Report Pursuant to Section 12103 of the Agriculture Improvement Act of 2018: Study to Determine the Feasibility of Establishing a Livestock Dealer Statutory Trust

PACKERS AND STOCKYARDS DIVISION
AGRICULTURAL MARKETING SERVICE

UNITED STATES DEPARTMENT OF AGRICULTURE

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I. Commonly Used Terms and Abbreviations

2018 Farm Bill	Agricultural Improvement Act of 2018
Act	Packers and Stockyards Act of 1921
Agency	Agricultural Marketing Service
AMS	Agricultural Marketing Service
BOC	Market Agency Buying on Commission
EFT	Electronic Funds Transfer
FTC	Federal Trade Commission
P&S	Packers and Stockyards
PACA	Perishable Agricultural Commodities Act
PSD	Packers and Stockyards Division
SALE Act	Securing All Livestock Equitably Act of 2017
Secretary	United States Secretary of Agriculture
SOC	Market Agency Selling on Commission
Study Period	October 1, 2013-June 30, 2019
TA/LOC	Trust Agreement and Letter of Credit
TFA	Trust Fund Agreement
UCC	Uniform Commercial Code
USDA	United States Department of Agriculture

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III. Executive Summary

In the 2018 Farm Bill, Congress instructed USDA to examine the feasibility of establishing a livestock dealer statutory trust. USDA reviewed internal and industry data as well as public input to provide this report to Congress.

To carry out this study, the Agricultural Marketing Service's (AMS) Packers and Stockyards Division (PSD) examined the payment history of livestock dealers, market agencies, packers, and live poultry dealers during the period of October 1, 2013, to June 30, 2019. The payment history analysis used dealer and market agency bond claim data, packer bond and trust claim data, and live poultry dealer trust claim data. Trust beneficiaries under the Perishable Agricultural Commodities Act (PACA) trust may file actions in U.S. District Court and need not appeal to USDA to enforce their trust rights. Thus, AMS does not have complete PACA payment history data for analysis here.

PSD also sought public input on eight key issues raised in the 2018 Farm Bill. A *Federal Register* notice posed a series of questions aimed at obtaining public views and experiences in dealing with dealer payment issues. The 60-day comment period yielded 1,597 comments, nearly all of which expressed an opinion on whether a dealer statutory trust should be created. Summaries of, and highlights from, public comments are provided in greater detail in this report's appendices.

Summary of Findings

Based on its analysis of industry data, public input, and experience with the livestock industry, PSD finds that it would be feasible to implement a livestock dealer statutory trust. A statutory trust covering dealers' livestock purchases could be established in much the same manner as the statutory trusts covering meat packers, live poultry dealers, and produce buyers. The following respond to Congress's request for specific information.

1. Livestock dealers may perform multiple commercial functions. Depending on their various roles, dealers might not carry their own bonds, might not take possession of livestock they purchase, and might not maintain adequate assets to cover defaults, thus jeopardizing the financial welfare of sellers with whom they do business. A dealer statutory trust could improve sellers' chances of obtaining full recoveries if it took into account each of the unique circumstances under which livestock dealers operate and the value of the livestock sales they manage.

2. Statutory trusts in other segments of agriculture are effective in improving financial recoveries for unpaid sellers of agricultural products. Similar results could be expected under a livestock dealer statutory trust. Authorizing the Secretary to appoint an independent trustee could improve the trust claim and payout process, but payment of trustee fees may reduce funds available for recoveries to livestock sellers.

3. Establishment of a livestock dealer statutory trust could improve livestock seller recovery in the event of a dealer default. Total recoveries under a statutory trust would likely be higher than what is achievable with only bond payouts. In cases of bankruptcy, livestock sellers would realize improved recovery compared to their potential recovery as unsecured creditors.

4. Under bankruptcy law, a livestock seller may offer valid legal defenses against trustee claims of preferential transfer. However, mounting those defenses can be costly to sellers and offset the potential benefits of preserving livestock payment funds. A livestock dealer statutory trust could improve conditions for livestock sellers as to preferential transfers in bankruptcy. Under a trust, livestock purchase payments made to sellers within 90 days

before a dealer files bankruptcy would not be considered preferential transfers and could not be reclaimed from sellers.

5. A *de minimis* annual purchase threshold of $500,000 exempting smaller dealers from a statutory trust could exclude a significant percentage of dealers, offering better protection only to those sellers who do business with larger livestock dealers.

6. Establishment of a livestock dealer statutory trust would likely have little effect on buyer and seller behavior in livestock markets. In general, commerce would continue as usual. Livestock sellers would enjoy a greater chance of financial recovery in the case of a dealer default.

7. Implementation of a livestock dealer statutory trust would be unlikely to significantly impact credit availability or lender behavior.

8. Industry-wide adoption of EFT payments for livestock purchases would significantly change the way the industry functions. To date, relatively few entities – predominantly the larger ones – have adopted that payment method. Making EFT payments mandatory under the Act is generally opposed by the industry. If adopted industry-wide, EFT payments would likely improve on-time payments and diminish the incidence of dishonored checks due to non-sufficient funds. However, an EFT payment requirement provides a seller little payment protection if the dealer takes possession of the livestock, but does not have sufficient funds to cover the purchase price.

9. The cost to the government to administer and enforce a livestock dealer statutory trust is estimated at $600,000 annually. This estimate recognizes that PSD already regularly responds to bond claims and other claims regarding nonpayment. Administering dealer statutory trust claims would require additional resources.

IV. Introduction and Background Information

As mandated by the 2018 Farm Bill, this study addresses eight key issues. Issues were studied using a combination of techniques described in greater detail throughout the report. Where practicable under the time constraints of this study, data obtained from a broad-based population of industries and regulated entities through annual reporting requirements under the Packers and Stockyards Act, 1921 (P&S Act) regulations were analyzed empirically. Where we do not readily have data to analyze, the study focuses more on evaluation and analysis of public comments.

This report is organized to provide the reader with an introduction that describes the statutory mandate requiring the study. The report then provides a historical context for the study, including previous legislative proposals that would have established a livestock dealer statutory trust, and also highlights several recent industry occurrences that might have been impacted by a dealer statutory trust, if one had been in effect at the time of each occurrence.

For each of the study components, the report provides narrative sections offering additional background information, the PSD data analysis where available, a brief summary of public comments on the issue, and PSD's conclusion. Appendices at the end of the report include detailed comment summaries and several illustrative comments on each issue, as well as legislative documents that help provide context for this study.

