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Re: Transparency in Poultry Grower Contracting and Tournaments Proposed Rule

The undersigned organizations (collectively, "Commenters") respectfully submit these comments in response to the U.S. Department of Agriculture, Agricultural Marketing Service's ("AMS") Transparency in Poultry Grower Contracting and Tournaments Proposed Rule, AMS-FTPP-21-0044 ("Proposed Rule"). We are encouraged that AMS is looking to strengthen the protections Congress enshrined in the Packers and Stockyards Act ("PSA" or "the Act") to account for present day conditions and challenges faced by producers in the poultry industry. This proposed transparency rule is an important first step in that direction. The extreme consolidation and vertical integration in the poultry industry places excessive market power in the hands of a very small number of live poultry dealers, which use that power to manipulate markets and take advantage of their contract growers.[1] Addressing the informational asymmetry between vertically integrated live poultry dealers ("integrators") and growers or potential growers as laid out in the Proposed Rule will help inform a grower or potential grower whether to enter or remain in this risky and often abusive system and could assist in identifying unlawful practices and initiating enforcement actions.

While the Proposed Rule is a welcomed *first* step, it alone does not go far enough. As AMS recognizes, the PSA "seeks to promote fairness, reasonableness, and transparency in the marketplace by *prohibiting practices* that are contrary to these goals." 87 Fed. Reg. 34980, 34980 (June 8, 2022) (emphasis added). The Proposed Rule has the potential to limit one type of abusive practice—using power asymmetries in flock placement frequency and stocking densities as a weapon against disfavored growers—but otherwise simply requires the integrator disclose its enormous control and discretion over a grower's ability to succeed, potentially illuminating certain ways in which a grower has been or could be abused by the integrator. However, the PSA

[1] *See, e.g.*, Michael Kades, Washington Center for Equitable Growth, Protecting Livestock Producers and Chicken Growers (May 2022), https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.

was enacted to *stop* harmful conduct in its incipiency, not simply inform producers of the potential for that conduct. In effect, the Proposed Rule, standing alone, puts the burden of enforcing the Act on growers who are in dramatically asymmetrical relationships with integrators. It is inconsistent with the PSA for AMS to leave growers to fend for themselves against powerful integrators. The Agency therefore must not only finalize this rule, but also proceed with substantive prohibitions in response to the information received through the pending advanced notice of proposed rulemaking in order to make meaningful change in this presently unfair system. *See* Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (June 8, 2022) (hereinafter, "Tournament System Fairness ANPR").

I. Interests of Commenters

Commenters are a diverse group of non-profit organizations representing farmer, sustainable agriculture, environmental, animal welfare, and consumer interests. Collectively, Commenters represent millions of members and supporters across the country.

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. FWW has long advocated for better controls over integrators to protect farmers, consumers, and the environment.

Animal Legal Defense Fund ("ALDF") is a national, nonprofit membership organization based in California with over 300,000 members and supporters nationwide. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. One way ALDF achieves this mission is by advocating and litigating for transparency and effective oversight of the industrial animal agriculture system across the United States—including as it relates to poultry integrators.

MountainTrue is an environmental non-profit working for Healthy Communities, Resilient Forests, and Clean Water in Western North Carolina. **Broad Riverkeeper** has been a program of MountainTrue for 7 years now. We believe that the corporate integrators of factory farms should be held accountable for an array of external costs associated with these factories, including: decreased property values in rural areas which are saturated by these operations, water and air pollution associated with the huge amount of waste generated, adverse health effects suffered by neighbors in close proximity, and displacement of truly sustainable meat producing farms. We also believe that the abusive Tournament System in which poultry growers must operate places them in opposition/competition with their neighboring growers, while undermining the real and historical farming values of helping and supporting each other and working together to build healthy communities.

The **Buffalo River Watershed Alliance** ("BRWA") is a non-profit, 501(c)(3) volunteer organization created in early 2013 in direct response to the first and largest hog CAFO of its kind in Arkansas. BRWA was organized by stakeholders living in the Buffalo River watershed, but its supporters span the state and region. Its mission is to help preserve and protect the scenic beauty and pristine water quality of the Buffalo National River by opposing and preventing the construction and proliferation of industrial concentrated animal feeding operations within the watershed. After the successful closing of the swine CAFO in 2019, BRWA continues to monitor developments that could threaten the watershed. This includes continued work on a permanent moratorium on hog CAFOs in the watershed as well as monitoring other threats such as the spread of agricultural waste beyond agronomic need and plans for extensive logging in the headwaters of the watershed.

