

2020 SUPPORTING STATEMENT

Preserving Trust Benefits Under the Packers and Stockyards Act

OMB NO. 0581-NEW

A. Justification.

1. EXPLAIN THE CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY. IDENTIFY ANY LEGAL OR ADMINISTRATIVE REQUIREMENTS THAT NECESSITATE THE COLLECTION.

The Packers and Stockyard Act, 1921, as supplemented and amended (7 U.S.C. 181-229), authorizes and directs the Secretary of Agriculture, to direct the following:

- a. The Agricultural Market Service (AMS), Fair Trade Practices Program's (FTPP) Packers and Stockyards Division (PACKERS AND STOCKYARDS DIVISION), requires regulated entities in the livestock, meat packing, and poultry industries to keep records, submit information to PACKERS AND STOCKYARDS DIVISION, and provide information to third parties. The regulated entities are packers, live poultry dealers, stockyard owners, market agencies, and dealers. In general, the information required includes identifying, descriptive, procurement, and financial information and certifications (7 U.S.C 181-229).
- b. Packers and Stockyards Division administers the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. 181-229c). Among other things, the P&S Act makes it unlawful for packers, dealers, market agencies, and live poultry dealers to engage in unfair, unjustly discriminatory, deceptive, or anti-competitive practices in the livestock, meat, and poultry industries. Through policy statements in 9 CFR, part 203, we provide guidelines for members of the livestock, meat packing, and poultry industries. Through the regulations in 9 CFR, part 201 (the regulations), we implement provisions of the P&S Act. The P&S Act, the regulations, and policy statement require the collection of information in the form of information to be filed with the Secretary of the United States Department of Agriculture (USDA), records to be kept, and information to be disclosed to third parties.
- c. Through enforcement of the P&S Act, we regulate the business practices of those engaged in commerce in livestock and live poultry marketing, as well as meat and poultry packing. The P&S Act is designated to protect

the financial interests of livestock and poultry producers engaged in commerce of livestock and live poultry sold for slaughter. The P&S Act also protects members of the livestock and poultry marketing, processing, and merchandising industries from unfair competitive practices.

- d. Section 401 of the P&S Act (7 U.S.C. 221) requires every packer, live poultry dealer, stockyard owner, market agency, and dealer to keep such accounts, records, and memoranda to fully and correctly disclose all transactions involved in its business. In addition, section 401 specifies that the Secretary may prescribe the manner and form in which such accounts, records, and memoranda must be kept. Most of these accounts, records, and memoranda are kept by the subject entities as usual and customary records.
- e. Market agencies, dealers, and packers whose average annual purchases exceed \$500,000 are required to file and maintain reasonable bonds under such rules and regulations as the Secretary prescribes in 7 U.S.C. 204.¹
- f. Section 409 of the P&S Act (7 U.S.C. 228b) requires a written agreement to be disclosed in the records of any market agency or dealer selling livestock, when the parties to the sale expressly agree to extend payment after the close of the next business day.
- g. Section 206 of the P&S Act (7 U.S.C. 196) requires sellers to give written notice to the packer and file the notice with the Secretary to preserve the benefit of the trust provisions of section 206. Section 207 of the P&S Act (7 U.S.C. 197) require sellers or poultry growers to give written notice to the live poultry dealer and file the notice with the Secretary to preserve the benefit of the trust provisions of section 207.
- h. Section 402 of the P&S Act (7 U.S.C. 222) applies sections 6, 8, 9, and 10 of the Federal Trade Commission Act, as amended (FTC Act) (15 U.S.C. 41-58) to the jurisdiction of the Secretary of Agriculture in enforcing the provisions of the P&S Act. In addition, these sections apply in order for USDA to provide information for the use of Congress. Requirements for the collection of information in section 6 of the FTC Act include:
 - 1. Gathering and compiling information concerning the organization, business, conduct, practices, and management of any corporation engaged in commerce to regulate commerce and the corporation's relation to other corporations and to individuals, associations, and partnerships. (Section 6, paragraph (a))

¹ NOTE: 7 U.S.C. 204 is a freestanding provision and is not contained in a section of the P&S Act.

2. Making public such portions of the information obtained, except trade secrets and names of customers, appropriate in the public interest, and making annual and special reports to the Congress and to publish reports for public information and use. (Section 6, paragraph (f))
3. Requiring other agencies, when directed by the President, to furnish records, papers, and information in their possession relating to any corporation subject to these provisions. (Section 8)
4. Providing the Agency or its duly authorized agent or agents, at all reasonable times access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against. (Section 9)
5. Specifying fines for violations related to false entries or statements of fact in any required report, account, record, or memorandum kept by any subject corporation, and for failing to file any required annual or special report. (Section 10)

2. **INDICATE HOW, BY WHOM, AND FOR WHAT PURPOSE THE INFORMATION IS TO BE USED. EXCEPT FOR A NEW COLLECTION, INDICATE THE ACTUAL USE THE AGENCY HAS MADE OF THE INFORMATION RECEIVED FROM THE CURRENT COLLECTION.**

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ection 763 of the Consolidated Appropriations Act, 2021 (7 U.S.C. 217b; *Pub. L. 116-260; December 27, 2020*), amended the Packers and Stockyards Act, 1921, as previously amended (7 U.S.C. 181 et seq.), by adding a new Sec. 318 establishing a statutory trust for the benefit of unpaid cash sellers of livestock.