Statutory Mandate. Section 12103 of the Agricultural Improvement Act of 2018[1], commonly known as the 2018 Farm Bill, charged the Secretary of Agriculture with conducting a study to determine the feasibility of establishing a livestock dealer statutory trust. Section 12103 requires that the study:

[1] Public Law 115-334 (Dec. 20, 2018).

(1) Analyze how the establishment of a livestock dealer statutory trust would affect buyer and seller behavior in markets for livestock (as defined in section 2(a) of the Packers and Stockyards Act, 1921 (7 U.S.C. 182));

(2) Examine how the establishment of a livestock dealer statutory trust would affect seller recovery in the event of a livestock dealer payment default;

(3) Consider what potential effects a livestock dealer statutory trust would have on credit availability, including impacts on lenders and lending behavior and other industry participants;

(4) Examine unique circumstances common to livestock dealers and how those circumstances could impact the functionality of a livestock dealer statutory trust;

(5) Study the feasibility of the industry-wide adoption of electronic funds transfer or another expeditious method of payment to provide sellers of livestock protection from nonsufficient funds payments;

(6) Assess the effectiveness of statutory trusts in other segments of agriculture, whether similar effects could be experienced under a livestock dealer statutory trust, and whether authorizing the Secretary to appoint an independent trustee under the livestock dealer statutory trust would improve seller recovery;

(7) Consider the effects of exempting dealers with average annual purchases under a *de minimis* threshold from being subject to the livestock dealer statutory trust; and

(8) Analyze how the establishment of a livestock dealer statutory trust would affect the treatment of sellers of livestock as it relates to preferential transfer in bankruptcy.

Context for this Study. A bill titled the Securing All Livestock Equitably Act of 2017[2] (SALE Act) was introduced in the U.S. House of Representatives in October 2017. A related bill,

[2] H.R.4058, 115th Congress (2017-2018).

also titled the SALE Act, was introduced in the Senate on June 26, 2018.[3] These bills proposed to amend the Packers and Stockyards Act, 1921,[4] by creating a livestock dealer statutory trust. The two SALE Act bills' proposed dealer statutory trusts were modeled after the existing livestock packer statutory trust, enacted in 1976.[5] The bills would have required all livestock purchased by a livestock dealer in cash sales, and all receivables or proceeds from such livestock, to be held by the dealer in trust until all unpaid cash sellers of livestock have been paid. The House version included a provision not found in the current packer statutory trust that would require the dealer, upon receiving notice of a trust claim, to give notice to "all persons who have recorded a security interest in, or lien on, the livestock held in such trust." The 2017 House version would have applied only to those dealers with average annual livestock purchases of more than $500,000.

The 2018 Senate version included several variations from the 2017 House version. In particular, it would have provided an option for the parties to waive the dealer statutory trust and would have exempted those livestock dealers whose average annual livestock purchases are less than $250,000. It also provided that if the dealer failed to perform its duties as trustee, the Secretary would be authorized to appoint an independent trustee and preserve trust assets.

The final version of the 2018 Farm Bill, enacted on December 20, 2018, did not include the SALE Act, but instead directed the Secretary to conduct a study on the feasibility of implementing a livestock dealer statutory trust.

The 2017 and 2018 bills proposing a livestock dealer statutory trust were not the first such proposals. In April 1996, legislation was introduced in the Senate that would have created a dealer statutory trust.[6] The 1996 bill closely mirrored the existing packer statutory trust and was similar

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[3] S. 3140, 115th Congress (2017-2018).
[4] 7 U.S.C. 181, et seq.
[5] 7 U.S.C. 196.
[6] S.1707, April 25, 1996.

to both the 2017 and 2018 SALE Acts. The most significant difference between the 1996 bill and other proposals was the scope of the statutory trust. The 1996 bill would have created a statutory trust covering purchases by both livestock dealers and market agencies buying livestock on commission. The 1996 bill would have exempted dealers with average annual livestock purchases of less than $250,000.

In 2000, a bill titled "Statutory Trust for the Protection of Sellers of Livestock to Market Agencies and Livestock Dealers" would have amended the P&S Act by creating a dealer statutory trust.[7] The 2000 bill also addressed the scope of the statutory trust's coverage. The bill expressly excluded livestock purchases for feeding operations, stating that "purchases by a dealer of livestock for its own account for feeding in a feedlot or on pasture shall not be considered dealer transactions for the purposes of this section." Like the 1996 bill, the 2000 bill also would have exempted dealers whose annual livestock purchases were less than $250,000.

The SALE Act of 2018 was introduced in the aftermath of the largest livestock dealer failure in U.S. history. In November 2010, hundreds of checks issued for livestock purchases made by livestock dealer Eastern Livestock Company, LLC (Eastern), were dishonored. Livestock sellers started filing claims on Eastern's bond on November 4, 2010. Ultimately, Eastern's demise would result in 375 claims of nonpayment from livestock sellers across 26 states. Eastern maintained an $875,000 bond to secure its livestock purchases. Approximately $37 million in bond claims were filed. Of that amount, just over $17 million in claims were deemed valid. Just under $750,000 was paid to livestock sellers from Eastern's bond, with the remaining funds used to compensate the bond trustee. Unpaid sellers with valid claims received a pro-rata distribution of bond proceeds equal to approximately 4.37% of their claims.

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[7] S. 2744, June 15, 2000.

Eastern filed for bankruptcy protection in 2010. Bankruptcy records show that Eastern had over $30 million in accounts receivable, $2 million in undelivered cattle contract deposits, over $35 million in inventory, and $7 million in cash. These assets of more than $74 million could have easily paid all of the unpaid livestock sellers' claims.

However, under bankruptcy laws, the livestock sellers were in a class of unsecured creditors. Secured creditors had priority over unsecured creditors as to those assets. In addition, the Eastern bankruptcy case included nearly $850 million in payments made to creditors within the 90 days prior to the bankruptcy filing. Payments within 90 days of filing may be considered "preferential" and can be recovered from creditors by the bankruptcy trustee. The trustee instituted numerous actions in the bankruptcy court to recover preferential payments made by Eastern to livestock sellers.

Approach to this Study. This study was completed by AMS personnel, primarily employees of PSD, which administers the P&S Act for USDA. AMS published a notice in the *Federal Register*[8] to solicit industry views on the various points to be covered by the study. AMS staff considered that input, utilized data available from PSD records, conducted additional research and literature reviews, and spoke with a limited number of other professionals to fill in certain gaps in the data.

