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## **An Agricultural Law Research Article**

### **An Overview of the Packers and Stockyards Act**

by

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# An Overview of the Packers and Stockyards Act

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### Introduction

The Packers and Stockyards Act of 1921<sup>1</sup> is intended to ensure fair competition and fair trade practices in the marketing of livestock, meat, and poultry.<sup>2</sup> It fulfills a need for specialized regulation of these industries in recognition of their unique marketing and distribution practices.<sup>3</sup>

The Act also “is one of the most comprehensive regulatory measures ever enacted.”<sup>4</sup> In broadly prohibiting monopolistic, unfair, deceptive, and unjustly discriminatory practices, the Act gives the Secretary of Agriculture “complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.”<sup>5</sup>

As remedial legislation, the Act is liberally construed.<sup>6</sup> Under the Act, the Secretary has “jurisdiction to deal with every unjust, unreasonable, or discriminatory regulation or practice’ involved in the marketing of livestock.”<sup>7</sup> This authority, which extends to preventing “potential injury by stopping unlawful practices

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1. 7 U.S.C. §§ 181-229 (2000). Hereinafter, all citations to the United States Code are to the 2000 edition except where, as noted in the text, a section was added by the 2002 Farm Bill, formally known as the Farm Security and Rural Investment Act of 2002.

2. For recent commentary on the effectiveness of the Act in achieving this goal, see Michael C. Stumo & Douglas J. O’Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91 (2003); Terence Stewart et al., *Trade and Cattle: How the System Is Failing an Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 509-11 (2000); Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 490-91 (1999); Edward P. Lord, *Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts*, 33 WAKE FOREST L. REV. 1125, 1136-40 (1998); Douglas J. O’Brien, *The Packers and Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 J. CORP. L. 651 (1995).

3. See  *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968).

4. Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 AGRICULTURAL LAW § 3.01 (John Davidson ed., 1981) [hereinafter Campbell].

5. 10 NEIL E. HARL, AGRICULTURAL LAW § 71.01 (1992) [hereinafter HARL] (footnote omitted); see also 1 JULIAN CONRAD JUERGENSMEYER & JAMES BRYCE WADLEY, AGRICULTURAL LAW § 16.1 (1982) (discussing the Act’s scope).

6. See, e.g., *Bowman v. United States Dep’t of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966).

7. *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (quoting 7 U.S.C. § 208(a)).

in their incipency,<sup>8</sup> is broader than the authority conferred under the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.<sup>9</sup>

The Act's regulatory regime has two basic purposes. First, it is intended to protect the immediate financial interests of livestock and poultry producers by, among other things, ensuring that they are paid promptly based on accurate animal weights. In this respect, the Act serves to ensure the integrity of livestock and poultry marketing transactions.<sup>10</sup>

Second, the Act is intended to protect producers and consumers by prohibiting monopolistic or predatory practices.<sup>11</sup> For example, it prohibits packers, swine contractors, and live poultry dealers from colluding to manipulate prices or to apportion territory to force sellers to accept lower prices than would exist under free competition.<sup>12</sup>

The Secretary has delegated responsibility for administering the Act to the Assistant Secretary for Marketing and Regulatory Programs who, in turn, has subdelegated that authority to the Administrator of the Grain Inspection, Packers and Stockyards Administration (GIPSA).<sup>13</sup> Prior to the enactment of the Federal Crop Insurance Reform and the Department of Agriculture Reorganization Act of 1994,<sup>14</sup> the responsible agency was the Packers and Stockyards Administration (PSA). GIPSA assumed the responsibilities of the PSA under the USDA's reorganization.<sup>15</sup> GIPSA's regulations implementing the Act are codified at 9 C.F.R. Parts 201-203.<sup>16</sup>

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8. Daniels v. United States, 242 F.2d 39, 42 (7th Cir. 1957).

9. See Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); Wilson v. Benson, 286 F.2d 891, 894 (7th Cir. 1961).

10. See, e.g., Stafford v. Wallace, 258 U.S. 495, 514-15 (1922); Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978); Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric., 438 F.2d 1332, 1337 (8th Cir. 1971).

11. See, e.g., Mahon v. Stowers, 416 U.S. 100, 106 (1974).

12. See 7 U.S.C. § 192(c)(f).

13. See 7 C.F.R. §§ 2.22(3)(iii), 2.81 (2003). Hereinafter, all citations to federal regulations in this article are to the 2003 edition of the Code of Federal Regulations.

14. Pub. L. No. 103-354, 108 Stat. 3178-3242.

15. See 59 Fed. Reg. 66,517-19 (Dec. 27, 1994). GIPSA's current organizational structure and the functions of its various units are described at 9 C.F.R. Part 204.

16. GIPSA's enforcement activities on behalf of the Secretary often result in formal administrative adjudications. Hearings are conducted by administrative law judges (ALJs), and the ALJ's decision may be appealed by either party to the USDA's Judicial Officer. See 7 C.F.R. §§ 1.130-151 (containing the USDA formal adjudication rules of practice). Final decisions of the Judicial Officer are published in *Agricultural Decisions* and are available in print and on database services such as Westlaw. Decisions issued after January 1, 2003, are also available at [www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org). The current Judicial Officer, William Jensen, was appointed in January, 1996, to succeed Donald A. Campbell, who had served since 1971. The circumstances of the creation of the Judicial Officer position and its functions are described in Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 GEO. WASH. L. REV. 277 (1958). See also

This article offers an overview of the structure and basic provisions of the Packers and Stockyards Act. It begins with brief accounts of the Act's history and of the industries the Act regulates. It then describes the manner in which the Act regulates those subject to it—packers, swine contractors, stockyard owners, market agencies, dealers, and live poultry dealers. It concludes with a description of a recently enacted statute that, while not a part of the Packers and Stockyards Act, will apply to some within the sectors that the Act regulates.

### A. The Packers and Stockyards Act and Market Concentration

The Packers and Stockyards Act has been amended several times, but its core provisions were enacted in response to market concentration and anticompetitive practices in the livestock industry in the early 1900s. A major impetus for the Act was a 1919 Federal Trade Commission (FTC) report concluding that the five largest meat packers, the “Big Five,” had engaged in anticompetitive practices:

It appears that five great packing concerns of the country—Swift, Armour, Morris, Cudahy, and Wilson—have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands . . . .

The producer of live stock is at the mercy of these five companies because they control the market and the marketing facilities and, to some extent, the rolling stock which transports the product to the market . . . .

The power of the Big Five in the United States has been and is being unfairly and illegally used to—

- Manipulate live-stock markets;
- Restrict interstate and international supplies of foods;
- Control the prices of dressed meats and other foods;
- Defraud both the producers of food and consumers;
- Crush effective competition;
- Secure special privileges from railroads, stockyard companies, and municipalities;
- and
- Profiteer . . . .

The rapid rise of the packers to power and immense wealth and their present strangle hold on food supplies were not based necessarily on their ownership of packing houses, but upon their control of the channels of distribution, particularly the stockyards, private car lines, cold storage plants, and branch houses. Similarly the great profits which they have secured and are now securing are not primarily due to exceptional efficiency in operating packing houses and manufacturing plants, but are secured through their monopolistic control of the distributive machinery.<sup>17</sup>

The FTC recommended governmental ownership of the stockyards and their related facilities. Congress, however, chose a less drastic alternative and enacted the Packers and Stockyards Act in 1921, a year after the “Big Five” packers and others entered into a consent decree under the Sherman Act.<sup>18</sup>

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Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 254 (1966) (discussing the function of the USDA Judicial Officer).

17. Campbell, *supra* note 4, § 3.02 (quoting FTC, *Report of the Federal Trade Commission on the Meat Packing Industry* 392 (1919)).