- a. Under the new trust, livestock dealers whose average annual purchases of livestock exceed \$100,000 must hold all inventories of and receivables and proceeds from livestock purchased in cash sales in trust for the benefit of all unpaid cash sellers of that livestock until the cash sellers have been paid in full.
- b. Under the new statutory trust provisions, livestock sellers lose their interest in the trust unless they notify livestock dealers and the Secretary of Agriculture (Secretary) in writing that payment has not been received. Such notice must be provided within 30 days of the final date when payment was due or within 15 days of notice that a dealer's payment instrument has been dishonored. The statute further provides that trust provisions apply only to cash sales, which are defined in the statute as sales in which the seller does not expressly extend credit to the buyer. Thus, livestock sellers have no claim against the trust if they have extended credit to the buyer.

- c. Currently, § 203.15 of the Packers and Stockyards regulations (9 CFR parts 201 through 206) outlines the process by which livestock sellers and live poultry sellers and growers preserve their interest in the packer and poultry trusts previously established under the Act. AMS proposes to revise § 203.15, which would continue to provide for preservation of trust benefits under the packer and poultry trusts, by adding the process by which livestock sellers can preserve their interests under the new livestock dealer trust. The statute provides that livestock sellers, and poultry sellers or growers must notify packers, live poultry dealers, or livestock dealers and the Secretary in writing of their intent to preserve their trust benefits within 30 days of the final day on which payment was due or within 15 days of receiving notice that the livestock dealer's, packer's, or live poultry dealer's payment instrument was dishonored.
- d. Accordingly, revised § 203.15 would outline how sellers and growers can comply with the statutory requirement. The written notification should identify both parties in the transaction, the date of the transaction, the date notice was received that the payment instrument had been dishonored (if applicable), and the amount of money due. Written notification may be by letter, fax, email, or other electronic transmission, preferably filed with the Packers and Stockyards Division of AMS. Section 203.15 of the Act continues to provide that while the written notification described above is preferred, any written notice to the buyer and the Secretary that the seller has not received full payment is sufficient to meet the statutory requirement if it is given within the prescribed timeframes. Finally, § 203.15 would be revised to include the statutory definition of a cash sale, meaning a sale in which the seller does not expressly extend credit to the buyer.
- e. Section § 201.200 of the regulations currently prohibits packers whose annual livestock purchases exceed \$500,000 from entering into credit agreements with livestock sellers unless the packer obtains written acknowledgement from the seller that the seller has no trust rights with respect to each particular sale under a credit agreement.
- f. Under this proposed rule, § 201.200 would be revised to also prohibit livestock dealers whose annual livestock purchases exceed \$100,000 from entering into credit agreements with livestock sellers unless the dealer obtains written acknowledgement from the seller that the seller has no trust rights with respect to each particular sale under a credit agreement. The seller's statement must further acknowledge that the credit agreement covers a single sale, remains in effect until a specified date, or remains in effect until it is canceled in writing by either party. The seller's acknowledgement must be dated and signed by the seller. The livestock dealer would be required to maintain records of the acknowledgement, as well as all other documents related to the credit agreement, for as long as required by law or by the AMS Administrator, but for no less than two years following the expiration of the credit agreement referred to in the acknowledgment. Finally, the livestock dealer would be required to provide a copy of the acknowledgment to the

seller.

In general, the information required includes identifying qualifying transactions from livestock producers of cattle, hogs, sheep and lambs, and horses and mules, and determining whether the livestock dealer has entered into a credit agreement with the seller. The information is used:

- To provide necessary business transaction safeguards;
- To protect financial interests and trade practices of livestock producers, poultry growers and others in the livestock, meat packing and poultry industries;
- To help assure that the regulated entities do not engage in unfair, unjustly discriminatory, or deceptive trade practices or anti-competitive behavior:
- To preserve business transactions occurring under the P&S Act;
- To assist PSD personnel in carrying out their regulatory responsibilities;
- To determine if unfair, unjustly discriminatory, or deceptive practices exist;
- To investigate complaints by auditing the firm's business records;
- To settle the dispute by PSD or, when violations of the P&S Act are disclosed, as legal evidence in a formal administrative hearing; and

Specific requirements for uses of information to be collected follow by specific form and regulation.

Reporting Requirements – Specific Forms

The documents necessary to require and provide the information needed to invoke the Dealer trust are as follows:

Dealer Trust Letter to Potential Claimant

- This letter provides information regarding the purpose of the Dealer trust, and instruction to those sellers of livestock that wish to invoke the Dealer Trust.

Dealer Trust Notification Form

- Form provided by the potential claimant detailing the information for livestock purchases by the dealer that has not been paid.

- 9 CFR 201.95 – Inspection of Business Records and Facilities

This regulation does not contain a specific recordkeeping requirement. It requires those firms subject to the P&S Act to make their business records and facilities available to our representatives for inspection and copying.

- 9 CFR 201.200 – Sale of Livestock to a Packer on Credit

This regulation helps protect cash sellers of livestock from losing an interest under the trust provisions of the P&S Act. The regulation contains the language to be used in a written acknowledgment by a livestock seller that the livestock seller would lose any interest in the trust provision by entering into this credit sale and agreeing to such sale. This would be extremely costly to livestock sellers if they sold livestock on credit and did not have an opportunity to obtain such payment through the trust provision. The acknowledgment is necessary when a packer asks the seller of livestock to extend credit. If the sale is on a cash basis, such an acknowledgment is not required.