AMS staff examined PSD data covering fiscal years 2014 through 2018[9] and the current fiscal year from October 1, 2018, to June 30, 2019. PSD data includes numbers of dealers, market

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[8] The *Federal Register* is the official daily journal of the Federal government. It is published every business day by the National Archives and Records Administration (NARA). It contains Federal agency regulations, Proposed Rules and Notices of interest to the public, Executive Orders, Proclamations, and other Presidential documents. The April 25, 2019, *Federal Register* notice regarding the Feasibility Study on Livestock Dealer Statutory Trust can be accessed at https://www.federalregister.gov/documents/2019/04/25/2019-08350/feasibility-study-on-livestock-dealer-statutory-trust.

[9] Data were examined based on the fiscal year used by the federal government. The government's fiscal year begins on October 1 and ends on September 30. Data examined for this study covers the dates October 1, 2013 through September 30, 2018, and October 1, 2018 through June 30, 2019.

agencies, packers, and live poultry dealers operating subject to the P&S Act. The data also provides financial information including bond amounts, purchase volume, payment defaults, bond claims, and trust claims where applicable. Staff also conducted literature reviews and researched legislative and legal histories of the packer, poultry, and PACA trusts. Details regarding the Eastern Livestock Company dealer failure, which occurred outside the date range identified for this study, were found to be relevant to the issue of a dealer trust and are addressed by this study using agency records, bankruptcy court records, and publicly available news and journal articles.

Trust Background. Several "statutory trusts" have been enacted in the agricultural sector. These include a livestock trust applicable to meat packers,[10] a poultry trust applicable to live poultry dealers,[11] and the PACA trust applicable to produce buyers.[12] These trusts were each created as amendments to existing federal laws following financial crises in the industry in which the sellers of agricultural commodities lost significant amounts of money.

Statutory trust laws work by providing that certain assets of a buyer are held in trust for the benefit of unpaid sellers. In practical application in the livestock industry, for example, the packer statutory trust for livestock allows the farmer to be paid in full for the livestock he has sold and delivered to the packer before the bank who has loaned the packer money recovers its investment.

The packer trust provisions of the P&S Act were passed in 1976 in response to the bankruptcy of American Beef Packers and the attending harm to cattlemen who had delivered cattle to American Beef Packers just prior to the bankruptcy filing. As the court in *In re Gotham Provision Co, Inc.*, said:

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[10] 7 U.S.C. 196. Applicable to meat packers that purchase more than $500,000 of livestock annually. The livestock statutory trust will be referenced as the "packer statutory trust" throughout this report.

[11] 7 U.S.C. 197. Applicable to live poultry dealers that obtain by purchase in cash sales or by poultry growing arrangement more than $100,000 of poultry annually.

[12] 7 U.S.C. 499e, known throughout the industry as the PACA trust.

> It is clear that the purpose of the 1976 amendments to the Packers and Stockyards Act of 1921 was to provide some future protection for livestock sellers against the type of serious financial loss that cattlemen experienced when some major meat packers went bankrupt in the early 1970's.Of principal concern to Congress was the bankruptcy of American Beef Packers in 1975, at the time one of the largest meat packers in the country. That bankruptcy affected many farmers throughout the country who had delivered their entire year's output of cattle to American Beef Packers and did not receive payment. (*In re Gotham Provision Co. Inc., 669 F.2d 1000 (1982), 1008)*

The Gotham court quoted the Senate Agricultural and Forestry Committee report concerning the amendments:

> Under present law, a packer is able to offer as security for a loan the livestock, meat, meat food products, or receivables or proceeds therefrom, which he has not paid for. The producer, who was responsible for raising, feeding, and caring for the livestock is left unpaid, while secured creditors reap the reward of his labors....
> (*In re Gotham Provision Co. Inc., 669 F.2d 1000 (1982), 1008)*

The trusts protect sellers by requiring buyers to hold inventories and proceeds received from the sale of agricultural commodities in trust for the benefit of unpaid sellers. In cases in which the buyer is in bankruptcy, the buyer's inventory and proceeds are viewed as trust assets and are not included in the bankruptcy estate. Unpaid sellers have priority over even secured creditors as to those assets.

The statutory trusts do not require buyers to designate a trust account. The trust is a non-segregated "floating trust" made up of all of a firm's commodity-related liquid assets, under which there may be a commingling of trust assets. Under this provision, there is no need to identify specific trust assets through each step of the accrual and disposal process. Since commingling is contemplated, all trust assets are subject to the claims of unpaid sellers and agents to the extent of the amount owed them. As each supplier gives ownership, possession, or control of agricultural commodities to a buyer, and preserves their trust rights, that supplier will automatically become a participant in the trust. Trust participants remain trust beneficiaries until they have been paid in full.

The trusts protect certain livestock sellers and poultry growers and sellers by making their rights to specific assets of the packer or live poultry dealer legally superior to the interest of any secured lenders to whom the packer or live poultry dealer offered those assets as collateral for loans. Section 206 of the P&S Act authorizes a statutory trust for a packer, whereas Section 207 authorizes a statutory trust for a live poultry dealer.

The trust is created when the commodity is delivered, but not paid for by the buyer. So long as the buyer has not paid for the commodity and there are amounts of the specified assets available, the trust exists. A trust is triggered when a livestock seller or poultry grower or seller sends notice in writing to the packer or the livestock poultry dealer and to PSD that a packer or live poultry dealer has failed to pay for livestock or for poultry. The seller has thirty (30) calendar days after payment was due, or within fifteen (15) business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, to file on the packer or live poultry dealer's trust.

Trust assets of a packer consist of all livestock purchased by the packer in cash sales and all inventories of, or receivables or proceeds from, meat, meat food products, or livestock products derived therefrom. Trust assets must be held in trust for the benefit of all unpaid cash sellers of such livestock until such unpaid sellers have received full payment. Similarly, trust assets of a live poultry dealer consist of all poultry obtained by the live poultry dealer through cash sales or poultry growing arrangements, and all inventories of, or receivables or proceeds from, the poultry or poultry products derived therefrom. The PACA trust is comprised of the perishable agricultural commodities purchased from the suppliers, all inventories of food or other products derived from the perishable agricultural commodities, and receivables or proceeds from the sale of the commodities or products.

A district court of the United States, or a bankruptcy court if the packer or live poultry dealer is in bankruptcy, can order a packer or live poultry dealer to hold specific assets in trust for the benefit of unpaid livestock sellers or poultry growers or sellers; however, a written complaint must be filed with the court. If the seller or grower does not petition the court, the court may order that the assets be distributed to other unpaid cash sellers who did file a petition.

The language of the packer trust sets forth certain requirements for establishing a right under the statutory trust. First, it exempts packers whose annual livestock purchases total $500,000 or less. Second, it requires unpaid sellers to file claims on the trust within 30 days of the final date for making full payment under section 409. Third, unpaid sellers are not considered to have been paid if they receive a payment instrument that is dishonored; however, such sellers must file claims on the trust within 15 business days after receiving notice that the payment instrument was dishonored. Finally, the trust provision instructs that the trust is preserved by giving written notice to the packer and by filing notice with the Secretary.

