed. Trade Comm’n v. RCG Advances, Inc.*, No. 1:20-cv-4432, ECF No. 84 (S.D.N.Y. Jun. 10, 2021).

³⁸ See *Atl. Ref. Co. v. Fed. Trade Comm’n*, 381 U.S. 357, 368-72 (1965); *Fed. Trade Comm’n v. Texaco, Inc.*, 393 U.S. 223, 225-30 (1968); *Shell Oil Co. v. Fed. Trade Comm’n*, 360 F.2d 470, 475-78 (5th Cir. 1966).