In addition, the regulation provides that the packer retain the written acknowledgment in its records for at least 2 calendar years. This requirement allows investigators to determine if such agreement has been signed.

NOTE: This regulation will be modified to include the provisions of the Dealer Trust.

- 9 CFR 203.4 – Statement with Respect to the Disposition of Records by Packers, Live Poultry Dealers, stockyard owners, market agencies and dealers

Each packer, live poultry dealer, stockyard owner, market agency and dealer may destroy or dispose of accounts, records, and memoranda which contain, explain, or modify transactions in its business after such accounts, records, and memoranda have been retained for a period of 2 full years. The statement goes on to say that specific records made or kept by a packer may be disposed of after 1 year.

The statement does not require specific records to be generated; it specifies the time period after which certain records, if made or kept, may be destroyed. This statement relieves the burden on packers by specifying when required records may be disposed of and thus reducing storage requirements.

- 9 CFR 203.15 – Trust Benefits under Section 206 and 207 of the P&S Act

This policy statement clarifies the requirement and recommends the type of information to be included in the written notice to be filed by an unpaid poultry grower or unpaid cash seller of livestock or live poultry to a packer or live poultry dealer. The document preserves the seller's rights to trust funds. The generated document is required when a packer or live poultry dealer fails to pay.

3. DESCRIBE WHETHER, AND TO WHAT EXTENT, THE COLLECTION OF INFORMATION INVOLVES THE USE OF AUTOMATED, ELECTRONIC, MECHANICAL, OR OTHER TECHNOLOGICAL COLLECTION TECHNIQUES OR OTHER FORMS OF INFORMATION TECHNOLOGY, E.G. PERMITTING ELECTRONIC SUBMISSION OF RESPONSES, AND THE BASIS FOR THE DECISION FOR ADOPTING THIS MEANS OF COLLECTION. ALSO DESCRIBE ANY CONSIDERATION OF USING INFORMATION TECHNOLOGY TO REDUCE BURDEN.

The forms in this information collection are part of the AMS Integrated eGovernment Report. AMS is committed to complying with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

The Packers and Stockyards Automated System (PSAS) allows the program's scanned documents to be stored in a state of the art Enterprise Content Management (ECM) system that allows for improved security controls, easier access by its users, and improved document versioning controls.

The data management piece of the new system has improved Packers and Stockyards Division's data integrity by integrating what was currently several systems across multiple data bases into one completely integrated system with all the data residing in one system and database. The system includes data validation and completeness checks that aids in the capturing of more complete data and accurate data than was possible under the old system. The multi-tiered and web based implementation provides a basis for a future extension to allow that capturing of data by the livestock industry entities who are regulated by Packers and Stockyards Division via a web-based public interface. All of these features help reduce the data entry load on the staff in Packers and Stockyards Division. A webpage is available to Packers and Stockyards Division employees.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION. SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN ITEM 2 ABOVE.

The information that subject entities are required to furnish and the records they are required to maintain are not available from other sources, either within Government or from non-government sources. This is confirmed during day-to-day working relations with Federal and State agencies and other organizations.

5. IF THE COLLECTION OF INFORMATION IMPACTS SMALL BUSINESSES OR OTHER SMALL ENTITIES (ITEM 5 OF THE OMB FORM 83-1), DESCRIBE THE METHODS USED TO MINIMIZE BURDEN.

To minimize the burden on small entities, the regulations required the least information necessary to carry out the program. It is estimated that 302, or 10 percent of the 3,015 dealers that annually purchased more than \$100,000 in livestock, would have credit agreements that require trust waiver acknowledgements.

6. DESCRIBE THE CONSEQUENCE TO FEDERAL PROGRAM OR POLICY ACTIVITIES IF THE COLLECTION IS NOT CONDUCTED OR IS CONDUCTED LESS FREQUENTLY, AS WELL AS ANY TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN.

Upon reviewing the Packers and Stockyards Division regulations, Packers and Stockyards Division has determined that the information to be maintained is the minimum necessary to administer the P&S Program. We believe it is vital that Packers and Stockyards Division collect the most current business information from regulated entities to fulfill its obligation to enforce fair trading provisions in the livestock, poultry, and swine industries as required by the P&S Act.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES THAT WOULD CAUSE AN INFORMATION COLLECTION TO BE CONDUCTED IN A MANNER:

The recordkeeping/reporting procedures are consistent with the guidelines established under 5 CFR 1320.5.

8. IF APPLICABLE, PROVIDE A COPY AND IDENTIFY THE DATE AND PAGE NUMBER OF PUBLICATION IN THE FEDERAL REGISTER OF

THE AGENCY'S NOTICE, REQUIRED BY 5 CFR 1320.8(d), SOLICITING COMMENTS ON THE INFORMATION COLLECTION PRIOR TO SUBMISSION TO OMB. SUMMARIZE PUBLIC COMMENTS RECEIVED IN RESPONSE TO THAT NOTICE AND DESCRIBE ACTIONS TAKEN BY THE AGENCY IN RESPONSE TO THESE COMMENTS. SPECIFICALLY ADDRESS COMMENTS RECEIVED ON COST AND HOUR BURDEN.

The notice of information collection and request for comments was published in the Federal Register on May 5, 2022, Vol. 87 No. 87, page 26695. The Agency received six comments during this period..