The **Campaign for Family Farms and the Environment** ("CFFE") is a coalition of state and national organizations, including Dakota Rural Action (SD), Iowa Citizens for Community Improvement, Land Stewardship Project (MN), Missouri Rural Crisis Center, Food & Water Watch and Institute for Agriculture and Trade Policy. We work together to support family farmers, rural communities and a vibrant, sustainable food system. Through this work, we oppose national, state and local policies propping up corporate factory farms that are putting independent livestock producers out of business, extracting wealth from our rural communities, polluting our land, water and air, and threatening our national security.

The **Catawba Riverkeeper Foundation** ("CRF") is a member-funded environmental nonprofit that educates and advocates for the protection of the Catawba-Wateree River and all its tributaries. Our organization represents over 6,000 active members who rely on the watershed for drinking water, recreation, and electricity. There are over 750 poultry operations in the watershed, raising more than 50 million turkeys and broiler chickens annually.

Center for Food Safety ("CFS") is a national, non-profit 501(c)(3) organization with nearly one million members and supporters. CFS's mission is to empower people, support farmers, and protect the environment from industrial agriculture. CFS promotes truly sustainable and regenerative agriculture, like organic and ecological farming. For 25 years, CFS has furthered this mission through legal actions, groundbreaking scientific and policy reports, books and other educational materials, and market pressure and grassroots campaigns through our True Food Network. One of CFS's flagship programs seeks to end the harms of industrial meat production on farmers, animals, and the environment.

The **Center for a Livable Future** ("CLF") operates out of the Johns Hopkins Bloomberg School of Public Health from the Department of Environmental Health and Engineering and works with students, educators, researchers, policymakers, advocacy organizations and communities to build a healthier, more equitable and resilient food system.

Farm and Ranch Freedom Alliance ("FARFA") is a nonprofit organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems. Many of FARFA's members raise poultry and livestock. While FARFA's farmer members typically sell direct-to-consumer or to independent outlets (rather than

integrators), the conditions and laws that govern the industry as a whole have both direct and indirect impacts on both our farmer and consumer members.

Friends of the Earth ("FOE"), founded by David Brower in 1969, fights to create a healthy and just world. Our Climate-Friendly Food Program aims to reduce the harmful impacts of industrial animal agriculture and build a more just and resilient food system through policy change and by reducing institutional purchases of industrial meat and dairy while driving increased demand for plant-based foods and organic, high welfare, and pasture-raised animal products.

Public Justice is a national public interest advocacy organization that specializes in connecting high-impact litigation with strategic communications and the strength of our partnerships to fight these abusive and discriminatory systems and win social and economic justice. The Public Justice Food Project employs those techniques to take on industrial animal agriculture and its ills. Among its work, it is presently advocating alongside poultry growers and ranchers to stop anticompetitive practices facilitated by industry and USDA.

The **Ranchers Cattlemen Action Legal Fund United Stockgrowers of America** ("R-CALF USA") is the largest trade association exclusively representing United States cattle farmers and ranchers within the multi-segmented beef supply chain. It is also the largest all-voluntary membership-based cattle trade association with nearly 5,000 voluntary dues paying members in over 40 states. Its membership includes cow-calf operators, cattle backgrounders and stockers, cattle feedlot owners, and sheep producers. Numerous main street businesses are non-voting members of R-CALF USA.

Socially Responsible Agriculture Project ("SRAP") has served as a mobilizing force for more than 20 years to help communities protect themselves from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. Our team includes technical experts, independent family farmers, and rural residents who have faced the threats of factory farms in their communities. When asked for help, SRAP offers free support, providing communities with the knowledge and skills to protect their right to clean water, air, and soil and to a healthy, just, and vibrant future.

Waterkeeper Alliance is the largest and fastest-growing nonprofit solely focused on clean water. The organization works to preserve and protect water by connecting and mobilizing more than 300 local Waterkeeper groups worldwide. Waterkeeper Alliance strengthens and grows this global network of grassroots leaders, and also engages in advocacy work to organize, educate, and litigate to ensure all habitable watersheds on earth are drinkable, fishable, and swimmable.

II. Discussion, Support, and Recommendations

Commenters submit the following arguments and recommendations in support of the Proposed Rule. First, not only does AMS have clear legal authority to strengthen transparency in poultry grower contracting under the PSA, but the Agency is also empowered—and indeed required—to go further and prohibit unfair, discriminatory, deceptive, retaliatory, or

unreasonably preferential practices inherent to the tournament system. Second, Commenters support AMS's proposal requiring integrators provide disclosure documents to growers at the time of contracting and suggest additional improvements that will enable growers to better understand and evaluate the potential risks involved in these business arrangements. Third, Commenters support the need for guaranteed minimum flock placements and stocking densities, and make further recommendations to ensure that growers not only understand how such disclosed minimum values will translate into actual income, but can also enforce such minimums through binding contract terms. Finally, Commenters support proposed disclosures showing how integrators distribute inputs to growers and raise several considerations for increasing transparency into and accountability for unlawful input distribution practices.