18. *Id.*; see generally HARL, *supra* note 5, at § 71.03 (discussing the consent decree).

Ironically, nearly seventy-five years after the enactment of the Packers and Stockyards Act, the meat packing industry “is now more concentrated than it was in 1921.”<sup>19</sup> In a 2002 report regarding the cattle and hog industries, GIPSA, in noting that “[c]oncentration in beef packing has increased over the years,” found that “[t]he four largest firms’ share of total commercial steer and heifer slaughter rose from 35 percent in 1980 to 72 percent in 1990 and 81 percent in 1993, but has remained relatively stable since then.”<sup>20</sup>

As to hogs, the report concluded that “[c]oncentration has increased in the pork packing industry. The share of U.S. hog slaughter accounted for by the four largest hog packers rose from 34 percent in 1980 to 46 percent in 1995 and 55 percent in 1996, and has remained about the same since then.”<sup>21</sup>

Although the Act is generally credited as having been effective in ensuring prompt and accurate payment to livestock sellers, the increased concentration in the livestock industry in the last two decades has called into question the Secretary’s oversight of market competitiveness.<sup>22</sup> For example, the United States General Accounting Office (GAO) has repeatedly criticized the Secretary’s oversight of the industry.<sup>23</sup>

One measure of the concern over concentration in the livestock industry was offered by former Secretary Glickman, who, in 1994, stated: “Perhaps the single biggest issue I have heard about while traveling the country the last several months has been concern about concentration in the meat

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19. U.S. Gen. Accounting Office, *Packers and Stockyards Administration: Oversight of Livestock Market Competitiveness Needs To Be Enhanced* (Pub. No. RCED-92-36, Oct. 1991) at 3 [hereinafter *Oversight of Livestock Market*]. Most of this concentration has occurred in the last twenty-five years:

Following the antitrust activity in the 1920s, market concentration by the larger beef-packing firms declined over the next 50 years. By 1975 the four largest firms slaughtered only 28 percent of the steer and heifer market. However, this situation reversed itself after 1975, culminating in mergers and acquisitions by two of the largest packers between 1986 and 1987.

USDA reported that in 1988 the top four beef-packing firms slaughtered about 70 percent of steers and heifers, and they fabricated about 70 percent of the boxed beef on the market.

U.S. Gen. Accounting Office, *Beef Industry: Packer Market Concentration and Cattle Prices* (Pub. No. RCED-91-28, Dec. 1990) at 3 [hereinafter *Packer Market Concentration*].

20. USDA, GIPSA, *Assessment of the Cattle and Hog Industries: Calendar Year 2001* vii (2002) [hereinafter *Assessment of the Cattle and Hog Industries*].

21. *Id.* at ix.

22. See generally James M. MacDonald et al., *Consolidation in U.S. Meatpacking* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 785, Feb. 2000) (describing consolidation in the U.S. meatpacking industry); Kenneth H. Mathews, Jr., et al., *U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration* (USDA, Econ. Research Serv., Tech. Bul. No. 1874, Apr. 1999) (describing concentration in the cattle industry).

23. See U. S. Gen. Accounting Office, *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices* (Pub. No. RCED-00-242, Sept. 2000); *Oversight of Livestock Market*, *supra* note 19.

processing industry. Today, four companies control nearly 95% of the industry. Four companies control this country's supply of meat . . . ."<sup>24</sup>

Views differ over the effect of this concentration on livestock producers, especially with respect to the impact of the procurement of cattle by packers under forward contracts.<sup>25</sup> For example, those opposed to the use of forward contracts and the resulting "captive supply" of livestock in the hands of packers have urged GIPSA to adopt rules under the Packers and Stockyards Act to restrict the use of forward contracts.<sup>26</sup> In broad terms, those who hold this view advance two basic concerns. "First, the more packers control production, the less they will be aggressive in the marketplace, and second, the more this trend continues, the more packers will control production and the fewer cattle will be sold in open markets on negotiated terms."<sup>27</sup>

On the other hand, packers have vigorously opposed restrictions on the use of forward contracts. In administrative disciplinary proceedings brought by GIPSA under the Packers and Stockyards Act, for example, IBP successfully established that its use of an exclusive marketing agreement neither gave an undue or unreasonable preference to the cattle producers who were parties to the arrangement nor unduly or unreasonably prejudiced or disadvantaged similarly situated producers who were not parties to the agreement.<sup>28</sup>

An unsuccessful attempt was made to amend the Packers and Stockyards Act in the 2002 Farm Bill to more specifically address concentration in the livestock sector by restricting packer ownership of livestock.<sup>29</sup> Although unsuccessful, this attempt indicates that the Packers and Stockyards Act's prohibitions against anticompetitive practices will continue to receive attention. As noted by GIPSA in a May 30, 2003, announcement that it will conduct a congressionally mandated study of "marketing methods

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24. Dan Glickman, *Address Before the National Press Club (Oct. 18, 1994)*, FEEDSTUFFS, Nov. 6, 1995, at 10.

25. In general, a "forward contract" is an agreement to sell at a set price or pursuant to an established pricing formula with delivery to occur at a later date. See, e.g., Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLINE L. REV. 397, 398 (1995).

26. See 62 Fed. Reg. 1845 (Jan. 14, 1997) (notice of the filing of a petition for rulemaking by the Western Organization of Resource Councils (WORC) relating to packer livestock procurement practices). For GIPSA's response to the WORC petition, see USDA, GIPSA, *Review of Western Organization of Resource Councils (WORC) Petition for Rulemaking* (Aug. 29, 1997). See also USDA, GIPSA, *Captive Supply of Cattle and GIPSA's Reporting of Captive Supply* (Jan. 11, 2002) (discussing "captive supplies" of cattle).

27. Rod Smith, *Cattle Industry May Need To 'Leap' to New But Rewarding Industry Structure*, FEEDSTUFFS, Nov. 20, 1995, at 9 (reporting on remarks made by Topper Thorpe, Executive Vice-President of Cattle Fax). See also Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531 (discussing concentration in agricultural markets generally).

28. See *In re: IBP, Inc.*, 57 Agric. Dec. 1353 (1998); see also *IBP, Inc. v. Glickman*, 187 F.3d 974, 977-78 (8th Cir. 1999) (holding that a right of first refusal held by IBP under the marketing agreement did not violate the Packers and Stockyards Act).

29. For a description of this proposed amendment and an account of its failure to be enacted, see Roger A. McEowen et al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE J. AGRIC. L. 267 (2002).

used in the livestock and red meat industries,” “[t]he issue of packer ownership of livestock is highly contentious among livestock industry members.”<sup>30</sup>

## B. Livestock and Poultry Production

The Packers and Stockyards Act defines “livestock” to include “cattle, sheep, swine, horses, mules, or goats—whether live or dead.”<sup>31</sup> The Act also applies to “poultry,” which is defined to mean “chickens, turkeys, ducks, geese, and other domestic fowl.”<sup>32</sup>

Poultry production is almost totally vertically integrated, with individual firms handling all stages of production from breeding to processing.<sup>33</sup> Feeding is typically done under contract with putatively independent growers.<sup>34</sup>

Hog production is becoming more vertically integrated, with increasing numbers of hogs being raised by producers who hold a production contract with a processor.<sup>35</sup> “About 19 percent of feeder pig producers and 34 percent of finished hog operations produced under contract in 1998, but these operations accounted for 82 percent of feeder pigs and 63 percent of finished hogs.”<sup>36</sup>

Consolidation is also occurring in the hog industry. “Since 1994, the percent of hog and pig inventory on farms with 2,000 head or more increased from 37 percent to nearly 75 percent. Also, just over half of hogs and pigs were on farms with 5,000 head or more in 2001, compared with about a third in

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30. 68 Fed. Reg. 32,455, 32,456 (May 30, 2003).