Credit sales acknowledgements

One commenter supported the proposed requirements that dealers obtain acknowledgments from sellers that sellers waive their trust rights when making credit sales and that credit agreements specify whether those agreements cover a single sale, remain in effect until a certain date, or remain in effect until cancelled. The commenter stated these requirements protect sellers against waiving their trust rights unknowingly.

AMS agrees that requiring dealers to obtain credit sales waivers and requiring such acknowledgments to specify the length of the credit agreement term can protect livestock sellers from waiving their trust rights inadvertently. AMS is making no changes to the proposed rule based on these comments.

Definition of cash sale

The same commenter recommended that AMS revise the proposed definition of *cash sale* to mean one in which the seller does not expressly extend credit to the buyer *in writing*. The commenter cited case law that found “that unless the parties clearly agree in writing to a credit agreement, the transaction is a cash sale.”² The commenter asserted that adding “in writing” to the cash sale definition would clarify that a written extension of credit is needed for the sale to no longer be a cash sale and would make the definition of *cash sale* align with the requirements that the credit agreement and waiver be in writing.

AMS notes that sec. 409(b) of the Act (7 U.S.C. 228b) requires credit agreements to be in writing. Further, the commenter’s proposed definition of *cash sale* would be redundant and would cause confusion because it is different than the statutory definition of *cash sale* in sec. 318(d) of the Act (7 USC 217b), which provides that “[f]or the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.” Accordingly, AMS is making no changes to the proposed regulatory definition of *cash sale* based on this comment.

² *In re Gotham Provision Co.*, 669 F.2d 1000, 1005 (5th Cir. 1982).

One commenter suggested that the definition of *cash sale* should be only those in which neither the seller nor any lender has extended credit to the buyer to purchase the seller's livestock. The commenter asserted that livestock sales ultimately involve more participants than just the buyers and sellers, and that lenders would face increased burden as they attempted to follow all the transactions involved to determine whether sales were actually cash sales.

While the commenter seems to suggest lenders should have priority over the livestock for which the dealer has borrowed money, AMS points out that the trust is designed specifically to protect livestock sellers from situations where a lender might take livestock or proceeds from a buyer who hasn't paid for the livestock. Further, as mentioned above, the *cash sale* definition is statutory and not open to agency revision. Accordingly, AMS is making no change to the rule as proposed based on this comment.

Notifications

One commenter supported the proposed language in § 203.15 that provides what information should be submitted with a claim for a livestock seller to preserve their interest in the dealer trust and that such a claim must be submitted to both the defaulting dealer and the Secretary. The commenter agreed that the required information properly identifies the sale for which trust benefits are being preserved and concurred with the proposal that while such information is desirable, any timely written notice informing the dealer and the Secretary that the dealer has failed to pay is sufficient to meet the notice requirement in order to preserve the seller's interest in the trust.

AMS notes that the proposed notification requirements mirror those currently in place in § 203.15 relating to the packer and live poultry dealer trusts. Accordingly, AMS is making no changes to the proposed rule based on these comments.

Two commenters stated the proposed timeframes for notification are too long, one suggesting that trust notifications should be made no later than 10 business days from the date payment was due and/or postmarked, as per current prompt payment rules,³ with an additional three business days allowed after a payment instrument is dishonored. Both commenters expressed concern that the proposed rule's notification timeframes could allow for up to 45 days of "clear title" disruption and comingling of the non-paying dealer's receivables and assets. Two commenters further asserted that the proposed timeline could allow unpaid sellers to collude with non-paying dealers, allowing them to operate illegally for up to 45 days from the date of the original transgression, and

³ Payment for livestock purchases is generally due no later than the close of the next business day following the purchase and transfer of possession of the livestock. 7 U.S.C. 228b.

allowing competitors to unknowingly sell livestock to offending dealers.

AMS notes that notification timeframes are based on the date of the transaction for which payment is not received. Later transactions do not extend the filing timeframe for earlier transactions. PSD's experience with the packer and live poultry dealer trusts suggests that sellers are unlikely to wait 30 days before filing notifications to preserve their trust rights. AMS believes sellers are motivated to file timely trust notifications in order to avoid losing revenues or assets pertaining to their livestock sales. Further, if a seller chooses to do business with a buyer that has not paid for earlier transactions, that seller does so at their own risk. PSD investigations into trust claims have uncovered no evidence that sellers collude with dealers to allow dealers to continue operating illegally. In any event, the proposed notification timeframes are statutory, and AMS cannot issue regulations that would conflict with the statute. Accordingly, AMS is making no changes to the proposed rule based on these comments.

In connection with the list of registered dealers on PSD's website, two commenters suggested PSD also should be required to report trust claim notifications against dealers so all industry participants can verify not only the registration and bonding status of dealers, but also their status regarding trust claims. The commenters expressed concern about PSD's ability to maintain and publish such lists in a timely manner. Further, commenters suggested the proposed notification timelines and a lack of reliable disclosure about dealer payment defaults potentially harms other market participants. Commenters asserted there must be transparency and disclosure about dealers so that industry participants can make appropriate decisions with respect to their perceived risk.

PSD is prohibited under 9 CFR 201.96 – Unauthorized disclosure of business information prohibited – from publicizing information acquired through investigations about dealers' businesses without their consent. However, PSD acts quickly to initiate investigations when it receives trust notifications. PSD reviews packers', dealers', and live poultry dealers' records and determines whether other sellers have not been paid. As appropriate, PSD notifies other unpaid sellers that they may need to file trust notifications to protect their interests. Accordingly, AMS is making no changes to the proposed regulations based on these comments.