The language of the poultry statutory trust sets forth certain other requirements for establishing a statutory trust. First, it exempts live poultry dealers that do 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. Second, it requires unpaid sellers to file claims on the trust within thirty days of the final date for making full payment under section 410.[13] Third, unpaid sellers are not considered to have been paid if they receive a payment instrument that is dishonored;[14] however, such sellers must file claims on the trust within fifteen business days after

[13] 7 U.S.C. 197(b)
[14] 7 U.S.C. 197(c).

receiving notice that the payment instrument was dishonored. Finally, the trust provision instructs that the trust is preserved by giving written notice to the live poultry dealer and by filing notice with the Secretary.[15]

Under the PACA trust, unpaid sellers must give written notice of their intent to preserve the trust within thirty calendar days after payment must be made or they lose the benefits of the trust.[16] In a provision unique to PACA, licensees are able to use billing or invoice statements to give notice of their intent to preserve the trust. In such cases, the bill or invoice must include on its face the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."[17]

Enforcement of payment of a valid packer trust clam has proven difficult in cases where the packer has continued operation subsequent to the filing of trust claims. The packer is trustee of the packer trust, and as such, has conflicting interests. On the one hand, the packer has a natural desire to use any available funds to continue operations. On the other hand, the law is clear that the packer has the duty to use available funds to pay the livestock seller. Enforcement of the packer trust provisions is typically best realized when the packer has ceased operations and filed for protection under provisions of the bankruptcy code. While the packer trust is not a part of the bankruptcy estate, the packer statutory trust is consistently recognized by bankruptcy courts, and trust claimants are commonly paid significantly sooner than the other creditors in bankruptcy.

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[15] 7 U.S.C. 197(b).
[16] 7 U.S.C. 499e(c)(3).
[17] 7 U.S.C. 499e(c)(4).

Packers and Stockyards Act, 1921. The P&S Act was enacted in 1921 following the release in 1918 and 1919 of the *Report of the Federal Trade Commission on the Meat Packing Industry*. For years prior to the Act's passage, the largest meatpacking companies had been charged with conspiring to control the purchases of livestock, the preparation of meat and meat food products, and their distribution throughout the country and abroad. In 1917, President Wilson directed the Federal Trade Commission (FTC) to investigate the facts relating to the meatpacking industry. The FTC concluded that the "Big Five" (Swift, Armour, Cudahy, Wilson, and Morris) controlled the market in which they bought their supplies and the market in which they sold their products. The report pointed out that the monopolistic position of the "Big Five" was based primarily upon their ownership or control of stockyards and essential facilities for the distribution of perishable foods, and that control of stockyards carried with it dominance over commission firms, dealers, cattle-loan banks, trade publications, etc. The FTC reported packers were manipulating markets, restricting flow of foods, controlling the price of dressed meat, defrauding producers and consumers of food, and crushing competition.

On August 15, 1921, Congress passed the P&S Act, and it became effective one month later, on September 15, 1921. The P&S Act's stated purpose at the time it was passed was to "regulate interstate and foreign commerce in livestock, live-stock product, dairy products, poultry, poultry products, and eggs, and for other purposes." It prohibited packers from engaging in unfair and deceptive practices, giving undue preferences to persons or localities, apportioning supply among packers in restraining of commerce, manipulating prices, creating a monopoly, or conspiring to aid in unlawful acts.

The P&S Act also made stockyards[18] quasi-public utilities and required yard officers, agents, and employees to register with the government. Stockyards were forbidden from dealing in the livestock they handled and were required to maintain accurate weights and measures and pay shippers promptly.

The P&S Act has been amended numerous times since 1921, most notably in 1958, expanding jurisdiction over stockyards;[19] in 1976, adding significant financial protections for livestock sellers;[20] in 1987, adding financial protection for poultry growers;[21] and in 2002, expanding jurisdiction to include swine contractors.[22]

Livestock Dealer Background. Section 301(d) of the Act defines a "dealer" as "any person, not a market agency, engaged in the business of buying or selling in commerce[23] livestock, either on his own account or as the employee or agent of the vendor or purchaser."[24] Under the Act, a person who buys or sells livestock in commerce on his or her own account or for another person is a dealer, unless the person charges a commission, in which case he or she is a market agency.[25] A "market agency" is defined as meaning "any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyards services."[26]

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[18] Initially, the P&S Act applied only to stockyards with more than 20,000 ft^2 of pen space. In 1958, Congress amended the Act to remove that limitation. As a result, all livestock auction markets, large and small, are under the Act's jurisdiction.
[19] 72 Stat. 944, Pub. L. 85-791 (September 2, 1958).
[20] 90 Stat. 1249, Pub. L. 94-410 (September 13, 1976).
[21] 101 Stat. 917, Pub. L. 100-173 (November 23, 1987).
[22] 116 Stat. 134, Pub. L. 107-171 (May 13, 2002).
[23] The Act defines "commerce" as "commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia." 7 U.S.C. § 182(a)(11)
[24] 7 U.S.C. § 201(d).
[25] See *U.S. v. Haun*, 124 F.3d 745 (6th Cir., 1997).
[26] 7 U.S.C. § 201(c).

Livestock dealers have certain obligations under the Act. Section 303 of the Act, in conjunction with applicable regulations, requires each person operating as a dealer to register with the Secretary of Agriculture.[27] Dealers who do not register may be fined up to $1,913, plus up to $96 for each day the unlawful operations continue.[28] USDA regulations also require dealers and market agencies to post a reasonable bond to secure their financial obligations.[29]

PSD maintains a record of all dealers that are currently, or were previously, registered at any time during the period covered by the study. Available information includes dealer applications for registration, bond forms, and annual reports that dealers are required to file with PSD.[30] Annual reports are filed, using a USDA form[31] according to the reporting entity's fiscal year. Most filers report on a calendar year basis, while some use differing fiscal years. Reports must be filed with PSD by April 15 for calendar year filers, or within 90 days after the end of the filer's fiscal year.

The annual report form requires each entity to report separately and by species its "Livestock Dealer Purchases" and "Livestock Bought on Commission," in both number of head and dollar volume. The report form also requires all dealers and market agencies buying on commission (BOC) with annual livestock purchases of over $2.6 million to provide additional

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[27] 7 U.S.C. § 203; see 9 C.F.R. § 201.10(a) (requiring every person operating or desiring to operate as a dealer or market agency to apply for registration by filing a properly executed application for registration and furnishing a bond).