31. 7 U.S.C. § 182(4).

32. *Id.* at 182(6).

33. See generally Steve W. Martinez, *Vertical Coordination of Marketing Systems: Lessons From the Poultry, Egg, and Pork Industries* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 807, Apr. 2002); Michael Ollinger et al., *Structural Change in U.S. Chicken and Turkey Slaughter* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 787, Sept. 2000).

34. See generally Neil D. Hamilton, *Broiler Contracting in the United States—A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43 (2002); Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEMPHIS L. REV. 1207, 1208-10 (1995) (discussing poultry production contracts) [hereinafter Roth]; Clay Fulcher, *Vertical Integration in the Poultry Industry: The Contract Relationship*, AGRIC. L. UPDATE, Jan. 1992, at 4 (same); Janet Perry et al., *Broiler Farms’ Organization, Management, and Performance* (USDA, Agric. Econ. Serv., Agric. Info. Bull. No. 748, Mar. 1999) (discussing the business and economic structure of broiler farms using production contracts).

35. See, e.g., Steve W. Martinez et al., *Vertical Coordination and Consumer Welfare: The Case of the Pork Industry* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 753, Aug. 1997) at 1-2.

36. William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 818, Feb. 2003) at 25 [hereinafter McBride & Key]. See also Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEMPHIS L. REV. 1051, 1056 (1995) (noting that, by the mid-1990s, “over 20% of swine [were] produced under contract, up from only 2% in 1980”).

1996.”<sup>37</sup> “[B]etween 1994 1994 and 1999, the number of hog farms fell by more than 50 percent, from over 200,000 to less than 100,000, and fell to just over 80,000 by 2001.”<sup>38</sup>

Cattle production has three phases—breeding, feeding, and slaughter. Breeding is typically done by “cow-calf” operations that breed cows for the production and sale of young steers and heifers.<sup>39</sup> The number of these operations has been declining.<sup>40</sup> “There are about 900,000 cow-calf operations in the U.S., with about one-third of the beef cows on family-owned operations of less than 50 cows.”<sup>41</sup>

Most cattle from cow-calf operations are fed at cattle-feeding operations before slaughter. Feedlot operators either purchase the cattle they feed or custom feed cattle owned by cow-calf operations or others, including beef-packing firms.<sup>42</sup> Economies of scale and technological advances, such as feed additives, computerized feed mills, and improved transportation, have encouraged the development of large-capacity feedlots.<sup>43</sup> This trend will probably continue.<sup>44</sup>

Fed cattle are sold either to a beef-packing firm or a packing firm’s agent, and about eighty percent of all cattle slaughtered are fed cattle. Packing firm operations differ. Most slaughter the cattle and fabricate the carcasses into boxed beef. Others purchase the carcasses and fabricate them into box beef. Some only slaughter the cattle and sell the carcasses.<sup>45</sup>

### C. The Packers and Stockyard Act’s Provisions

The Packers and Stockyards Act contains four titles:

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37. McBride & Key, *supra* note 37, at 5. Compare with Leland Southard & Steve Reed, *Rapid Changes in the U.S. Pork Industry*, AGRIC. OUTLOOK, Mar. 1995, at 11, 12-13 (noting that, in 1995, “about 70 percent [of hog operations] are farrow-to-finish operations, and “hog operations with less than 100 head still account for 60 percent of all U.S. hog operations”). For additional information on economic conditions and business practices in the hog industry, see *Assessment of the Cattle and Hog Industries*, *supra* note 20, at 33-48.

38. McBride & Key, *supra* note 37, at 5. See also Chris Hurt, *Industrialization in the Pork Industry*, CHOICES, 4th Quarter 1994, at 9.

39. See *Packer Market Concentration*, *supra* note 19, at 2.

40. See *id.* at 5.

41. Teresa Glover & Leland Southard, *Cattle Industry Continues Restructuring*, AGRIC. OUTLOOK, Dec. 1995, at 13, 15 [hereinafter Glover & Southard]. For additional information on economic conditions and business practices in the hog industry, see *Assessment of the Cattle and Hog Industries*, *supra* note 20, at 12-32.

42. See *Packer Market Concentration*, *supra* note 19, at 2.

43. See Glover & Southard, *supra* note 41, at 14-15.

44. See Mark Drabenstott, *Industrialization: Steady Current or Tidal Wave*, CHOICES, Fourth Quarter 1994, at 4, 6 (predicting that cattle feeding will follow swine and poultry as the next livestock segment to become “industrialized”).

45. See *Packer Market Concentration*, *supra* note 19, at 2-3.

- Title I (7 U.S.C. §§ 181-183) provides general definitions;
- Title II (7 U.S.C. §§ 191-197) specifically addresses the practices of “packers,” “swine contractors,” and “live poultry dealers”;
- Title III (7 U.S.C. §§ 201-217a) specifically addresses the practices of “stockyards,” “dealers,” and “market agencies”; and
- Title IV (7 U.S.C. §§ 221-229) contains administrative and other requirements.

As suggested by the subjects of the Act’s four titles, the Act regulates four segments of the livestock, meat, and poultry industry. First, it imposes comprehensive restrictions on the practices of “packers.” Packers include buyers of livestock for slaughter, meat processors, and wholesale distributors of meats, meat food products, or livestock products in an unmanufactured form.<sup>46</sup>

Second, by virtue of an amendment to the Act by the 2002 Farm Bill,<sup>47</sup> the Act now regulates “swine contractors.” A “swine contractor” is a person “engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or for selling the swine for slaughter . . . .”<sup>48</sup>

Third, the Act regulates certain activities of “live poultry dealers,” defined as persons who purchase live poultry or who obtain live poultry under a poultry growing arrangement.<sup>49</sup> As discussed later in this article, live poultry dealers are subject to the major prohibitions codified in § 192 of the Act that also apply to packers and swine contractors, but the Secretary’s enforcement authority is more limited relative to live poultry dealers.<sup>50</sup>

Finally, the Act regulates various activities of “stockyard owners,” “market agencies,” and “dealers.” “Stockyard” is broadly defined to include public markets for livestock producers and other facilities where livestock is received or held for sale or shipment in interstate commerce.<sup>51</sup> A “stockyard owner” is a person “engaged in the business of conducting or operating a stockyard.”<sup>52</sup> A “market agency” is any person who buys or sells livestock on a commission basis or who furnishes stockyard services.<sup>53</sup> A

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46. See 7 U.S.C. § 191.

47. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, tit. X, § 10502, 116 Stat. 142, 509-10 (codified at 7 U.S.C. §§ 182(a), 192, 193, 194, 195, 209(a), 221, 223).

48. 7 U.S.C. § 182(12).

49. See *id.* §§ 182(10) (defining “live poultry dealer”), 182(9) (defining “poultry growing arrangement”), 182(8) (defining “poultry grower”).

50. See *infra* notes 191-96 and the accompanying text.

51. See 7 U.S.C. § 202(a).

52. *Id.* § 201(a).