Dealers

The Packers and Stockyards regulations currently require livestock dealers to register with PSD. PSD maintains and publishes the list of registered dealers on its website. One commenter pointed out that regardless of their compliance with the registration requirement, any individual engaging in the business of buying and selling livestock in commerce is a dealer, and that sellers thus retain their statutory trust rights even when a buyer fails to register as a dealer. Another commenter

disagreed, saying that the trust should only be enforceable against regulated livestock dealers identified and disclosed by PSD. According to this commenter, a seller engaging in livestock trade with an unidentified and unregulated livestock buyer, or “alleged dealer,” should assume the risk of doing so when there are alternative methods of marketing livestock in a secure manner, such as through a regulated dealer or livestock market. A third commenter asserted that the proposed rule could cause many buyers to unknowingly be classified as dealers.

Section 301(d) of the Act (7 U.S.C. 201) defines the term *dealer* – as used in the Act – to mean “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.” The courts have held that if someone is not a *market agency*,⁴ and is engaged in the business of buying and selling in commerce livestock, their activities fall within the provision of sec. 301(d) of the Act, and that to hold otherwise would be to ignore completely the definition of a *dealer* as prescribed by Congress.⁵ Further, sec. 318(a)(1) of the Act (7 U.S.C. 217b) specifies that “[a]ll livestock purchased by a dealer in cash sales and all inventories of, or receivables or proceeds from, such livestock sales shall be held by such dealer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid cash sellers.” Only dealers whose average annual purchases of livestock do not exceed \$100,000 are exempt from the dealer trust provisions (sec. 318(a)(2)).

AMS notes that the statutory trust provisions do not differentiate between registered and unregistered dealers, nor between sales to registered and unregistered dealers. AMS believes that if the regulations were to exclude unregistered dealers from trust applicability, it could entice some dealers to not register, and thereby put more sellers at risk. Accordingly, AMS is making no changes to the rule as proposed based on these comments.

One commenter objected to the definition of a *dealer* as one with purchases exceeding \$100,000, finding the definition to be too broad and unenforceable from a regulatory standpoint. AMS clarifies that the \$100,000 threshold does not alter the statutory definition of *dealer*, as discussed above. The \$100,000 average annual purchases threshold, which is established by Congress in the amended statute, identifies which dealers are subject to the provisions of the trust and must comply with the

4 The term *market agency* is defined in sec. 307(c) of the Act (7 USC 201) to mean “any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.” The term includes “any person who engages in the buying or selling of livestock, on a commission or other fee basis, through the use of online, video, or other electronic methods when handling or providing the means to handle receivables or proceeds from such buying or selling, so long as such person’s annual average of online, video, or electronic sales of livestock, on a commission or other fee basis, exceeds \$250,000.”

5 *U.S. v. Kelly*, 106 F.Supp 394 (E.D. Okla., 1952).

requirement to obtain credit sales trust waiver acknowledgements from sellers. Further, PSD is able to determine a dealer's average annual purchase amount using information provided by dealers in their annual reports, filed pursuant to the requirements of 9 CFR 201.97. PSD is also able to extrapolate average annual purchases for new dealers, or those who have not filed recent reports, using current year-to-date purchase information. Thus, AMS believes the proposed requirement to be reasonably enforceable. Accordingly, AMS is making no change to the proposed regulation based on this comment.

Regulatory Burden

One commenter concurred with AMS's assessment of the reporting and recordkeeping burden related to compliance with these proposed requirements, agreeing that completing each acknowledgement would take one half hour or less and that the need for such acknowledgements would likely be infrequent. The commenter observed that the required credit sales acknowledgment is consistent with existing requirements related to the packer trust. AMS notes that these requirements intentionally mirror the packer trust provisions because the industry is already familiar with the process. AMS made no changes to the proposed rule based on these comments.

Another commenter stated that AMS grossly underestimated the financial impact of the trust itself on small businesses operating as livestock sellers, markets, producers, and/or dealers. The commenter suggested AMS has not considered costs to sellers related to offering credit terms. The commenter asserted that livestock marketing agencies would be forced by dealers to extend credit and would incur additional interest costs to secure lines of credit to cover their custodial accounts. The commenter speculated further that other industry participants, such as lenders and government agencies, would incur massive legal, interest, and administrative costs.

AMS notes that the scope of the proposed rule is confined to provisions related to making timely trust claim notifications and requiring dealers to obtain credit sales trust waiver acknowledgements from sellers. AMS's cost/benefit and Regulatory Flexibility analyses, which were published in the proposed rule, evaluated only the potential burdens, costs, and benefits of effectuating the proposed provisions. Thus, comments related to the burden of effectuating the statutory trust itself are outside the scope of the proposed rule, and AMS is making no changes to the rule as proposed based on these comments.

Trust provisions and enforcement

Three commenters expressed concern about the proposed regulations with regard to the establishment of the livestock dealer statutory trust, as well as other existing provisions of the amended Act and

the regulations, such as prompt payment requirements, “clear title” of cleared livestock transactions, and definition of the term *dealer*. One commenter asserted that the trust was established by Congress without any meaningful or robust discussion with industry participants, who felt there was already ample protection available in the marketplace for livestock sellers operating within the guidelines of prompt payment rules. Another commenter suggested that AMS suspend implementation of the proposed rule we can conduct outreach to the affected industry and lenders to mitigate its unintended consequences, including lower prices to producers.