[28] 7 U.S.C. § 203. The original penalty was $750 per offense and $50 each day it continues. The current penalty is effective as of March 14, 2018. See 7 CFR 3.91(1).

[29] 7 U.S.C. § 204; see 9 C.F.R. § 201.29(a), (b) (requiring every dealer or market agency to execute and maintain a reasonable bond; prohibiting any dealer or market agency from operating without having on file and in effect a bond in compliance with regulations).

[30] 9 CFR 201.10. Statutory authority for requiring dealers to file annual reports derives from Section 9 of the Federal Trade Commission Act, which is made applicable to the powers of the Secretary by Section 402 of the Packers and Stockyards Act. 7 U.S.C. § 222.

[31] The PSP Form 3001, Annual Report of Dealer or Market Agency Buying on Commission, is available on line at: https://www.ams.usda.gov/sites/default/files/media/PSP3001.pdf.

financial information, including assets and liabilities by type, net worth, income, expenses, and net profit.

There are 3,419 dealers and BOCs with active[32] PSD registrations. Of the active dealers and BOCs, 3,248 filed annual reports for fiscal year 2017 or 2018, or both. There are 171 active dealers that did not file an annual report for either of those years. For purposes of the present study, PSD used 2017 and 2018 annual report data from registered dealers, whichever was most current.

The dealers not filing 2017 or 2018 annual reports as of June 30, 2019, did not file for various reasons. Many are new registrants that were not registered in 2017 or 2018 and are not required to file reports until 2020. New entities whose first fiscal year after registering with PSD fiscal year ends in 2019 have not yet reached the filing deadline as of the date of this report. PSD used 2017 annual report data in some instances, because timely filed reports from dealers whose fiscal years ended December 31, 2018, had not yet been processed or entered into the PSD database at the time of this report.

Other non-filers include persons registered as dealers, but who are employees of packers,[33] or are employees or salespeople working for other dealers.[34] Others may be new registrants who will not file reports until their 2019 reports are due. Finally, some non-filers simply have not met their obligation to file a report and may have enforcement action pending for not filing.[35]

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[32] Active dealer data are current as of June 30, 2019, and does not include suspended registrants.

[33] Known as "packer buyers," these people are employed by a packer for purposes of purchasing livestock for the packer. There are 996 packer buyers registered with PSD as dealers, who are not required to maintain a bond or file annual reports. The employing packer's bond and the packer trust provision would apply in cases of non-payment.

[34] For example, a large livestock dealer employs nearly two dozen salespeople who are registered as dealers, but similar to packer buyers, they are not required to file annual reports. The employing dealer clears its salespeople, meaning that any bond claims that could be brought against the salespeople would be filed on the employing dealer's bond.

[35] Enforcement for non-filing of annual reports is authorized by Sec. 10 of the Federal Trade Commission Act. PSD must refer enforcement to the Department of Justice, which will file an action in federal district court. The penalty for failing to file is $559 for each day the filer continues to fail to file.

Of the 3,248 active dealers that filed annual reports for 2017 or 2018, 2,947 or 90.7 percent maintained clause 2 dealer bonds,[36] meaning that they are bonded for their own purchases. The remaining 301 dealers are mostly clearees (257), meaning they are cleared by another entity's bond. Of the 171 dealers that did not file annual reports, 152 either had valid bonds or were clearees.

Of the 3,248 dealer annual reports filed, 2,929 reported livestock dealer purchase volume or livestock bought on commission volume. The other 319 entities filed dealer annual reports but reported no purchase volume. Table 1 below summarizes these numbers and shows the dealer and BOC volume reported in each category.

Table 1. Active Dealers

Category	Dealers (count)	Volume ($b) DLR	Volume ($b) BOC	Volume ($b) Total
Total Active Dealers	**3,419**	**16.799**	**10.278**	**27.077**
Total Not Filing Annual Report	**171**	-	-	-
Total Filing Annual Report	**3,248**	**16.799**	**10.278**	**27.077**
Filed Annual Report with Bond	**2,947**	**15.750**	**9.008**	**24.758**
Filed Annual Report as Clearee	**257**	**0.981**	**1.237**	**2.218**
Filed Annual Report with No Bond	**44**	**0.067**	**0.033**	**0.100**
Total filing Annual Report	**3,248**	**16.799**	**10.278**	**27.077**
Filed Annual Report with Volume	**2,929**	**16.799**	**10.278**	**27.077**
Filed Annual Report with $0 Volume	**319**	**0**	**0**	**0**

Note that volumes reported in this table and all others in this report are in billions of dollars and rounded to the nearest $1 million. Detail may not sum to the totals shown due to rounding.

Defining a Default. For purposes of this study, a default is considered an instance in which a buyer has failed to pay for livestock and the seller has filed either a bond claim or a trust claim,

[36] Regulations governing Packers and Stockyards Act bonding requirements are found at 9 CFR 201.27 through 201.34. There are four types of bonds. Clause 1 bonds are required for market agencies selling on commission. A Clause 2 bond is required for livestock dealers and market agencies buying on commission. Clause 3 bonds are required for clearors. Clause 4 bonds are required for packers that purchase over $500,000 of livestock annually. Required bond amounts are determined by formulas specific to each bond type.

or both, as applicable. With respect to the poultry statutory trust, a default is considered to be an instance in which a live poultry dealer has failed to pay for poultry purchased in cash sales or obtained under a poultry growing arrangement, and the seller or grower has filed a trust claim.

Administering a Trust. By statute, the packer acts as trustee for the packer statutory trust. When an unpaid livestock seller wishes to file a trust claim, the seller must file notice of the claim with the Secretary and with the packer as trustee. PSD, as the Secretary's designated representative, receives notice of trust claims from unpaid sellers.

PSD learns of packer statutory trust situations in several ways. Most often, notice comes from livestock sellers who are not paid and request information on filing trust claims. Sometimes, a seller receives notice from their bank that a check in payment for livestock was returned for insufficient funds, and the seller contacts PSD as a result. In a few cases, the packer itself has contacted PSD to inform of payment problems and that sellers may not receive payment. In each of these instances, PSD activates an investigation team to review the packer's purchase and payment records. PSD notifies all sellers of the potential for non-payment and provides instruction for filing both bond claims and statutory trust claims.