53. See *id.* § 201(c); see also *id.* 201(b) (defining “stockyard services”).

“dealer” is a person who buys or sells livestock on his own behalf or as the employee or agent of a buyer or seller.<sup>54</sup>

As generally applicable matters, the term “person” includes individuals, partnerships, corporations, and associations.<sup>55</sup> The acts, omission, and failures of an agent are attributed to the principal.<sup>56</sup> Courts and the Secretary have used the alter ego doctrine to pierce the corporate veil to hold owners of corporations liable under the Act.<sup>57</sup>

The Act also expressly defines when a transaction is deemed “in commerce.”<sup>58</sup> It expressly preempts certain state authority but permits some state regulation.<sup>59</sup>

## 1. Packers

### a. “Packer” Defined

The Packers and Stockyards Act defines a “packer” as any person

engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.<sup>60</sup>

Under clause (c), which was added in 1976 amendments to the Act,<sup>61</sup> a person who purchases and then resells in the same form processed and packed meat in “sizes and quantities suitable for re-sale to institutions such as hospitals and schools and some restaurants and hotels” can be a “packer.”<sup>62</sup> Likewise, large supermarket chains that cut, grind, and wrap meat can be “packers.”<sup>63</sup> A freezer plant that

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54. *See id.* § 201(d).

55. *Id.* § 182(1).

56. *See id.* § 223.

57. *See Bruhn’s Freezer Meats*, 438 F.2d at 1343; *In re Sebastopol Meat Co., Inc.*, 28 Agric. Dec. 435, 441 (1969).

58. *See* 7 U.S.C. § 183.

59. *See id.* § 228c.

60. *Id.* § 191.

61. *See United States v. Jay Freeman Co., Inc.*, 473 F. Supp. 1265, 1267-68 (E.D. Ark. 1979).

62. *Id.* (also ruling that the phrase “in an unmanufactured form” only modifies “livestock products”).

63. *See Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 954-55 (D.C. Cir. 1966).

cuts meat and wraps it in portions for sale to consumers can also be a “packer.”<sup>64</sup> The retail sale of meat, however, is the primary responsibility of the FTC, even if a “packer” is involved.<sup>65</sup>

### **b. Packer Bonds**

Packers must be bonded unless their average annual purchases do not exceed \$500,000.<sup>66</sup> The Secretary may seek a cease and desist order prohibiting or limiting the packer from purchasing livestock if the Secretary determines that a packer is insolvent.<sup>67</sup> Because of the statutory trust provisions discussed below, “claims against packers’ bonds have been less than 1 percent of the average yearly bond coverage for packers . . . because trust inventories and receivables are exhausted before claims on bonds are made, which ultimately reduces such claims.”<sup>68</sup>

### **c. Prohibited Trade Practices**

Packer practices are comprehensively regulated. Specifically, with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, packers may not do the following:

- (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 whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or
- (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
- (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose of or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
- (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
- (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

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64. See *Bruhn’s Freezer Meats*, 438 F.2d at 1336-39.

65. 7 U.S.C. § 227(b)(3); see also *Giant Foods, Inc. v. FTC*, 307 F.2d 184, 187 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

66. 7 U.S.C. § 204; see also 9 C.F.R. §§ 201.29-.34 (prescribing the terms and conditions of packer bonds).

67. 7 U.S.C. § 204; see also 9 C.F.R. § 203.10 (statement of policy defining insolvency).

68. *Oversight of Livestock Market*, *supra* note 19, at 29.

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.<sup>69</sup>

GIPSA's regulations add specificity to some of these prohibitions. For example, packers may not circulate misleading reports about market conditions or prices.<sup>70</sup> Purchases and sales on a weight basis must be based on actual weights.<sup>71</sup> Packers may not, in connection with the purchase of livestock, "charge, demand, or collect from the seller of the livestock any compensation in the form of commission, yardage, or other service charge."<sup>72</sup> Packers may not own, finance, or participate in the management or operation of a market agency selling livestock on a commission basis.<sup>73</sup> "[P]ackers and dealers engaged in purchasing livestock, in person or through employed buyers, . . . [must] conduct . . . [their] buying operations in competition with, and independently of, other packers and dealers similarly engaged."<sup>74</sup> Packers also must use reasonable care and promptness in the handling of livestock.<sup>75</sup> In addition, as a matter of policy, advertising allowances and other merchandising payments and services are subject to restrictions.<sup>76</sup> Finally, GIPSA has adopted policies concerning meat packer sales and purchase contracts, the giving of gifts to government employees, and the disposition of records.<sup>77</sup>

The phrase "unfair, unjustly discriminatory, or deceptive practice or device" is not defined in the Act. Accordingly, the meaning of the words in the phrase "must be determined by the facts of each case within the purposes of the Packers and Stockyards Act."<sup>78</sup> Conduct that has been held to be "unfair, unjustly discriminatory, or deceptive" has included discriminatory pricing,<sup>79</sup> predatory pricing,<sup>80</sup> and

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69. 7 U.S.C. § 192 (also regulating "swine contractor[s] with respect to livestock, meats, meat food products, or livestock products in unmanufactured form" and "live poultry dealer[s] with respect to live poultry").

70. See 9 C.F.R. § 201.53.

71. See *id.* § 201.55; see also *id.* §§ 201.71-.76 (pertaining to scales, weighing, and reweighing).

72. *Id.* § 201.98.

73. See *id.* § 201.67; see also *id.* §§ 203.19 (statement of policy with respect to packers engaging in the business of livestock dealers and buying agencies), 203.18 (statement of policy with respect to packers engaging in the business of custom feeding livestock).

74. *Id.* § 201.70.

75. See *id.* § 201.82.

76. See *id.* § 203.14 (statement of policy with respect to advertising allowances and other merchandising payments and services).

77. See *id.* §§ 203.7, 203.2, 203.4.

78. *Capital Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965) (citations omitted).

79. See *Swift & Co. v. United States*, 347 F.2d 53, 55 (7th Cir. 1963).

80. See *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961).

deceptive advertising.<sup>81</sup> A conspiracy to force auction stockyards to alter sale terms<sup>82</sup> and false weighing<sup>83</sup> have also been held to violate the Act.<sup>84</sup>

On the other hand, recent decisions have rejected claims that the Act was violated by the refusal to provide a producer with a contract that may have been offered to other producers,<sup>85</sup> by a right of first refusal,<sup>86</sup> and by a packer's direct ownership and contractual acquisition of hogs.<sup>87</sup> These and other decisions suggest that whether conduct violates the Act is a question of law, although one court has expressed doubt over "who should determine whether a particular act is unfair, discriminatory or deceptive under the [Packers and Stockyards Act]."<sup>88</sup>

#### **d. Prompt Payment**

The Act imposes a prompt payment requirement on packers. As a general rule, full payment of the livestock's purchase price must be made "before the close of the next business day following the purchase of livestock and transfer of possession thereof . . . ."<sup>89</sup>

This rule is qualified in two respects. First, when livestock is purchased for slaughter, payment must be made to the seller or the seller's representative at the point of transfer, or the funds must be wired to the seller's account by the close of the next business day.<sup>90</sup> If the sale is on a carcass weight basis, payment must be made at the point of transfer, or the funds must be wired to the seller's account by the close of the next business day following the determination of the purchase amount.<sup>91</sup>

Second, "if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession . . . the packer . . . shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits

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81. See *Bruhn's Freezer Meats*, 438 F.2d at 1342.

82. See *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

83. See *Burruss v. United States Dept. of Agric.*, 575 F.2d 1258, 1958 (8th Cir. 1978) (per curiam).

84. See generally *Campbell*, *supra* note 4, at §§ 3.45-.58 (discussing judicial applications of § 192); *HARL*, *supra* note 5, at § 71.08 (same).

85. See *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995).

86. See *IBP, Inc.*, 187 F.2d at 977-78.

87. See *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp.2d 824, 827-29 (E.D. Va. 2002).

88. *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 201 n.5 (E.D.N.C. 1996).

89. 7 U.S.C. § 228b(a).

