

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

Poultry Grower Payment Systems and
Capital Improvement Systems

Docket No. AMS-FTPP-22-0046

WRITTEN SUBMISSION OF
THE U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION AND FEDERAL
TRADE COMMISSION CHAIR LINA M. KHAN

The U.S. Department of Justice and Federal Trade Commission Chair Lina M. Khan submit the following filing as part of the above-captioned proceeding.

I. Introduction and Interest

The Antitrust Division of the U.S. Department of Justice and the Chair of the Federal Trade Commission¹ provide this comment on the United States Department of Agriculture's rulemaking entitled "Poultry Grower Payment Systems and Capital Improvement Systems."² We have a special interest in rulemaking under the Packers and Stockyards Act, because the Department of Justice often enforces the statute and the statute was, in part, modeled on the Federal Trade Commission Act.³ We applaud the USDA's efforts to bolster fairness for poultry growers and improve enforcement of the Packers and Stockyards Act. We submit our comment today to answer questions raised by USDA in their notice of proposed rulemaking.

II. Broiler Grower Compensation Design (§ 201.106)

A. USDA asks whether it is presumptively unfair for comparison-based compensation to equal or exceed 25 percent of total compensation for any grower.⁴ We believe the answer is yes, and the rule should include a presumption that variable compensation greater than 25 percent of total compensation is unfair. We break this analysis into three parts: limiting the proportion of comparison-based compensation would prevent unfairness and deception, a 25 percent ceiling is justified, and a presumption offers significant benefits.

1. Need for a Ceiling

Tournaments that rely on penalties are inherently deceptive and unfair. The proposed rulemaking explains that broad and unavoidable variance in potential outcomes prevents growers from understanding the risks and rewards of the tournament system, without which they cannot make meaningful, informed contracting and business decisions. Second, a broad variance in outcomes that depends on factors beyond the growers' control unfairly increases risk experienced by growers.⁵ Further, the live poultry dealers frequently possess significant monopsony power.⁶

The proposed rule attempts to address these concerns by eliminating penalties. Without a ceiling on variable compensation, however, live poultry dealers could easily circumvent the rule.

¹ The views set forth herein represent the Chair's views only and not those of the Commission or any other Commissioner.

² 89 Fed. Reg. 49,002 (proposed June 10, 2024) (to be codified at 9 C.F.R. pt. 201).

³ See Packers and Stockyards Act, 7 U.S.C. § 192 (a); Federal Trade Commission Act, 15 U.S.C. § 45(a). The Department of Justice has exclusive enforcement authority over live poultry dealers. Compare 7 U.S.C. § 193 with 7 U.S.C. § 224. For more detailed history, see generally Michael Kades, *Protecting Livestock Producers and Chicken Growers*, WASH. CTR. FOR EQUITABLE GROWTH (May 5, 2022), <https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/>; and Lina M. Khan, Comment Letter on Poultry Growing Tournament Systems: Fairness and Related Concerns, FED. TRADE COMM'N n.2 (Sept. 1, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/poultry-growing-tournament-systems-docket-no-ams-ftpp-22-046-fairness-related-concerns>.

⁴ Poultry Grower Payment Systems and Capital Improvement Systems, 89 Fed. Reg. at 49,011-12 § 201.106.C.3-4.

⁵ Kades, *supra* note 3, at 22.

⁶ 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).

They could lower base pay and increase the percentage of variable compensation. USDA recognizes that, if the fixed portion of grower compensation is too low, “the LPD (and not the growers) would obtain most or all of the benefit of efficiency gains from grower investments.”⁷ We agree. In circumstances where the fixed portion of compensation is too low and the variable compensation is too large, the tournament is deceptive and unfair.⁸ The growers will be unable to adequately assess the risk of the tournament, much less avoid it, and most growers need more predictable compensation given their debt.⁹ Increasing risk through excessive and unavoidable variance is unfair to the growers. Accordingly, a limit to variable-based compensation is needed to effectuate the intent of the rule. DOJ and USDA included such a provision in the Wayne-Sanderson consent decree.¹⁰ Indeed, absent such a limitation, a live poultry dealer might even reduce base pay to zero, make all compensation variable, and still claim to be complying with the rule.