PSD tracks and schedules all bond and trust claims and assesses the validity of those claims. PSD does not make final determinations of the validity of claims; rather it provides the trustee (bond and statutory trust) with a schedule of the apparently valid claims. For bond claims, PSD continues to monitor payments to sellers and is available to the trustee for guidance as needed. Where trust claims have been filed, PSD continues its work to account for and inventory all trust assets. PSD prepares and reviews pro-rata asset distribution schedules and provides those to the packer as trustee. PSD continues its work by monitoring trust assets to prevent packers from dissipating those assets. If it appears that trust assets could be dissipated, PSD gives notice to creditors that any disbursements of trust assets are in breach of trust. In extreme cases, PSD may seek a temporary restraining order (TRO) to stop a packer from dissipating trust assets.

V. Elements of the Feasibility Study

This report addresses each of the feasibility study elements set forth in the 2018 Farm Bill. The elements are arranged here to first give a broad overview of the industry, then focus more closely on specific issues. The report examines circumstances unique to livestock dealers, then discusses the effectiveness of statutory trusts in other segments of agriculture. The report reviews anticipated recoveries for livestock sellers under a dealer statutory trust, and how such a trust would impact sellers if a dealer declared bankruptcy. The report considers the effects of exempting dealers under a *de minimis* threshold from the trust. Finally, the report looks at buyer and seller behavior in markets, the potential effects of a livestock dealer statutory trust on credit availability, and the feasibility of industry-wide adoption of electronic funds transfers in payment for livestock purchases.

To complete the study, PSD examined and analyzed industry data as it applied to each of the elements. This report contains the result of PSD's analysis, as well as an analysis of public comments related to each study element. Appendices to this report include expanded summaries of public comments received. The full text of all comments received is available at www.regulations.gov.[37]

The 2018 Farm Bill did not specifically instruct the Secretary to survey the industry for its views on whether a livestock dealer statutory trust should be implemented, and therefore, that

[37] https://www.regulations.gov/document?D=AMS-FTPP-19-0037-0001

question was not posed to the public for comment. Nonetheless, nearly every one of the 1,597 comments received expressed an opinion either supporting or opposing a dealer statutory trust.

Not all commenters identified the elements or questions to which they were responding. Therefore, where numbers are used in this report to indicate the number of responses for each element, the numbers are approximate. PSD used its judgment to assign comments to one or more issues. The numbers included here will not equal the total number of comments. Many commenters commented on only certain issues and not others.

VI. Circumstances Unique to Livestock Dealers

Study Element: Examine unique circumstances common to livestock dealers and how those circumstances could impact the functionality of a livestock dealer statutory trust.

Background: Livestock dealers are unique among the types of entities that operate subject to the P&S Act. They differ from packers, who generally operate slaughtering and/or processing plants and are not in the business of buying or selling livestock on commission or reselling livestock as a dealer.[38] Livestock dealers differ from most live poultry dealers, who are in the business of buying or obtaining live poultry for slaughter and not reselling poultry for other purposes.[39] Livestock packer and live poultry dealer business activities are well defined, with a tangible output of meat products that are often captured as assets in the event of a default. The livestock dealer's business processes are more complex, with no clear output of product.

[38] 9 CFR 203.19 provides guidance on when a packer may engage in dealer activity. Generally, approval to engage in such behavior requires that the livestock dealer activity not create a conflict of interest or result in a restraint of competition.

[39] A small portion of the poultry industry involves live bird purchases and sales.

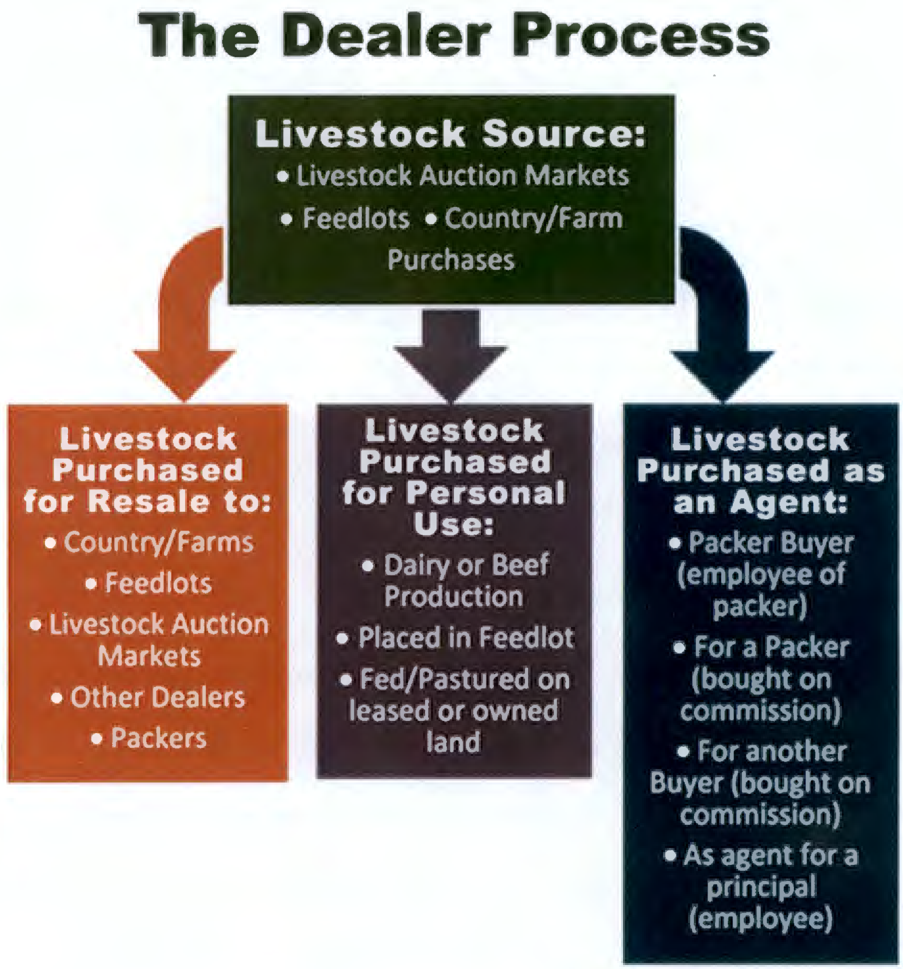

Figure 1. Livestock Purchases by Dealers

As illustrated in Figure 1, a livestock dealer may operate in many capacities, purchasing livestock in multiple ways for multiple purposes. Dealers operating subject to the P&S Act tend to be individuals or small businesses owned and operated by individuals. The dealer's business structure is often informal, lacking software programs for record keeping and being less likely to undergo annual financial audits. Many dealers also have their own farming or ranching operations and buy livestock for their own production.[40] This unique, complex business structure often leads

[40] PSD does not maintain data on the number of dealers who are also producers. Producers are not regulated under the P&S Act and therefore do not report purchase or sales volumes to PSD.

to comingling of livestock purchases and records, creating more difficulty in discerning regulated and unregulated activities that would be subject to trust protections. The lack of formality in record keeping can complicate the tracing of assets if the trust is evoked.