One commenter suggested that a new program to be instituted by the Federal Reserve will make it possible to transact instant interbank payments for livestock purchases.⁶ The commenter pointed out that the proposed rule does not discuss use of the instant payment system in lieu of the dealer trust, nor its potential impact on information collection.

One commenter asserted that trust provisions conflict with Uniform Commercial Code (UCC) provisions regarding “clear title” on livestock transactions and lenders’ liens and security interest in livestock. The commenter further questioned whether competing buyers under UCC and trust provisions would be in a truly competitive bidding process or level playing field at public market.

Two commenters expressed concerns about the mechanics of enforcing a dealer trust claim and the U.S. Department of Agriculture’s (USDA) ability to enforce trust claims. One commenter further expressed belief that the trust and the proposed regulations may disrupt livestock markets and undermine current industry efforts to “establish true price discovery,” thereby damaging livestock producers who “are already languishing under current market conditions.” The same commenter stated there may be substantial dealer trust enforcement issues with regard to livestock transactions between members inside and outside of tribal nations. The commenter asserted that USDA has not met its burden of proof with regard to the impact and enforcement of the trust on Indian tribal nations.

One commenter expressed the opinion that the non-paying dealer would be the trustee of the trust created under the Act. Another commenter noted that USDA’s enforcement role in the dealer trust appears to be greater than its role in enforcement of the packer trust and encouraged USDA to prioritize the establishment of dealer trust enforcement procedures so the agency is prepared to act immediately when a default occurs.

AMS notes that the Act regulates the business activities of livestock dealers. The trust was created to protect livestock sellers doing business with dealers. The trust is specifically intended to keep inventories of livestock and the proceeds therefrom in trust so that

⁶ https://www.federalreserve.gov/paymentsystems/fednow_about.htm; accessed August 2, 2022.

livestock sellers are paid.

Prior to implementing the trust, Congress instructed USDA to conduct a study on the feasibility of a dealer trust. The study, released on February 4, 2020, included input from the industry and lenders that Congress later considered when amending the Act to establish the livestock dealer statutory trust.⁷ Congressional establishment of the dealer statutory trust through amendment of the Packers and Stockyards Act became effective December 27, 2020. The provisions of the proposed rule are preliminary steps to trust enforcement and include the regulations AMS deemed necessary to begin trust administration. The proposed provisions are intended to help sellers understand the conditions under which they can preserve their trust rights, and to help both sellers and dealers engaged in credit transactions understand the conditions of credit sales as they relate to trust benefits.

AMS agrees with commenters that trust enforcement is important and assures commenters that we are working on trust enforcement regulations to be proposed in the future. In the meantime, PSD responds quickly to all complaints of nonpayment for livestock in order to notify sellers of their right to file trust claims and bond claims. Where appropriate, PSD brings enforcement action against violators, which could result in civil penalties and/or suspension of registration. AMS points out that the statute includes authority for USDA to replace the dealer with another person as trustee to better protect livestock sellers.

Nevertheless, AMS finds that comments about the merits of the trust itself, about trust enforcement inside and outside tribal nations, about provisions of the amended Act, or about other existing regulations are outside the scope of the proposed rule of May 5, 2022. Accordingly, AMS is making no changes to the rule as proposed based on those comments.

DESCRIBE EFFORTS TO CONSULT WITH PERSONS OUTSIDE THE AGENCY TO OBTAIN THEIR VIEWS ON THE AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, THE CLARITY OF INSTRUCTIONS AND RECORDKEEPING, DISCLOSURE, OR REPORTING FORMAT (IF ANY), AND ON THE DATA ELEMENTS TO BE RECORDED, DISCLOSED, OR REPORTED.

No efforts were made to consult with persons outside the agency to obtain their view on the availability of data, frequency of collection, the clarity of instructions, etc. Packers and Stockyards Division's resident agents are in contact on a daily basis with the industry. There have been no concerns or recommendations made concerning Packers and Stockyards Division's forms.

⁷ [Report Pursuant to Section 12103 of the Agriculture Improvement Act of 2018: Study to Determine the Feasibility of Establishing a Livestock Dealer Statutory Trust \(usda.gov\)](#); accessed August 2, 2022.

CONSULTATION WITH REPRESENTATIVES OF THOSE FROM WHOM INFORMATION IS TO BE OBTAINED OR THOSE WHO MUST COMPILE RECORDS SHOULD OCCUR AT LEAST ONCE EVERY 3 YEARS -- EVEN IF THE COLLECTION OF INFORMATION ACTIVITY IS THE SAME AS IN PRIOR PERIODS. THERE MAY BE CIRCUMSTANCES THAT MAY PRECLUDE CONSULTATION IN A SPECIFIC SITUATION. THESE CIRCUMSTANCES SHOULD BE EXPLAINED.

Packers and Stockyards Division's employees, as a part of everyday business operations, attend meetings and are in contact with industry trade groups, associations, State departments of agriculture, farm organization, and other interested members of the livestock, meat packing, and poultry industries. The P&S Act and regulations are discussed in these forums and information is routinely solicited on the effectiveness of the Packers and Stockyards Division's operations, which includes the need to obtain information from the affected industries.

- 9. EXPLAIN ANY DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS, OTHER THAN REMUNERATION OF CONTRACTORS OR GRANTEEES.**

The recordkeeping/reporting requirements are mandated by law. No payments are made to respondents.