A. The Proposed Rule Is Well Within AMS's Statutory Authority, and the PSA Authorizes AMS to Go Further

The Proposed Rule's disclosure requirements are well within what the PSA authorizes and are a necessary first step to satisfying congressional intent and aligning the PSA with current conditions. Further, the PSA allows—and in fact requires—AMS to better protect growers from the unlawful conduct facilitated by and built into the tournament system.

1. The PSA Clearly Authorizes the Proposed Disclosure Requirements

The PSA authorizes the Secretary of Agriculture to make rules "as may be necessary to carry out the provisions" of the PSA, 7 U.S.C. § 228(a), one of the cornerstones of which is ensuring that business arrangements between integrators and growers are not unfair, unjustly discriminatory, deceptive, or facilitating undue preferences or prejudices, discrimination, or retaliation. 7 U.S.C. § 192(a)–(b). Because the Proposed Rule aims to improve the information asymmetry between integrators and growers within the tournament system, which enables violations of the PSA to persist unchecked, the proposed disclosure requirements clearly fall within AMS's rulemaking authority. Indeed, as the Proposed Rule points out, long-standing PSA rules already require certain disclosures to growers, and the additional requirements are tailored to address changes in the poultry industry that hamper growers' ability to make informed business decisions. Proposed Rule, at 34981 ("This proposed rule builds on existing disclosure concepts under the Packers and Stockyards Act"); *see* 7 U.S.C. § 192(a)–(c); 9 C.F.R. § 201.100.

2. The Proposed Rule Also Passes Constitutional Muster

Requiring disclosure of material information to protect parties to asymmetrical business relationships is a longstanding congressional and administrative agency tool for fostering healthier markets and does not violate the First Amendment rights of integrators, or any other cognizable right. Courts evaluate disclosure mandates like those contemplated in the Proposed Rule under a more lenient standard than other First Amendment inquiries, as set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (holding that the more lenient standard set forth in *Zauderer* applies to disclosures designed to prevent deception as well as other governmental interests). That test, at most, requires AMS to show that the disclosure

requirements are "reasonably related" to a "substantial government interest." *Id.* at 34 (Kavanaugh, J., concurring).

The rationale of the Supreme Court's holding in *Zauderer* was that a commercial advertiser has no more than a "minimal interest" in withholding valuable commercial information in the course of consummating a commercial transaction. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005). While many of the relevant cases focus on commercial speech in the context of seller-consumer relationships, integrators similarly have no more than a minimal interest in withholding material information from its own growers or potential growers with whom it wishes to contract. *See Am. Meat Inst.*, 760 F.3d at 22. In fact, federal law has long required the written disclosure of information relevant to private contractual relationships to advance government interests. *See, e.g.*, 29 U.S.C. § 1821(a) (imposing written disclosure requirements on farm labor recruiters when making an offer of employment to a migrant agricultural worker); *id.* § 1831(a) (same for seasonal agricultural workers); 49 U.S.C. § 32705 (requiring disclosures when privately transferring ownership of a vehicle).

Disclosure requirements like those in the Proposed Rule serve a clear function that is at least reasonably related to the substantial government interests set forth in the PSA. "The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality." *Am. Meat Inst.*, 760 F.3d at 26 (citing disclosure requirements regarding country-of-origin labeling, fiber content, care instructions, and ingredient lists); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (citing disclosure requirements that do not offend the First Amendment regarding securities, corporate proxy statements, price and production information among competitors, and employer retaliation for labor activities). "[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. R.I.*, 517 U.S. 484, 499 (1996) (citing cases). "The government can require disclosure of factual and uncontroversial information in the realm of commercial speech as long as the disclosure 'reasonably relate[s]' to an adequate interest." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 534 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (citing *Zauderer*, 471 U.S. at 651). "Laws 'requiring a commercial speaker to make purely factual disclosures related to its business affairs … facilitate rather than impede the free flow of commercial information.'" *Id.* (quoting *Beeman v. Anthem Prescription Mgmt.*, 58 Cal. 4th 329 (Cal. 2013)). Therefore, so long as a disclosure requirement deals with the commercial aspect of speech, a reasonable relation to an adequate state interest is enough. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). Furthermore, requiring the disclosure of material terms to commercial relationships is a "traditional or ordinary economic regulation" generally allowed under the First Amendment. *See AHA v. Azar*, 983 F.3d 528, 542 (D.C. Cir. 2020) ("Requiring hospitals to disclose prices before rendering services undoubtedly qualifies as 'traditional or ordinary economic regulation of commercial activity' that is acceptable under the First Amendment" (quoting *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020))).