Another complicated aspect of dealer operations is the transfer of possession of livestock. Multiple transactions by dealers involving the same livestock can occur very quickly. This can impact a seller's ability to trace assets if necessary. Dealers sometimes schedule the transportation of livestock from the point of purchase to a customer's location without taking physical possession of the livestock themselves. For example, a dealer might purchase livestock at an auction market for a particular customer. The dealer contracts with a trucker, who picks up the livestock from the auction market and delivers it to the dealer's customer. In these types of transactions, the dealer does not maintain a livestock inventory in his or her possession. By contrast, packers and live poultry dealers take physical possession of livestock or poultry and maintain possession from purchase to end product through the packing and slaughtering processes, as illustrated in Figure 2.

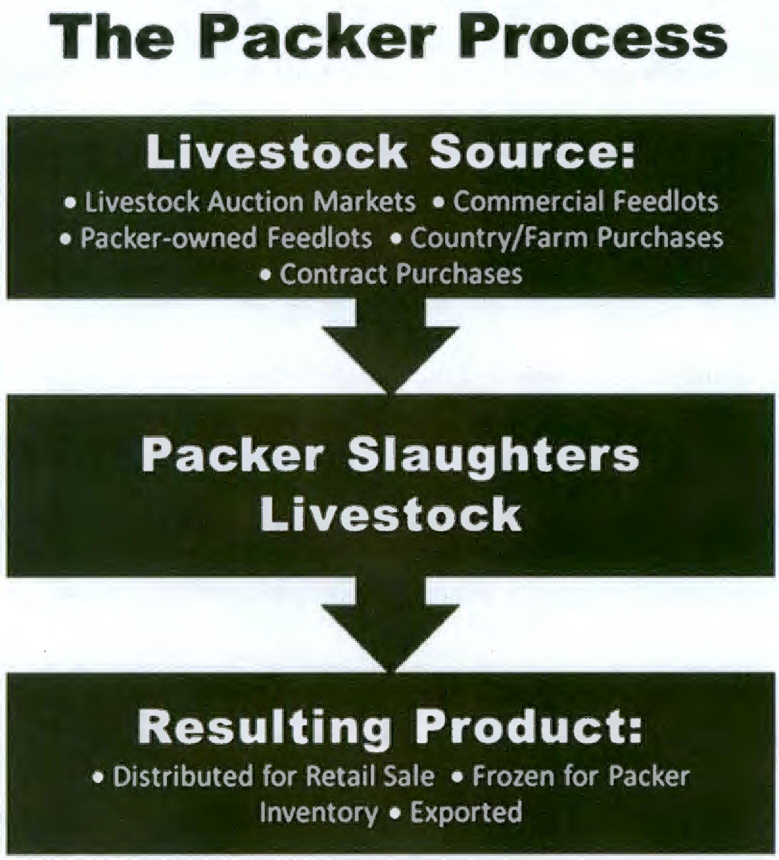

Figure 2. Livestock Purchases by Packers

Livestock dealers may also be registered and operate as market agencies buying on commission (BOC). When buying on commission, the principal may be "disclosed" or "undisclosed," a distinction that affects the commission buyer's liability in case of nonpayment. Other regulated entities can also operate dealer businesses. Some auction markets, for example, and even some packers[41] have dealer registrations that could make them subject to a dealer statutory trust.

Some livestock dealers are clearees (operating under another dealer's bond), and some operate as salaried packer buyers. In the case of a clearee, bond claims for nonpayment are filed

[41] See 9 CFR 203.19.

against the bondholder (clearor). Under a dealer trust, claims might be filed against the clearee, the clearor, or both, depending on the circumstances of the transaction. In the case of a packer buyer, bond claims are filed against the packer's bond. Even if there were a dealer trust in place, seller claims would likely still be filed as packer trust claims because the packer buyer, as an employee of the packer, would not maintain possession of any trust assets. Clearees and some BOCs might also be less likely to possess trust assets that could be recovered in the event of a default.

PSD data indicate that most livestock dealers deal in cattle; however, some dealers specialize in other species, such as sheep, goats, hogs, or horses. This is important when considering whether to exempt dealers from the trust requirements based upon an annual purchase threshold. On a per head basis, cattle values are much higher than those for sheep, goats, hogs, or horses.

Each of these aspects of livestock dealer operations would be important to consider in the drafting phase of any dealer statutory trust legislation.

The Business Activities of a Livestock Dealer	
Purchases Livestock to Resell as a Livestock Dealer	The Livestock Dealer purchases livestock at auction markets or from producers. The dealer resells the livestock without changing the composition of the animal for profit at other market agencies selling on commission, to feedlots, to packers/slaughterers, or to local farmers/producers. The dealer is responsible for paying the seller for the livestock. The dealer may never have the livestock in his/her possession and the livestock remain in transit from purchase location to final buyer.
Purchases Livestock as a Market Agency, Buying on Commission	The Livestock Dealer purchases livestock on the account of others on a commission basis at auction markets or from producers. The dealer receives a negotiated commission rate per head or per weight designation as compensation by the account owner. The account owner (principal) is often responsible for the payment to the seller. The livestock are often not in the possession of the dealer and transferred through hauling arrangements from purchase location to principal's location or principal's customer location. Note: these are market agency transactions and not dealer transactions.
Purchases Livestock for Farm Use or Other Producer Activities	The Livestock Dealer purchases livestock from at auction markets or from producers to maintain on feed or use in another farm production. The livestock is maintained long enough to change the composition of the animal. This is not an activity regulated by PSD. However, co-mingling of records with dealer activities is frequent and may violate the Packers and Stockyards Act's record-keeping requirements. The dealer often uses one checking account for all purchases and often purchases the dealer cattle and producer cattle on one invoice.
Purchases Livestock as a Clearee	A livestock dealer may be provided bond coverage by another PSD regulated entity via a clearing service conditional bond. This type of livestock dealer often purchases livestock on the account of the principal. The account holder (principal) would be responsible for payment to the seller and the clearee receives a commission or other payment for services. Hauling of the livestock from purchase location to principal's customer is arranged.
Purchases Livestock as a Packer Buyer	A packer buyer is a salaried employee of a packer who is purchasing livestock for the account of the packer at market agencies selling on commission, from producers, or other feeding operations. The account holder (principal) is responsible for the payment to the seller. The livestock is shipped from purchase location to principal's location.
Purchases Livestock as an Employee of Principal	PSD regulated entities (other than packers) sometimes have an agent who is a salaried employee purchase livestock on their account at market agencies or producers. Feedlots and backgrounders sometimes have salaried representatives purchase livestock for feeding. The agent would be covered under the principal's bond coverage as a salaried employee and would not have separate coverage. The account holder is responsible for payment to the seller. The livestock is often shipped from purchase location to principal's location.