2. *Limiting Variable Compensation to 25 Percent of Total Compensation*

The 2022 DOJ and USDA Wayne-Sanderson consent decree limited variable pay to 25 percent of total compensation. The 25 percent cap has proven workable for both a major live poultry dealer and the growers contracted with Wayne-Sanderson. Further, we are not aware of significant empirical evidence establishing that the tournament system or substantial variable compensation affects grower performance.

3. *Value of a Presumptive Ceiling*

Although the evidence may support a ban on variable compensation that exceeds 25 percent of total compensation, adopting a rebuttable presumption would strengthen the rule and be consistent with the Wayne-Sanderson decree. A presumption would protect growers from unfair and deceptive acts while allowing consideration of specific factual circumstances that would justify allowing variable compensation to exceed 25 percent.

B. USDA also asks whether it should adopt a rule that more prescriptively requires that the base pay rate must be expected to provide a reasonable opportunity for a grower that delivers under the contract to earn a reasonable return.¹¹ DOJ and Chair Khan, based on our respective experiences addressing monopsony markets, believe USDA should adopt such a reasonable return standard. While addressing the unfairness of unpredictable, variable pay is an important step towards a fair compensation system, it may not address broader concerns of monopsony power suppressing grower compensation.

C. USDA further asks about risks to growers during the transition to § 201.106.¹² DOJ and Chair Khan suggest that, for the duration of a reasonable transition period, USDA require that current payments remain overall comparable, so that live poultry dealers cannot

⁷ 89 Fed. Reg. at 49024 col. 2.

⁸ For greater certainty, when referring to variable compensation and variability, DOJ and FTC focus on variability caused by factors outside the grower’s control, not inherent variability due to factors within grower control (i.e., skill, effort, and so on).

⁹ See *infra* Section III.

¹⁰ See Final Judgement at 8-9, *United States v. Cargill Meat Solutions Corp., et al.*, No. 1:22-cv-1821 (D. Md. filed June 5, 2023).

¹¹ Assuming they comply with general production practices. See 89 Fed. Reg. at 49,011 § 201.106.C.2.

¹² *Id.* at 49,012 § 201.106.C.11-12.

arbitrarily lower grower base pay or overall compensation during the transition period or impose other unfair contract terms. USDA should also require that modified contracts have, at a minimum, the same length as the period covered by the grower's initial contract. USDA review of grower contracts, through comparison to past years, is an efficient way to achieve this goal.

III. Broiler Grower Capital Improvement Disclosure Document (§ 201.112)

USDA asks whether it should amend § 201.216 to include additional criteria that may be considered as categorical presumptions of unfairness with respect to capital investments. Specifically, USDA asks whether it should include an additional requirement that a live poultry dealer cannot mandate or request an additional capital investment unless the cost of the required additional capital investment can reasonably be expected to be recouped by the grower.¹³ It would be unfair under the Packers and Stockyards Act if a live poultry dealer mandates (whether explicitly or implicitly) an additional capital investment and the grower cannot reasonably expect to recoup the proposed investment. Reasonable recoupment should include paying off the debt plus a reasonable rate of return.

When a live poultry dealer mandates or requests additional capital investment, the grower has little negotiating leverage. Growers typically incur substantial debt; may sell only to the contracting live poultry dealer; depend on that dealer for chicks, feed, and other critical inputs; and generally have few or no alternative dealers to contract with. The grower faces a Hobson's choice: either agree to the additional investment or face termination, loan default, and substantial financial hardship. Under these circumstances, a request for additional capital investment may be unfair. DOJ and Chair Khan also suggest that USDA clarify that a facially voluntary or suggested capital investment can be mandatory in fact and falls within the scope of the rule.¹⁴

Reasonable recoupment will depend on industry practice, grower expectations and understanding, and market dynamics, and will require case-by-case enforcement over time.

IV. Conclusion

The proposed rule is a vital step towards securing fair, competitive, and sustainable poultry markets. DOJ and Chair Khan value our longstanding collaborative relationship with USDA. The proposed rule makes important changes that will prevent unfair and deceptive acts in poultry tournaments that would violate the Packers and Stockyards Act. We submit this comment to help USDA improve and finalize its rule.

¹³ *Id.* at 49,025 § 201.112.C.10.

¹⁴ For example, retaliation, threatened termination, and other forms of coercion are forms of mandatory requirements of additional capital investment for the purposes of determining unfairness under section 202. DOJ and Chair Khan take no position on additional capital investments that are voluntary in fact.