First, the Proposed Rule would regulate commercial speech. The "core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. Pharmacy Bd. v. Va.*

Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976))); *see Pharm. Care Mgmt. Ass'n*, 429 F.3d at 309 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" (quoting *El Dia, Inc. v. P.R. Dep't of Consumer Affairs,* 413 F.3d 110, 115 (1st Cir. 2005))); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) ("expression related solely to the economic interests of the speaker and its audience" or "speech proposing a commercial transaction") (quoting *Cent. Hudson*, 447 U.S. at 561–62)). Clearly, the disclosure requirements in the Proposed Rule relate to speech that "proposes a commercial transaction" and is "expression related solely to the economic interests" of poultry integrators and current or potential growers in their execution of poultry growing agreements. *E.g.*, *Bolger*, 463 U.S. at 66; *Philip Morris USA, Inc.*, 566 F.3d at 1143.

Second, the Proposed Rule requires disclosure of purely factual and uncontroversial information, and the requirements are reasonably related to the government's substantial interest in ensuring fair and functional poultry production markets and addressing years of complaints and concerns expressed by growers subject to the tournament system. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 534; *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring) (recognizing "Government's longstanding interest in supporting American farmers and ranchers"). The Proposed Rule only requires disclosure of factual information, such as past grower compensation at different quartiles of a tournament system spread. These facts are not controversial in the context of integrator-grower contracts because they are merely communicating missing but material terms to a commercial transaction. *See CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 848 (9th Cir. 2019) (finding a health warning on cell phones uncontroversial). They would provide critical information to growers considering continuing or entering a grower arrangement with an integrator or would provide critical information about an integrator's fair performance under the agreement such as disclosing flock details to the recipient grower—requirements obviously related to the government's substantial interests in protecting growers and ensuring fairness in a market where drastically unequal bargaining power is the norm.

Finally, ensuring that parties to commercial transactions in the livestock and poultry industries have necessary information to protect the fairness and integrity of those commercial interactions is nothing new and is allowed under the First Amendment as "traditional or ordinary economic regulation." *See AHA v. Azar*, 983 F.3d 528, 542 (D.C. Cir. 2020). In sum, AMS can show that the Proposed Rule's disclosure requirements easily pass First Amendment scrutiny.

3. The "Major Questions Doctrine" Does Not Apply to This or Subsequent Rulemaking

The poultry industry is likely to raise the newly discovered "major questions doctrine" in the course of this Proposed Rule and subsequent PSA rulemaking.[2] *See West Virginia v. EPA*, 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting) (recognizing that the majority opinion "announces the arrival of the 'major questions doctrine,' which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules"). But this new doctrine should have no bearing on AMS's efforts to effectuate exactly what Congress intended and clearly

[2] *See* Maeve Sheehey, *Climate Ruling Offers Opening to Challenge USDA Antitrust Role*, Bloomberg (Aug. 1, 2022), https://about.bgov.com/news/climate-ruling-offers-opening-to-challenge-usda-antitrust-role/ (reporting that a Senator from Arkansas, where Tyson Foods is headquartered, has already sent a letter to USDA claiming that the proposed rules could run afoul of the "major questions doctrine" as recently laid out by the Supreme Court).

expressed in the text of the PSA and should not chill AMS from taking strong but tailored action to give effect to the PSA.

The Supreme Court's newly formulated doctrine appears to require a two-step analysis. *Id.* at 2634. Step one calls for a threshold assessment to determine whether the doctrine applies. The doctrine only applies to "extraordinary cases" where an agency finds "[e]xtraordinary grants of regulatory authority" to "make a radical or fundamental change to a statutory scheme" in "modest words, vague terms, or subtle device[s]." *Id.* at 2609 (internal quotations and citations omitted). An underlying basis for this new doctrine is that courts should presume "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (quoting *U.S. Telecom Ass'n v. FCC*, 855 F. 3d 381, 419 (D.C. Cir. 2017)). Where a court finds such extraordinary circumstances, a regulated industry may argue the major questions doctrine applies.

Step two of the major questions doctrine requires the agency to "convince" a court that the enabling statute authorizes the agency action. *Id.* The agency must do so with "more than a merely plausible textual basis for the agency action," and instead "must point to 'clear congressional authorization' for the power it claims." *Id.* (quoting *Utility Air*, 573 U.S. at 324).