- 10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS AND THE BASIS FOR THE ASSURANCE IN STATUTE, REGULATION, OR AGENCY POLICY.**

Records/reports received from firms and individuals subject to the P&S Act are considered confidential and protected under the Freedom of Information Act. Information on individual firms is not released. Any Packers and Stockyards Division employee releasing such information without proper authority is subject to a fine and/or imprisonment (5 U.S.C. 50).

- 11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE, SUCH AS SEXUAL BEHAVIOR AND ATTITUDES, RELIGIOUS BELIEFS, AND OTHER MATTERS THAT ARE COMMONLY CONSIDERED PRIVATE. THIS JUSTIFICATION SHOULD INCLUDE THE REASONS WHY THE AGENCY CONSIDERS THE QUESTIONS NECESSARY, THE SPECIFIC USES TO BE MADE OF THE INFORMATION, THE EXPLANATION TO BE GIVEN TO PERSONS FROM WHOM THE INFORMATION IS REQUESTED, AND**

ANY STEPS TO BE TAKEN TO OBTAIN THEIR CONSENT.

This collection of information contains no such questions of a sensitive nature. Requests for records or information of a personally sensitive nature are not asked or maintained..

12. PROVIDE ESTIMATES OF THE HOUR BURDEN OF THE COLLECTION OF INFORMATION. THE STATEMENT SHOULD:

INDICATE THE NUMBER OF RESPONDENTS, FREQUENCY OF RESPONSE, ANNUAL HOUR BURDEN, AND AN EXPLANATION OF HOW THE BURDEN WAS ESTIMATED. UNLESS DIRECTED TO DO SO, AGENCIES SHOULD NOT CONDUCT SPECIAL SURVEYS TO OBTAIN INFORMATION ON WHICH TO BASE HOUR BURDEN ESTIMATES. CONSULTATION WITH A SAMPLE (FEWER THAN 10) OF POTENTIAL RESPONDENTS IS DESIRABLE. IF THE HOUR BURDEN ON RESPONDENTS IS EXPECTED TO VARY WIDELY BECAUSE OF DIFFERENCE IN ACTIVITY, SIZE, OR COMPLEXITY, SHOW THE RANGE OF ESTIMATED HOUR BURDEN, AND EXPLAIN THE REASONS FOR THE VARIANCE. GENERALLY, ESTIMATES SHOULD NOT INCLUDE BURDEN HOURS FOR CUSTOMARY AND USUAL BUSINESS PRACTICES.

Dealers with credit agreements:
Number of respondents – 302
Annual burden hours – 755

Burden hours were determined by experienced PSD personnel and industry input, through meetings and contacts as described above in item 8, to provide the best estimates of the time to complete forms and maintain records that are required under the P&S Act, PSD regulations, and policy statement and that are not considered usual and customary records

IF THIS REQUEST FOR APPROVAL COVERS MORE THAN ONE FORM, PROVIDE SEPARATE HOUR BURDEN ESTIMATES FOR EACH FORM AND AGGREGATE THE HOUR BURDENS IN ITEM 13 OF OMB FORM 83.1.

Sellers filing trust claims:
Number of respondents 14.5
Annual burden hours 17

Burden hours were determined by experienced PSD personnel and

industry input, through meetings and contacts as described above in item 8, to provide the best estimates of the time to complete forms and maintain records that are required under the P&S Act, PSD regulations, and policy statement and that are not considered usual and customary records

- **PROVIDE ESTIMATES OF ANNUALIZED COST TO RESPONDENTS FOR THE HOUR BURDENS FOR COLLECTIONS OF INFORMATION, IDENTIFYING AND USING APPROPRIATE WAGE RATE CATEGORIES. THE COST OF CONTRACTING OUT OR PAYING OUTSIDE PARTIES FOR INFORMATION COLLECTION ACTIVITIES SHOULD NOT BE INCLUDED HERE. INSTEAD, THIS COST SHOULD BE INCLUDED IN ITEM 14.**

The cost to the public was determined by multiplying the total number of burden hours by the wages per hour rate. P&SP estimated that the average hourly wage rate as \$37.71, and that obtaining written acknowledgement from the seller would take no more than a half hour of a dealer's time, or \$18.86 for each acknowledgement, and the same amount for each claim filed... Therefore, the total cost to the public would be \$18.86 for each acknowledgement and claim filed x 772 burden hours per year = \$14,5529.92.

The hourly wages as quoted above were obtained from the U.S. Department of Labor, Bureau of Labor Statistics News Release, "Occupational Employment and Wages, May 2021," published March 31, 2022, (USDOL-22-0556), 11-9013 Farmers, Ranchers, and Other Agricultural Managers." This publication can be found at the following website: <http://www.bls.gov/news.release/pdf/ocwage.pdf>. (National estimates for Business and financial operations occupations, Buyers and Purchasing Agents, mean annual wage)

13. **PROVIDE AN ESTIMATE OF THE TOTAL ANNUAL COST BURDEN TO RESPONDENTS OR RECORDKEEPERS RESULTING FROM THE COLLECTION OF INFORMATION. (DO NOT INCLUDE THE COST OF ANY HOUR BURDEN SHOWN IN ITEMS 12 AND 14).**