90. See *id.*

91. See *id.*

specified in this subsection, such action being deemed compliance with the requirement for prompt payment.”<sup>92</sup>

The prompt payment requirement may be waived by written agreement.<sup>93</sup> However, if the seller agrees to extend credit to a packer, the seller loses his, her, or its interest in the statutory trust discussed below.<sup>94</sup> Any delay or attempt to delay the collection of funds by a packer is deemed to be an “unfair practice.”<sup>95</sup>

Packers must maintain prescribed records of their business transactions and other matters.<sup>96</sup> Failure to do so is a criminal offense.<sup>97</sup> The records are subject to the Secretary’s inspection.<sup>98</sup> Annual reports are required.<sup>99</sup> Written information, under oath or affirmation, may also be demanded by the Secretary.<sup>100</sup>

### **e. Statutory Trust**

The Act establishes a statutory trust for livestock purchased by a packer whose average annual purchases exceed \$500,000. The trust is for the benefit of unpaid cash sellers, and it extends to “all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom . . . .”<sup>101</sup> “[A] cash sale means a sale in which the seller does not expressly extend credit to the buyer.”<sup>102</sup> “Even if there is a delay in payment, the transaction is a ‘cash sale’ unless there is an express agreement extending credit from the seller to the buyer.”<sup>103</sup>

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92. *Id.*; see also 9 C.F.R. § 201.43 (implementing the statutory prompt payment rule).

93. 7 U.S.C. § 228b(b); see also 9 C.F.R. §§ 201.200 (providing for the terms of credit sales agreements with respect to packers whose average annual purchases of livestock exceed \$500,000), 203.16 (statement of policy regarding the mailing of checks in cash purchases of livestock for slaughter).

94. See 7 U.S.C. § 196(c); 9 C.F.R. § 201.200(a).

95. 7 U.S.C. § 228b(c).

96. See *id.* at § 221; 9 C.F.R. § 201.43.

97. See 7 U.S.C. § 221.

98. See 9 C.F.R. § 201.95; *Western States Cattle Co., Inc. v. Edwards*, 895 F.2d 438, 441-43 (8th Cir. 1990) (upholding warrantless search of records required to be maintained under the Act); see also 9 C.F.R. § 201.96 (prohibiting the unauthorized disclosure of business information).

99. See 9 C.F.R. § 201.97.

100. See *id.* § 201.94.

101. See 7 U.S.C. § 196(b).

102. *Id.* § 196(c).

103. *Kunkel v. Sprague Nat’l Bank*, 128 F.3d 636, 646 (8th Cir. 1997) (citation omitted).

Because the trust assets do not become part of the bankruptcy estate if a packer files bankruptcy, unpaid cash sellers do not compete with secured creditors for the trust's assets.<sup>104</sup> To make a claim against the trust, the unpaid cash seller must give notice to the Secretary within thirty days of the final date for making prompt payment under § 228b or within fifteen business day of being notified that the payment of a promptly presented check was dishonored.<sup>105</sup> A trust modeled on the Act also is created under the Perishable Agricultural Commodities Act (PACA).<sup>106</sup>

#### **f. Enforcement**

When the Secretary has reason to believe that a packer has violated the Act, the Secretary may commence formal administrative adjudicatory proceedings against the packer.<sup>107</sup> The proceedings are conducted under the procedures prescribed in 7 C.F.R. §§ 1.130-.151.<sup>108</sup> A cease and desist order may be issued, and civil penalties of up to \$10,000 may be assessed for each violation.<sup>109</sup>

Under the Hobbs Administrative Orders Review Act,<sup>110</sup> judicial review is available in the federal court of appeals for the circuit where the packer resides, has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit.<sup>111</sup> The sixty-day time limit for filing the petition of review specified in § 2344 of the Hobbs Administrative Orders Review Act overrides the thirty-day limit found in § 194(a) of the Packers and Stockyards Act.<sup>112</sup>

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104. See RANDY ROGERS & LAWRENCE P. KING, *COLLIER FARM BANKRUPTCY GUIDE* § 105[1] (1997) (discussing the livestock trust fund provisions of the Packers and Stockyards Act).

105. See 7 U.S.C. § 196(b); see also 9 C.F.R. § 203.15 (statement of policy regarding the preservation of trust benefits).

106. 7 U.S.C. §§ 499a-499t. See generally J.W. Looney, *Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust under the Perishable Agricultural Commodities Act*, 23 U.C. DAVIS L. REV. 675, 689-94 (1990) (discussing the PACA statutory trust).

107. See 7 U.S.C. § 193(a).

108. See Campbell, *supra* note 4, at 203-23 (discussing administrative disciplinary proceedings under the Act); see generally GARY J. EDLES & JEROME NELSON, *FEDERAL REGULATORY PROCESS: AGENCY PRACTICES AND PROCEDURES* 135-77 (2d ed. 1994) (generally discussing formal administrative adjudication procedures).

109. See 7 U.S.C. § 193(b). See also *United States v. Great American Veal, Inc.*, 998 F.Supp. 416, 424 (D.N.J. 1998) (ruling that § 193(b) "mandates that an action to enforce a civil penalty in the district courts must await the imposition of a civil penalty in an administrative proceeding and the failure on the part of a violator to pay such a penalty").

110. 28 U.S.C. §§ 2342-2350.

111. See *id.* § 2343.

112. See *Capitol Packing Co. v. United States*, 350 F.2d 67, 72 (10th Cir. 1965).

Violation of a final cease and desist order is punishable by a fine and imprisonment.<sup>113</sup> The Secretary also has the authority to request a temporary injunction or a restraining order in certain circumstances.<sup>114</sup>

Private parties may seek damages for any violation of the Act or of an order of the Secretary by commencing an action in federal district court.<sup>115</sup> Other statutory and common law claims may be asserted.<sup>116</sup>

### **g. Swine Packer Marketing Contracts**

Packers who offer to purchase swine under contracts with swine producers must provide to the Secretary certain information related to their contracts, including the types of contracts offered.<sup>117</sup> In turn, subject to the availability of appropriations, “the Secretary shall establish and maintain a library of each type of contract offered by packers to swine producers for the purchase of all or part of the producers’ production of swine (including swine that are purchased or committed for delivery), including all available noncarcass merit premiums.<sup>118</sup> The Secretary is directed to make information on the types of contracts being offered available to “producers and other interested parties . . . .”<sup>119</sup> Inaccurate or incomplete reporting by a packer is a violation of the Act.<sup>120</sup>

## **2. Swine Contractors**

### **a. “Swine Contractor” Defined**

A “swine contractor” is defined as

any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or selling swine for slaughter, if—

(A) the swine is obtained by the person in commerce;

or

(B) the swine (including products from the swine) obtained by the person is sold or shipped in commerce.<sup>121</sup>

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113. See 7 U.S.C. § 195(3).

114. See *id.* § 228(a).

115. See *id.* § 209.

116. See *id.* § 409(b).

117. See 7 U.S.C. § 198a(d).

118. *Id.* § 198a(a); see also *id.* § 198(7) (defining the term “type of contract”).

119. *Id.* § 198a(b). The Secretary must also report on other information derived from these contracts. See *id.* § 198a(d).

120. See *id.* § 198a(e).

121. *Id.* § 182(12).

A “swine production contract” is “any growout contract or other arrangement under which a swine production contract grower raises and cares for the swine in accordance with the instructions of another person.”<sup>122</sup> A “swine production contract grower” is “any person engaged in the business of raising and caring for swine in accordance with the instructions of another person.”<sup>123</sup>

In general, swine contractors are regulated in a manner similar to the regulation of packers. Notable exceptions, however, include the absence of bond requirement, the absence of a prompt payment requirement, and the absence of a statutory trust protecting the rights of unpaid sellers or growers.