The major questions doctrine clearly does not apply here because AMS has not proposed anything close to a "radical or fundamental change to a statutory scheme." *West Virginia*, 142 S. Ct. at 2609. Nor does AMS rely on "modest words, vague terms, or subtle devices" in the PSA. Comparing the Proposed Rule and possible rulemaking in response to the Tournament System ANPR with what the Court found in *West Virginia v. EPA* should settle the issue. In that case, the Supreme Court concluded that EPA's rule, had it ever been implemented, would "substantially restructure the American energy market." *Id.* at 2610. This broad authority was based on "vague language of an ancillary provision of [the enabling statute], one that was designed to function as a gap filler[3] and had rarely been used." *Id.* (internal quotation and citation omitted).

In sharp contrast to those supposed circumstances, here the Proposed Rule is based on clear congressional mandates found in one of the *central* provisions of the Act, 7 U.S.C. § 192, and does little more than incrementally improve upon the preexisting regulatory regime. No integrator could have any expectation of doing business without oversight and limitations imposed by the PSA. These rules do not "substantially restructure" the agriculture industry, they merely adapt an existing framework to present conditions and challenges faced by growers at the hands of exceptionally more powerful integrators.

Furthermore, section 192 is the opposite of a "backwater" of the statute and is well-trodden ground for USDA rulemaking and enforcement efforts. There is nothing "modest" or

[3] While the Court characterized Section 111(d) of the Clean Air Act as a "gap filler," this has no bearing on proper statutory interpretation. *Id.* at 2629 (Kagan, J., dissenting) ("That something is a backstop does not make it a backwater."). Therefore, we apply the standard as "backwater" provisions that have been rarely used, not "gap fillers," per the dissenting opinion's correct analysis. Although, Commenters note that no reasonable person could characterize AMS's authorization here as a "gap filler" either.

"subtle" about the text that enumerates the practices Congress has deemed unlawful—and which AMS has a responsibility to regulate. Section 192 clearly and forcefully states,

> It shall be unlawful for … any live poultry dealer with respect to live poultry to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

Where, as here, market participants (*i.e.*, growers) have long complained of and provided evidence establishing pervasive violations of those prohibitions, and have further demonstrated that certain contracting practices facilitate this illegal conduct and harm to growers and competition, the PSA not only empowers AMS to act, but requires it. Simply stated, strengthening PSA enforcement and protections to address new challenges and market imbalances that place producers at the mercy of vastly more powerful integrators with a track record of harming growers and manipulating wholesale markets is *exactly* what Congress intended. Thus, even if the Proposed Rule was somehow "extraordinary" such that the major questions doctrine applies (which it is not), the Rule is based on a "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609. Congress made and reaffirmed the policy goals underlying the PSA—fairness for livestock and poultry producers and, separately, protection of competitive markets—and the Proposed Rule and contemplated future rulemaking do no more than effectuate those policies.

This reasoning applies to this Proposed Rule, but also to what Commenters expect from subsequent PSA rulemakings AMS has announced. The "major questions doctrine" does not prohibit AMS from doing exactly what Congress has called upon it to do in clear terms, and industry fearmongering should not dissuade the Agency.

4. The PSA Authorizes AMS to Do More to Prohibit Practices, Devices, or Conduct Related to the Tournament System

Not only does the Proposed Rule easily pass legal muster, but indeed the PSA calls on AMS to do more and actually protect growers from abusive integrator conduct, not just inform them of the abuse to come. The tournament system as used by integrators today inherently leads to violations of the PSA because it facilitates and obscures integrators' prohibited conduct. Allowing such a high degree of control and discretion over critical factors in the grower-integrator relationship allows integrators to, for example, provide substandard inputs to a disfavored grower that leads to substantially reduced compensation and possibly financial ruin. Integrators are essentially unrestrained in their exercise of that discretion to use "unfair, unjustly discriminatory, or deceptive practice[s] or device[s]," or to work an "undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any

particular person or locality to any undue or unreasonable prejudice of disadvantage in any respect." *See* 7 U.S.C. § 192(a)–(b).

Current poultry growing contracting also allows integrators to pressure growers or potential growers into assuming large capital expenditures and debt at the discretion of an integrator, which experience shows can lock growers into cycles of debt that financially strains them and makes them vulnerable to an integrator's demands or abusive treatment.[4] Again, the transparency requirements in the Proposed Rule would provide essential information for growers to assess these and other risks, but "given the economic power imbalances and competition concerns that exist in today's [poultry] markets," conduct prohibited by the PSA is likely to persist without clear and enforceable prohibitions in subsequent rulemaking. *See* Tournament System Fairness ANPR, at 34817.

These problems are only made worse by the enormous market power and monopsony or oligopsony control integrators exert. Integrators' response to *this very modest* transparency rulemaking exposes the way they think of and interact with their growers. Instead of allowing their growers to engage in this public process as free members of our society, to voice their own perspectives and better inform AMS's efforts, they are "coercing farmers to oppose the rule" with form letters written by the integrator.[5] AMS should take this as yet more evidence that integrators routinely engage in practices that offend the PSA to undermine growers' interests.