- **THE COST ESTIMATE SHOULD BE SPLIT INTO TWO COMPONENTS: (a) A TOTAL CAPITAL AND START-UP COST COMPONENT (ANNUALIZED OVER ITS EXPECTED USEFUL LIFE); AND (b) A TOTAL OPERATION AND MAINTENANCE AND PURCHASE OF SERVICES COMPONENT. THE ESTIMATES SHOULD TAKE INTO ACCOUNT COSTS**

ASSOCIATED WITH GENERATING, MAINTAINING, AND DISCLOSING OR PROVIDING THE INFORMATION. INCLUDE DESCRIPTIONS OF METHODS USED TO ESTIMATE MAJOR COST FACTORS INCLUDING SYSTEM AND TECHNOLOGY ACQUISITION, EXPECTED USEFUL LIFE OF CAPITAL EQUIPMENT, THE DISCOUNT RATE(S), AND THE TIME PERIOD OVER WHICH COSTS WILL BE INCURRED. CAPITAL AND START-UP COSTS INCLUDE, AMONG OTHER ITEMS, PREPARATIONS FOR COLLECTING INFORMATION SUCH AS PURCHASING COMPUTERS AND SOFTWARE; MONITORING, SAMPLING, DRILLING AND TESTING EQUIPMENT; AND RECORD STORAGE FACILITIES.

- **IF COST ESTIMATES ARE EXPECTED TO VARY WIDELY, AGENCIES SHOULD PRESENT RANGES OF COST BURDENS AND EXPLAIN THE REASONS FOR THE VARIANCE. THE COST OF PURCHASING OR CONTRACTING OUT INFORMATION COLLECTION SERVICES SHOULD BE A PART OF THIS COST BURDEN ESTIMATE. IN DEVELOPING COST BURDEN ESTIMATES, AGENCIES MAY CONSULT WITH A SAMPLE OF RESPONDENTS (FEWER THAN 10), UTILIZE THE 60-DAY PRE-OMB SUBMISSION PUBLIC COMMENT PROCESS AND USE EXISTING ECONOMIC OR REGULATORY IMPACT ANALYSIS ASSOCIATED WITH THE RULEMAKING CONTAINING THE INFORMATION COLLECTION, AS APPROPRIATE.**

- **GENERALLY, ESTIMATES SHOULD NOT INCLUDE PURCHASES OF EQUIPMENT OR SERVICES, OR PORTIONS THEREOF, MADE: (1) PRIOR TO OCTOBER 1, 1995, (2) TO ACHIEVE REGULATORY COMPLIANCE WITH REQUIREMENTS NOT ASSOCIATED WITH THE INFORMATION COLLECTION, (3) FOR REASONS OTHER THAN TO PROVIDE INFORMATION OR KEEPING RECORDS FOR THE GOVERNMENT, OR (4) AS PART OF CUSTOMARY AND USUAL BUSINESS OR PRIVATE PRACTICES.**

There are no capital/start-up or ongoing operation/maintenance costs associated with this information collection.

- 14. PROVIDE ESTIMATES OF ANNUALIZED COST TO THE FEDERAL GOVERNMENT. ALSO, PROVIDE A DESCRIPTION OF THE METHOD USED TO ESTIMATE COST, WHICH SHOULD INCLUDE QUANTIFICATION OF HOURS, OPERATION EXPENSES (SUCH AS EQUIPMENT, OVERHEAD, PRINTING, AND SUPPORT STAFF), AND**

ANY OTHER EXPENSE THAT WOULD NOT HAVE BEEN INCURRED WITHOUT THIS COLLECTION OF INFORMATION. AGENCIES ALSO MAY AGGREGATE COST ESTIMATES FROM ITEMS 12, 13, AND 14 IN A SINGLE TABLE.

There are no additional actual costs the agency will incur as a result of implementing the information collection.

- 15. EXPLAIN THE REASON FOR ANY PROGRAM CHANGES OR ADJUSTMENTS REPORTED IN ITEMS 13 OR 14 OF THE OMB FORM 83-1.**

This is a new form collection to be merged into the existing form collection of 0581-0308 once approved by OMB.

- 16. FOR COLLECTIONS OF INFORMATION WHOSE RESULTS WILL BE PUBLISHED, OUTLINE PLANS FOR TABULATION, AND PUBLICATION. ADDRESS ANY COMPLEX ANALYTICAL TECHNIQUES THAT WILL BE USED. PROVIDE THE TIME SCHEDULE FOR THE ENTIRE PROJECT, INCLUDING BEGINNING AND ENDING DATES OF THE COLLECTION OF INFORMATION, COMPLETION OF REPORT, PUBLICATION DATES, AND OTHER ACTIONS.**

There are no plans to publish the information obtained through this collection.

- 17. IF SEEKING APPROVAL TO NOT DISPLAY THE EXPIRATION DATE FOR OMB APPROVAL OF THE INFORMATION COLLECTION, EXPLAIN THE REASONS THAT DISPLAY WOULD BE INAPPROPRIATE.**

When OMB approves the collection, AMS will add the appropriate expiration date that appears on the Notice of Action completing the approval and renewal.

- 18. EXPLAIN EACH EXCEPTION TO THE CERTIFICATION STATEMENT IDENTIFIED IN ITEM 19, "CERTIFICATION FOR PAPERWORK REDUCTION ACT SUBMISSIONS," OF OMB FORM 83-1.**

"The agency is able to certify compliance with all provisions under Item 19 of OMB Form 83-1."

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

The information collection does not employ statistical methods.