### **b. Prohibited Trade Practices**

Swine contractors are subject to the same broad prohibitions under § 192 of the Act that apply to packers and live poultry dealers.<sup>124</sup> As they do for packers, these prohibitions apply to swine contractors “with respect to livestock, meats, meat food products, or livestock products in unmanufactured form . . .”<sup>125</sup>

### **c. Enforcement**

The Secretary has co-extensive enforcement authority against swine contractors and packers.<sup>126</sup> In addition, persons injured by a violation of the Act or an order of the Secretary “relating to the purchase, sale, or handling of livestock” or a swine production contract are entitled to recover damages in federal district court.<sup>127</sup>

## **3. Stockyards, Market Agencies, and Dealers**

### **a. “Stockyard” Defined**

A “stockyard” is defined in the Act as

any place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held or kept for sale or shipment in commerce.<sup>128</sup>

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122. *Id.* § 182(13).

123. *Id.* § 182(14).

124. *See id.* § 192.

125. *Id.*

126. *See id.* §§ 193, 194, 195.

127. *See id.* § 209.

128. *Id.* § 202(a).

A “stockyard owner” is any person “engaged in the business of conducting or operating a stockyard . . . .”<sup>129</sup> “Stockyard services” are “services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock . . . .”<sup>130</sup>

A feedlot is not a “stockyard,” at least when its owner receives no fees for assisting the cattle’s owners in making sales directly to packers.<sup>131</sup> The USDA, however, has taken a contrary view.<sup>132</sup>

#### **b. “Market Agency” Defined**

A “market agency” is any person “engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.”<sup>133</sup> The mere notation of “commission” on an invoice does not necessarily signify the existence of a sale on a commission basis, for the proper inquiry is a fact-based inquiry into “the nature of the business relationship.”<sup>134</sup>

#### **c. “Dealer” Defined**

A “dealer” is “any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.”<sup>135</sup> A person may be a “dealer” even if buying and selling livestock is not his or her only business.<sup>136</sup>

#### **d. Stockyard Postings**

When the Secretary determines that a stockyard meets the statutory definition of a “stockyard,” the stockyard is posted as such.<sup>137</sup> Within thirty days of a stockyard’s posting, market agencies and dealers must obtain written authorization from the stockyard owner to do business at the stockyard and

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129. *Id.* § 201(a).

130. *Id.* § 201(b).

131. See *Soloman Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 719-20 (10th Cir. 1977).

132. See *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 220-35 (1980) (holding that a custom feedlot that buys or sells livestock for its customers is subject to the Act); see generally Campbell, *supra* note 4, § 3.41 (discussing *Soloman Valley Feedlot* and *Sterling Colorado Beef Co.*); HARL, *supra* note 5, at § 71.07[11] (same).

133. 7 U.S.C. § 201(c).

134. *Ferguson v. United States Dept. of Agric.*, 911 F.2d 1273, 1278-79 (8th Cir. 1990).

135. 7 U.S.C. § 201(d).

136. *Kelly v. United States*, 202 F.2d 838, 841 (10th Cir. 1953); see also *United States v. Rauch*, 717 F.2d 448, 450 (8th Cir. 1983) (distinguishing a “dealer” from a “rancher”).

137. See *id.* § 202(b).

must register with the Secretary. Otherwise, after the thirty-day period has expired, they must cease doing business at the stockyard.<sup>138</sup>

#### **e. Bonds**

As a prerequisite to registration, market agencies and dealers must obtain a bond.<sup>139</sup> Registrants are prohibited from operating while insolvent.<sup>140</sup>

#### **f. Prohibited Trade Practices**

##### **(i) Reasonable and Nondiscriminatory Services and Charges**

Stockyard services furnished by a stockyard or market agency must be “reasonable and nondiscriminatory,” and such services may not be refused “on any basis that is unreasonable or unjustly discriminatory.”<sup>141</sup>

Rates or charges for stockyard services furnished at a stockyard by a stockyard owner or market agency must be “just, reasonable, and nondiscriminatory . . . .”<sup>142</sup> Rates and charges must be filed with the Secretary and be open for public inspection.<sup>143</sup> Changes in rates and charges also must be filed, and the Secretary may hold a hearing on the lawfulness of a rate or charge or any regulation or practice affecting a rate or charge.<sup>144</sup> If the Secretary determines that a rate, charge, regulation, or practice violates the Act, the Secretary may prescribe the appropriate rate or charge.<sup>145</sup> The same authority applies to rates, charges, regulations, or practices that discriminate between intrastate and interstate commerce.<sup>146</sup>

Stockyard owners and market agencies have the duty “to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing or stockyard services,” and regulations and practices that are not just, reasonable, and nondiscriminatory are unlawful.<sup>147</sup> Stockyard owners must manage and regulate their stockyards so that persons buying and

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138. See *id.* § 203; see also 9 C.F.R. §§ 201.10-.11 (specifying the registration requirements).

139. See 7 U.S.C. § 204; see also 9 C.F.R. §§ 201.29-34 (specifying the bond requirements); *United States v. Wehrein*, 332 F.2d 469, 472 (8th Cir. 1964).

140. See 7 U.S.C. § 204.

141. See *id.* § 205; see also 9 C.F.R. § 203.12 (statement of policy with respect to providing services and facilities at stockyards on a reasonable and nondiscriminatory basis).

142. *Id.* § 206.

143. *Id.* § 207(a); see also 9 C.F.R. § 201.17 (specifying requirements for filing tariffs).

144. 7 U.S.C. § 207(e); see also 9 C.F.R. §§ 202.1-7 (establishing the rules of practice applicable to rate proceedings), 203.17 (statement of policy with respect to rates and charges at posted stockyards).

145. 7 U.S.C. § 211.

146. See *id.* § 212.

147. *Id.* § 208(a).

selling livestock at their stockyards “conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive market.”<sup>148</sup>

## (ii) Unfair, Unjustly Discriminatory, or Deceptive Practices

Stockyard owners, market agencies, and dealers may not

engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.<sup>149</sup>

GIPSA's regulations elaborate on the statute's prohibitions. For example, stockyard owners, market agencies, and dealers may not circulate misleading reports about market conditions or prices.<sup>150</sup> Purchases and sales must be based on actual weights when livestock are bought or sold on a weight basis.<sup>151</sup> Market agencies must sell livestock “openly, at the highest available bid . . .”<sup>152</sup> and are restricted from purchasing livestock from consignments.<sup>153</sup> Market agencies' relationships with dealers and other buyers also are restricted.<sup>154</sup> Dealers and market agencies are restricted in the information they furnish to competitors.<sup>155</sup> Dealers must act independently of other dealers.<sup>156</sup> Dealers may not “charge, demand, or collect from the seller of . . . livestock any compensation in the form of commission, yardage, or other service charge.”<sup>157</sup> Scales, weighing, and livestock handling are also regulated.<sup>158</sup>

Violations of the prohibition against unfair, unjustly discriminatory, or deceptive practices may result in a cease and desist order and the assessment of a civil penalty up to \$10,000 for each violation.<sup>159</sup> Market agencies and dealers may also have their registration suspended “for a reasonable specified

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148. *Id.* § 208(b).

149. *Id.* § 213(a).

150. *See* 9 C.F.R. § 201.53.

151. *See id.* § 201.55.

152. *Id.* § 201.56(a).

153. *See id.* § 201.56(b)-(d).

154. *See id.* § 201.61.

155. *See id.* § 201.69.

156. *See id.* § 201.70.

157. *Id.* § 201.98.

158. *See id.* §§ 201.71-.82.