Congress intended the PSA to go beyond earlier antitrust laws that only redress competitive harms after the fact by "halt[ing] unfair trade practices in their incipiency, before harm has been suffered." *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (quoting *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985)). Merely informing growers that integrators hold all the cards, that a contract's terms are likely to facilitate the integrator's ability to engage in practices that should be clearly prohibited by § 192, or that an integrator is distributing inputs amongst growers in an unfair, unjustly discriminatory, deceptive, and/or unduly preferential or prejudicial way during the life of the contract will not accomplish Congress's goal of stopping such conduct "before harm has been suffered." *IBP, Inc.*, 187 F.3d at 977.

To "halt unfair trade practices in their incipiency," the PSA prohibits *conduct*, not merely the withholding of material information regarding that conduct. *See* 7 U.S.C. § 192(a)–(b). Requiring disclosure of features to commercial transactions between growers and integrators that will lead to these prohibited outcomes is not prohibiting the unlawful conduct—it merely gives growers tools to identify such conduct and assist in the private enforcement of their rights under the Act. As recognized nearly 90 years ago: "It has been the policy of the law to prohibit violations of provisions against preferences and discrimination." *Trunz Pork Stores, Inc. v. Wallace*, 70 F.2d 688, 690 (2d. Cir. 1934). The legislative history is clear that integrators are "prohibited from engaging in any unfair, deceptive, or unjustly discriminatory practices or device

[4] *E.g.*, Joe Fassler, *A New Class-Action Lawsuit Claims Poultry Processors Conspire to Keep Farmers Trapped and Dependent*, Counter (Feb. 1, 2017), http://thecounterorg.wpengine.com/chicken-farmer-collusion-suit/.
[5] Leah Douglas, *Big U.S. Chicken Company, Mountaire, Asks Contractors to Oppose Transparency Rule*, Reuters (Aug. 5, 2022), https://www.reuters.com/world/us/big-us-chicken-company-mountaire-asks-contractors-oppose-transparency-rule-2022-08-05/.

in the conduct of their business." *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 379 (5th Cir. 2009) (Garza, J., dissenting) (quoting H.R. Rep. No. 85-1048 at 1–2) (emphasis omitted). The Proposed Rule is important and will provide valuable informational benefits to growers, but AMS must also clearly prohibit the conduct used by integrators to violate the Act in a subsequent rulemaking.

B. Commenters Support the Live Dealer Disclosure Document and Suggest Improvements

Commenters support the Proposed Rule's requirement that integrators provide growers with a Live Dealer Disclosure Document at critical junctures in the relationship. The Disclosure Document's component parts—such as informing growers or potential growers that their pay will vary and that the integrator solely controls most of the variables that will determine their level of pay and of the minimum number of placement and stocking densities the integrator will provide—are missing terms to these agreements that are of such material importance that they can make or break a grower's financial viability. Additionally, as the Proposed Rule notes, growers are enticed into growing arrangements based on integrators' misleading presentation of simple average pay projections, which obfuscates the significant spread of actual grower pay dependent on relative performance within a tournament group. Requiring integrators to disclose average pay in quintiles across the compensation spread is critical. Numerous complaints and reports from growers show that these features of the existing grower-integrator dynamic are often the tools of unfair, discriminatory, or otherwise abusive conduct. *E.g.*, Proposed Rule at 34987.[6]

Commenters respectfully request that AMS consider the following points and responses to AMS's specific questions:

- **Recordkeeping Requirements.** Regarding proposed section 201.100(d)(4) (requiring an integrator to provide a summary of "any information the dealer collects or maintains" regarding growers' variable costs), AMS should impose recordkeeping requirements to ensure that integrators cannot skirt the requirement to provide information about grower variable costs by simply failing to maintain said information. Because these variable costs are material to the agreement, and integrators intentionally place those risks upon growers, such recordkeeping should be mandated under 7 U.S.C. § 221.

- **Governance and Certification.** Regarding proposed § 201.100(f) (governance and certification), Commenters support the effort to ensure more legal accountability. But Commenters are concerned that AMS may give too much flexibility to integrators to design their own governance and certification framework. Commenters request that AMS ensure this requirement is robust and proscriptive enough to effectively root out "the potential for a conspiracy of

[6] *See also* Food Integrity Campaign, *Craig Watts: Whistleblower Profile*, https://foodwhistleblower.org/profile/craig-watts/ (profiling Craig Watts, a former contract poultry grower for Perdue Farms and outspoken whistleblower exposing how large poultry firms control and abuse growers through predatory contacts and other business practices).

deception" within a company considering this type of conduct is already happening across companies. Propose Rule at 34996 (recognizing that "[c]urrent civil and criminal actions related to price fixing in the poultry industry, including admissions of guilt, suggest the potential for a conspiracy of deception among live poultry dealers").

- **Non-English Disclosures.** AMS inquires whether there are circumstances in which integrators should be required to provide the Disclosure Document in a language other than English. Commenters respond that a grower or prospective grower should have the right to request the Document in their primary language and that all applicable time limits be tolled until the integrator-offeror provides an adequate translation. The burden on a non-native English speaker to navigate these complicated arrangements if only provided in English drastically exceeds the minimal burden on an integrator to provide this information in the offeree's preferred language.

- **Environmental Compliance Costs.** Commenters request that AMS add to the Disclosure Document information about costs related to compliance with environmental regulations and proper waste disposal. Integrators typically place all liability for environmental compliance and proper waste disposal on growers, despite the integrator dictating nearly every facet of the operation that might alleviate or exacerbate those compliance burdens. *See, e.g.*, Evan Anderson, *Turning the Dirty Tide: The Farmer Fairness Act's Attempt to Create Integrator Liability*, 46 Iowa J. Corp. L. 199, 202–03 (2021); Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 Cal. L. Rev. 797, 799 (2005). AMS should require integrators to disclose typical environmental compliance costs for growers operating with similar systems as those imposed in the grower arrangement under consideration, and disclose aggregate information regarding past noncompliance issues and costs among its similarly situated growers. AMS should also require Integrators to clearly disclose what, if any, shared liability or responsibility the integrator has in the event of noncompliance. Environmental compliance costs can be significant, and as the poultry industry writ large causes ever greater environmental harm in certain regions of the country that necessitate more stringent regulatory controls, those compliance costs very well may increase. These are material and missing details that growers should know about up front.

C. Commenters Support Minimum Placements and Minimum Stocking Density Contract Terms

In addition to informing growers or potential growers of an integrator's intent to provide a minimum number of placements at minimum stocking densities in the Disclosure Document, Commenters support the inclusion of these minimums as binding contract terms. This would ensure that the material information in the Disclosure Document is an enforceable term of the agreement. Although, Commenters note that these minimum numbers still leave integrators essentially unrestrained in their ability to manipulate the quality of those placements.

Commenters[7] also request that AMS consider establishing a substantive floor to these minimum values that is commensurate with the degree of capital investment required of the grower under the agreement or that the integrator may impose at a future date. Growers and especially potential growers may not be well positioned to understand how the disclosed minimum values translate into actual income that can be used to satisfy debt obligations and other operating costs. AMS should establish that an integrator setting unreasonably low minimum values in light of required capital investments engages in an unfair and/or deceptive practice under section 192(a) because the integrator knows or should know that such an arrangement is likely to result in the financial demise of the grower. No concept in law[8] authorizes integrators to construct its commercial transactions in such a way that less informed, less powerful, and less sophisticated offerees are subject to patently unfair arrangements, especially when the PSA is designed to protect against that very kind of unfair commercial conduct. 7 U.S.C. § 192(a).

D. Commenters Support the New § 201.214 Tournament System Recordkeeping and Disclosure Requirements

Commenters generally support the proposed requirements in new section 201.214. Requiring an integrator to produce records showing how it distributed inputs to growers would allow for a higher degree of accountability when a grower alleges that an integrator has engaged in unduly preferential, retaliatory, or discriminatory conduct. Since integrators can and reportedly do use inputs to punish certain disfavored growers, and the variable nature and quality of those inputs can have dramatic financial outcomes within a tournament ranking system, creating and retaining these records for a minimum of five years will empower enforcement and could cause integrators to voluntarily pause before engaging in unlawful conduct.

Commenters also support the proposed requirement that integrators inform growers about the nature and quality of a flock provided by the integrator within 24 hours of placement. As the Proposed Rule notes, these disclosures could enable growers to adjust their management decisions regarding that flock to accommodate any shortcomings in the placement to avoid or at least offset reduced compensation upon settlement. Growers are tasked with raising and caring for the integrator's birds in a responsible manner, and this information is critical to their ability to do that.

Finally, Commenters support greater transparency in ranking system settlement documents for the same accountability benefits and potential to dissuade unlawful conduct as discussed above. Growers should be empowered to ascertain whether their success or failure is a result of their own hard work and skill or the integrator's whims.

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[7] Commenter ALDF does not support imposition of minimum stocking densities by AMS unless such densities are compatible with animal welfare.