159. *See* 7 U.S.C. § 213.

period.”<sup>160</sup> Any person who is responsible for or participated in the violation on which an order of suspension was based may not register under the Act during the suspension period.<sup>161</sup>

“In determining the amount of the civil penalty to be assessed . . . , the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person’s ability to continue in business.”<sup>162</sup> The USDA Judicial Officer’s current sanction policy is as follows:

the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.<sup>163</sup>

The Judicial Officer’s sanctions are judicially reviewable.<sup>164</sup> A violation is wilful if a person carelessly disregards the Act’s requirements.<sup>165</sup> A stricter standard may apply in some circuits.<sup>166</sup>

### **(iii) Prompt Payment**

Like packers, market agencies and dealers are subject to the prompt payment provisions of § 228b. The failure to make prompt payment is deemed to be an “unfair practice.”<sup>167</sup>

Financial irregularities may result in violations of § 213(a) and § 228b. For example, the issuance of insufficient funds checks is considered to be an unfair and deceptive practice in violation of § 213(a), and the resulting failure to pay when due and the failure to pay are considered violations of § 228b.<sup>168</sup>

### **(iv) Accounts and Records**

Like packers and swine contractors, stockyard owners, market agencies, and dealers must “keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in . . .

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160. *Id.* § 204.

161. See 9 C.F.R. § 201.11.

162. 7 U.S.C. § 213(b).

163. In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (1991), *aff’d*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

164. *Ferguson*, 911 F.2d at 1275-78.

165. See, e.g., *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 186-88 (1973).

166. See *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079-81 (4th Cir. 1991); *Capital Produce Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965).

167. 7 U.S.C. § 228b(c).

168. See *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1773 (1991); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1095 (1986), *aff’d sub nom. Garver v. United States*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988).

[their] business, including the true ownership of such business by stockholding or otherwise.”<sup>169</sup> The failure to make and maintain correct accounts, records, and memoranda is punishable by fine or imprisonment.<sup>170</sup> Annual reports regarding compliance with the Act may be required.<sup>171</sup>

#### **g. Compliance with the Secretary’s Orders**

Stockyard owners, market agencies, and dealers must obey orders rendered by the Secretary under § 211 (relating to rates, charges, regulations, or practices), § 212 (relating to discrimination between intrastate and interstate commerce), and § 213 (relating to unfair, unjustly discriminatory, or deceptive practices).<sup>172</sup> Civil penalties of \$500 may be assessed for each offense, and, in the case of a continuing violation, each day is deemed a separate offense.<sup>173</sup>

The Secretary or any injured party is authorized to seek an injunction against any stockyard owner, market agency, or dealer who fails to obey “any order of the Secretary other than for the payment of money while the same is in effect . . . .”<sup>174</sup> Orders of the Secretary, other than orders for the payment of money, take effect in not less than five days and remain in effect for the time specified in the order, unless suspended, modified, or set aside by the Secretary or set aside by a court.<sup>175</sup>

#### **h. Custodial Accounts**

The statutory trust provisions applicable to livestock purchases by packers do not apply to market agencies and dealers. Nonetheless, by regulation, payments made by a livestock buyer to a market agency selling on commission are deemed trust funds and must be deposited in a custodial account.<sup>176</sup> Deposits and withdrawals from custodial accounts are regulated.<sup>177</sup>

#### **i. Reparation Proceedings**

A person injured by a stockyard owner’s, market agency’s, or dealer’s violation of the Act or order of the Secretary relating to the purchase sale or handling of livestock or the purchase or sale of poultry

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169. 7 U.S.C. § 221; see also 9 C.F.R. §§ 201.43-.49 (specifying requirements for accounts and records).

170. See 7 U.S.C. § 221.

171. See 9 C.F.R. § 201.97.

172. See 7 U.S.C. § 215.

173. See *id.*

174. *Id.* § 216.

175. See *id.* § 214.

176. See 9 C.F.R. § 201.42(a), (b).

177. See *id.* § 201.42(c), (d).

may commence an action in federal district court “for the full amount of damages sustained in consequence of such violation.”<sup>178</sup> The action may be subject to the doctrine of primary jurisdiction.<sup>179</sup>

Alternatively, persons complaining of a violation of the Act or an order of the Secretary by a stockyard owner, market agency, or dealer may commence a reparation proceeding for money damages.<sup>180</sup> By the Act’s terms, reparation proceedings are not available against packers, swine contractors, and live poultry dealers.<sup>181</sup>

To initiate a reparation proceeding, the complaint must be filed within ninety days after the cause of action accrues.<sup>182</sup> The Secretary has adopted rules of practice for reparation proceedings.<sup>183</sup>

If the Secretary concludes that the complainant is entitled to an award of damages, the Secretary is required to order “the defendant to pay to the complainant the sum to which he is entitled on or before a day named.”<sup>184</sup> Such an order may be enforced in federal district court in an action brought within one year of the date of the order, and the order is prima facie evidence of the facts stated in it.<sup>185</sup> A prevailing petitioner is entitled to reasonable attorney’s fees.<sup>186</sup>

#### **4. Live Poultry Dealers**

##### **a. “Live Poultry Dealer” Defined**

A “live poultry dealer” is a person

engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person

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178. 7 U.S.C. § 209(a), (b).

179. See, e.g., *McCleneghan v. Union Stockyards Co.*, 298 F.2d 659, 663-69 (8th Cir. 1962); see generally 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* ch. 14 (4th ed. 2002) (discussing primary jurisdiction); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* §§ 8.26-.32 (3d ed. 1991) (same).

180. See 7 U.S.C. §§ 209(b), 210.

181. See *Jackson v. Swift Eckrich, Inc.* 53 F.3d 1452, 1457 (8th Cir. 1995) (noting that “[u]nder the plain language of the PSA, the administrative complaint procedure under § 309 of the PSA is simply not available for claims against a live poultry dealer” (footnote omitted)).

182. See 7 U.S.C. § 210(a).

183. See 9 C.F.R. §§ 202.101-.123. See generally *Campbell*, *supra* note 4, at § 3.83 (discussing reparation proceedings); J.W. LOONEY ET AL., *AGRICULTURAL LAW: A LAWYER’S GUIDE TO REPRESENTING FARM CLIENTS* 374-92 (1990) (same); Jake Looney, *Reparations: An Alternative to Litigation under Federal Statutes*, 1987 ARK. L. NOTES 46, 46-48 (same).

184. 7 U.S.C. § 210(b).

185. See *id.*

186. See *id.*

is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce . . . .<sup>187</sup>

A “poultry growing arrangement” is “any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another’s instructions, for slaughter . . . .”<sup>188</sup> A “poultry grower” is “any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or another, but not an employee of the owner of such poultry.”<sup>189</sup>

### **b. Prohibited Trade Practices**

With respect to live poultry, live poultry dealers are subject to the same prohibitions against unlawful practices as apply to packers under § 192. GIPSA has adopted regulations pertaining to these prohibitions.<sup>190</sup>

The enforcement authority provided to the Secretary in § 193 through § 195 does not apply, however, to live poultry dealers. By their terms, these provisions apply only to enforcement actions against packers and swine contractors.<sup>191</sup>

Under the Act, the Secretary’s enforcement authority against live poultry dealers is limited to seeking injunctive relief under § 228a. Under § 228a, the Secretary may seek injunctive relief if he has reason to believe that

(a) with respect to any transactions covered by this chapter, [a live poultry dealer] has failed to pay or is unable to pay for . . . live poultry, or has failed to pay any poultry grower what is due on account of poultry obtained under a poultry growing arrangement . . . ; or (b) has operated while insolvent, or otherwise in violation of this chapter in a manner which may reasonably be expected to cause irreparable damage to another person; . . . and that it would be in the public interest to enjoin such person from operating subject to this chapter or enjoin him from operating subject to this chapter except under such conditions as would protect vendors or consignors of such commodities or other affected persons . . . .<sup>192</sup>

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187. *Id.* § 182(10).

188. *Id.* § 182(9).

189. *Id.* § 182(8).

190. See, e.g., 9 C.F.R. §§ 200.49 (specifying requirements regarding scale tickets evidencing weighing of live poultry), 201.53 (prohibiting false reports about market conditions), 201.71-.73 (specifying requirements for weighing live poultry), 201.76 (specifying requirements for reweighing live poultry), 201.82 (requiring care and promptness in the weighing and handling of live poultry), 201.100-.108-1 (specifying records to be furnished to poultry growers and sellers and instructions for weighing live poultry).

191. *But see* Roth, *supra* note 34, at 1216-23 (arguing that certain unfair practices might be enforceable under the “full and prompt payment” requirements of the Act, 7 U.S.C. § 228b-1).

192. 7 U.S.C. § 228a.

The Secretary, however, may report violations to the Attorney General, “who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay.”<sup>193</sup> Because live poultry dealers are not required to register under the Act, the Secretary cannot use suspension of registration as a means of enforcement.<sup>194</sup>

Otherwise, the injured party may commence an action for damages in a federal district court.<sup>195</sup> Reparation proceedings are unavailable.<sup>196</sup>

### c. Statutory Trust

The Act establishes a statutory trust for the benefit of unpaid cash sellers and poultry growers applying to all poultry obtained by a live poultry dealer, “unless such live poultry dealer does not have average annual sales of live poultry, or average annual value of live poultry obtained by purchase or by poultry growing arrangement, in excess of \$100,000.”<sup>197</sup> The trust and the procedures for preserving it are similar to that for the benefit of unpaid cash sellers to packers.<sup>198</sup> The Secretary may enforce the statutory trust requirement through administrative proceedings.<sup>199</sup>

### d. Prompt Payment

Like packers, market agencies, and dealers who are subject to a prompt payment requirement under § 228b, live poultry dealers are required to make prompt payment under a similar provision contained in § 228b-1. Under § 228b-1,

[e]ach live poultry dealer obtaining live poultry by purchase in a cash sale shall, before the close of the next business day following the purchase of poultry, and each live poultry dealer obtaining live poultry under a poultry growing arrangement shall, before the close of the fifteenth day following the week in which the poultry is slaughtered, deliver, to the cash seller or poultry grower from whom such live poultry dealer obtains the poultry, the full amount due to such cash seller or poultry grower on account of such poultry.<sup>200</sup>

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193. *Id.* § 224.

194. *See id.* §§ 203 (requiring market agencies and dealers to register), 204 (authorizing the Secretary to suspend registrations).

195. *Id.* § 209; *see generally* Roth, *supra* note 34, at 1216-23 (discussing damages claims against live poultry dealers under the Act).

196. *See* 7 U.S.C. § 210; *Jackson v. Swift Eckrich, Inc.*, 53 F.3d at 1457.

197. 7 U.S.C. § 197(b).

198. *Compare id.* § 197 *with id.* § 196; *see also* 9 C.F.R. § 203.15 (providing the procedures for preserving trust benefits).

199. 7 U.S.C. § 228b-2(a), (b).

200. *Id.* § 228b-1.

For purposes of this provision, “a cash sale means a sale in which the seller does not expressly extend credit to the buyer.”<sup>201</sup>

Delaying or attempting to delay the collection of funds is deemed an “unfair practice” in violation of the Act.<sup>202</sup> GIPSA has adopted regulations pertaining to the prompt payment requirement.<sup>203</sup>

As with the statutory trust requirements, the Secretary may enforce the prompt payment requirements by initiating administrative proceedings.<sup>204</sup> Live poultry dealers may seek judicial review of the Secretary’s final enforcement order.<sup>205</sup> Violation of a final order is a criminal offense.<sup>206</sup> Injunctive relief may also be available.<sup>207</sup>

#### **e. Records**

Like packers, swine contractors, stockyard owners, market agencies, and dealers, live poultry dealers must maintain complete and accurate records of their transactions and their ownership.<sup>208</sup> Failure to do so is a criminal offense.<sup>209</sup> GIPSA’s regulations impose specific requirements for growout contracts, including their contents; condemnation and grading certificates; grouping or ranking sheets; and purchase invoices.<sup>210</sup>

### **D. Right To Discuss Contract Terms**

Although not enacted as an amendment to the Packers and Stockyards Act, Congress, in the 2002 Farm Bill,<sup>211</sup> limited the use of confidentiality clauses in contracts between livestock and poultry producers and processors who obtain livestock and poultry for slaughter.<sup>212</sup>

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201. *Id.* § 228b-1(c).

202. *Id.* § 228b-1(b).

203. *See* 9 C.F.R. § 201.43.

204. *See* 7 U.S.C. § 228b-2.

205. *See id.* § 228b-3.

206. *See id.* § 228b-4.

207. *See id.* § 228a.

208. *See id.* § 221.

209. *See id.*

210. *See* 9 C.F.R. § 201.100.

211. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, tit. X, § 10503, 116 Stat. 142, 510 (codified at 7 U.S.C. § 229b).

212. *See* 7 U.S.C. § 229b.

The statute defines a “producer” as “any person engaged in the raising and caring for livestock or poultry for slaughter.”<sup>213</sup> A “processor” is “any person engaged in the business of obtaining livestock or poultry for the purpose of slaughtering the livestock or poultry.”<sup>214</sup>

The statute provides as follows:

Notwithstanding a provision in any contract between a producer and a processor for the production of livestock or poultry, or in any marketing agreement between a producer and a processor for the sale of livestock or poultry for a term of 1 year or more, that provides that information contained in the contract is confidential, a party to the contract shall not be prohibited from discussing any terms or details of the contract with—

- (1) a Federal or State agency;
- (2) a legal adviser to the party;
- (3) a lender to the party;
- (4) an accountant hired by the party;
- (5) an executive or manager of the party;
- (6) a landlord of the party; or
- (7) a member of the immediate family of the party.<sup>215</sup>

This prohibition, however, is qualified as follows:

Subsection (b) of this section does not—

- (1) preempt any State law that addresses confidentiality provisions in contracts for the sale or production of livestock or poultry, except any provision of State law that makes lawful a contract provision that prohibits a party from, or limits a party in, engaging in discussion that subsection (b) of this section requires to be permitted; or
- (2) deprive any State court of jurisdiction under any such State law.<sup>216</sup>

This prohibition applies to contracts “entered into, amended, renewed, or extended after May 13, 2002.”<sup>217</sup> It is apparently intended to address the “major problem in poultry contracts over the years, which is increasingly becoming a problem in livestock and grain contracts, . . . [of] confidentiality clauses which prohibit the producer from discussing the contract with anyone.”<sup>218</sup>

## Conclusion

For over eight decades, the Packers and Stockyards Act has regulated livestock marketing. In the years that have followed its enactment, it has undergone changes that may well have been outpaced by

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213. *Id.* § 229b(a)(1).

214. *Id.* § 229b(a)(2).

215. *Id.* § 229b(b).

216. *Id.* § 229b(c).

217. *Id.* § 229b(d).

218. Joseph A. Miller, *Contracting in Agriculture: Potential Problems*, 8 DRAKE J. AGRIC. L. 57, 63 (2003).

the structural changes in the industries it regulates. Nevertheless, that its key provisions have survived largely intact since their original enactment suggests that its original comprehensive breadth was a sound decision by those who enacted it. Whether it should become more comprehensive is a question that will undoubtedly continue to be debated.

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