[8] Indeed, the Supreme Court long ago dispensed with the notion that the Constitution protects a fundamental right to freedom of contract such that integrators are free to structure their business arrangements in unfair ways. *West Coast Hotel v. Parrish*, 300 U.S. 397 (1937) (holding that freedom of contract is not a fundamental right and government can protect workers in an unequal bargaining position against exploitation); *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938). Since 1937, Commenters do not know of any economic regulation that has been found unconstitutional on the basis that it infringes on a "liberty" interest in freedom of contract.

Commenters respectfully request that AMS consider the following points and responses to AMS's specific questions:

- **Veterinary Care.** AMS must add veterinary care provided or withheld by the integrator in the required disclosures under proposed section 201.214(c). The provisioning of veterinary care to a flock—including the provision of medications and antibiotics—impact overall flock health, and therefore grower compensation. The impact veterinary care, or lack thereof, can have on tournament outcomes is similar to those of other inputs such as breeder flock age or feed quality, and should therefore also be disclosed. This would also provide more transparency into animal welfare practices among growers.

- **Reducing Deception.** AMS asks how well proposed section 201.214 will "reduce the chance of deception in the tournament payment system." Commenters believe that these transparency requirements are an important and necessary first step, but will not on their own substantially reduce integrators' ability or motivation to use deception in the system. AMS must move forward with restrictions on how integrators implement the tournament system in response to the Tournament System Fairness ANPR to accomplish this goal.

- **Future Performance.** AMS asks whether the proposed settlement information will help growers evaluate and improve their performance. Commenters do not believe that these disclosures alone will meaningfully allow growers to improve their future performance because the integrator remains able to manipulate the grower's ranking within a tournament group through variable inputs and group composition at its discretion. These disclosures appear most helpful for a grower to make out a case of unlawful conduct by the integrator, not meaningfully alter a grower's ability to determine future performance within tournament groups. Commenters again stress that AMS should not place the burden of enforcing the PSA on producers. AMS must move forward with restrictions on how integrators implement the tournament system in response to Tournament System Fairness ANPR to accomplish this goal.

- **Information Sharing.** Commenters request that AMS include the section 201.214 disclosures in a grower's right to discuss terms with others as provided in proposed section 201.100(b)(7) and (h). Because this information is critical to a grower's ability to ascertain whether their level of compensation is fair, and whether the grower's compensation can be attributed to their hard work and skill as opposed to the whims of an integrator, the same underlying reason for the right to discuss terms of a poultry growing arrangement applies here as well.

- **Breeder Farm Information.** Commenters request that AMS reverse its position that integrators only provide a breeder farm identifier as opposed to the breeding facility's name. Because of extreme vertical integration, many breeding facilities are owned by the integrator that then delivers chicks to a grower. Were growers to

know the actual name of breeders, they may be able to independently assess relevant variables or issues and would not have to rely on the integrator's potentially self-interested representations to the same degree.

- **Feed Disruptions.** Commenters request that AMS shorten the amount of time that a grower can be completely out of feed before triggering the integrator's responsibility to disclose that disruption as part of the settlement disclosures. Operating a poultry growing operation without any feed for the flock can have serious consequences on animal health and tournament outcomes, and growers should know whether an integrator's failure to provide a constant supply of feed is unique to them, widespread, or a fluke occurrence. Commenters support AMS's suggestion to at least shorten this time to six hours, but suggest that *any* period of time where the integrator has failed to provide feed to a grower should be disclosed. Growers may even face civil or criminal liability for failing to provide access to feed to livestock under their care, which is an additional cost and concern that growers should not have to deal with considering feed delivery is out of their control. *See, e.g.*, Neb. Rev. Stat. § 54-902 (defining "Abandonment," which is punishable as a Class I misdemeanor or a Class IV felony under Nebraska law, to mean "to leave a livestock animal [including poultry] in one's care, whether as owner or custodian, *for any length of time* without making effective provision for the livestock animal's feed, water, or other care as is reasonably necessary for the livestock animal's health" (emphasis added)).

III. Conclusion

Commenters thank AMS for taking the first step towards strengthening PSA regulations to protect poultry growers from rampant integrator abuse. The Proposed Rule is more than justified by the PSA, it is required. So too is further rulemaking to clearly prohibit the conduct integrators use to treat growers in unfair, unreasonable, and discriminatory ways. Commenters encourage AMS to move swiftly to adopt the necessary protections that will begin to rein in these abusive practices.

Sincerely,

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On behalf of:

Food & Water Watch
Animal Legal Defense Fund
Broad Riverkeeper

Buffalo River Watershed Alliance
Campaign for Family Farms and the Environment
Catawba Riverkeeper
Center for Food Safety
Center for a Livable Future
Farm and Ranch Freedom Alliance
Friends of the Earth
Public Justice
Socially Responsible Agriculture Project
Ranchers Cattlemen Action Legal Fund United Stockgrowers of America
Waterkeeper Alliance