Analysis: Dealers and Market Agencies Buying on Commission. Table 2 shows that a total $10.3 billion or 38.0 percent of total reported livestock purchase volume is made up of the value of livestock bought on commission for the account of others. Since the P&S Act specifically defines a dealer as a person who is not a market agency and a market agency as any person buying or selling livestock on commission, these purchases, even if made by someone who is otherwise a registered dealer, are not considered dealer transactions. When filing annual reports of dealer purchase volume, some entities report only buying on commission (BOC) purchase volume, some report both dealer and BOC purchase volume, and others incorrectly report farming, ranching, or feeding types of purchase volume. Persons acting as market agencies buying on commission are subject to the Act and are required to maintain bonds based on the dollar value of the livestock they buy on commission, just like livestock dealers.

Table 2. Dealer Purchases and BOC Purchases (2017 or 2018 Annual Reports)

Category	Number of Dealers	Dealer Purchase Volume ($ billion)	BOC Purchase Volume ($ billion)	Total Purchase Volume ($ billion)
Dealers reporting livestock purchase volume in 2017 or 2018	**2,929**	**16.799**	**10.278**	**27.077**
Dealers Reporting any Dealer Volume	**2,112**	**16.799**	**3.252**	**20.050**
Dealers Reporting both Dealer and BOC Volume	**592**	**3.986**	**3.252**	**7.238**
Dealers Reporting Only Dealer Volume	**1,520**	**12.812**	**0**	**12.812**
Dealers with Only BOC Volume	**817**	**0**	**7.026**	**7.026**

In BOC transactions, the principal is the legal purchaser and owner of the livestock in the transaction. The commission buyer does not own the livestock, but is paid a fee by the principal for the buying services. The commission the principal pays its agent is most often expressed and paid in the form of a certain amount (e.g. 50 cents) per hundredweight of the livestock the agent purchases on behalf of the principal. Alternatively, some commissions are expressed and paid in the form of a certain amount (e.g. five dollars) per head of livestock purchased. The principal in a BOC transaction may be a bonded livestock buyer subject to the Act, such as a packer or a dealer, or it may be an unbonded entity not subject to the Act, such as a producer or a feedlot. If the principal is bonded, and the principal defaults on payment to the seller, PSD encourages the seller to file a claim on both the principal's bond and BOC agent's bond because the BOC agent's bond provides additional protection to the seller if the principal's bond does not pay the full amount of the claim. If the principal is not bonded and defaults, the BOC's bond may provide the only protection to the seller in the event of a default.

In cases where the principle is a packer, unpaid sellers are also encouraged to file trust claims pursuant to the packer statutory trust. The same would likely be true under a livestock dealer statutory trust. In addition to filing claims under the BOC's bond and the principle dealer's bond, unpaid sellers could file trust claims under the principle dealer.

A dealer statutory trust that includes BOC transactions could provide valuable added protection to livestock sellers. Otherwise, sellers are limited to protection afforded by the principal's bond (if any) and to that afforded by the BOC/dealer's bond' to the extent of the BOC's liability. The BOC's liability depends on whether the principle is disclosed to the seller. If the principle is disclosed to the seller, the BOC is liable for the full purchase price of the livestock. However, even if there were a statutory trust covering BOC transactions, recovery from a BOC could be limited due to a lack of trust assets, particularly if the BOC does not take possession of the livestock or the handle the funds[42].

[42] Handle funds are provided by one of the parties to the sale that cover expenses such as physical transportation of animals sold.

Dealers and Clearees. A livestock dealer may be provided bond coverage by another regulated entity. A clearor is the entity providing the bond coverage and a clearee is the entity that is covered by the clearor's bond. Dealers operating as clearees are required to file annual reports and report their livestock purchase volume. Clearors are required to file annual reports of their own purchase volume and report separately the purchase volume of those for whom they clear. Table 3 summarizes the purchase volumes of the 264 dealer clearees (of 281 registered with PSD) that filed annual reports for 2017 or 2018.

Table 3. Dealers as Clearees (2017/2018 Annual Reports)

Category	Number of Dealers	Dealer Purchase Volume ($ billion)	BOC Purchase Volume ($ billion)	Total Purchase Volume ($ billion)
Total Active Dealers	**3,419**	**16.794**	**10.278**	**27.077**
Filed Annual Report as Clearee	**264**	**1.035**	**1.334**	**2.369**
Clearees Reporting Dealer Volume	**84**	**1.035**	**0.183**	**1.218**
Clearees with ONLY BOC Volume	**137**	**0**	**1.023**	**1.023**
Clearees Reporting no Volume	**43**	**0**	**0**	**0**
Clearees that did not file in 2017 or 2018	**17**	-	-	-

Livestock purchases made by clearees are dealer transactions and would be viewed the same as other dealer purchases under a dealer statutory trust. An important distinction is that the bond is held by the clearor, and therefore bond claims would be filed against the clearor, while a trust claim for the same incident would be filed against the clearee in most cases, improving the seller's chances for full recovery under valid claims. If the clearee is purchasing livestock on behalf of the clearor, the purchase may or may not be a BOC transaction; application of the provisions of a dealer statutory trust would depend upon the specific nature of the transaction.

Dealers by Livestock Species. The majority of dealer purchase activity involves cattle. Of the 2,929 dealers and BOCs filing 2017 or 2018 annual reports who reported purchase volume, 2,670 reported volume for cattle or calves. Dealers reporting hog purchases numbered 381; sheep and goat purchases, 397; and horse/mule purchases, 227. Table 4 shows active dealer purchase volume by species, using 2017 and 2018 annual reports. Note that the number of dealers per species sums to more than the total number of dealers filing because many dealers reported activity in more than one category.

Table 4. Active Dealers Filing by Species

Category	Number of Dealers	Dealer Purchase Volume ($ billion)	BOC Purchase Volume ($ billion)	Total Purchase Volume ($ billion)
Filing in 2017 or 2018 With Purchase Volume	**2,929**	**16.799**	**10.278**	**27.077**
Total Reporting Cattle/Calves	**2,670**	**15.229**	**9.938**	**25.666**
Dealers w/ Volume for Own Account	**1,884**	**15.229**	**3.214**	**18.444**
Dealers with ONLY BOC volume	**786**	**0**	**6.924**	**6.924**
Total Reporting Hogs	**381**	**1.294**	**0.278**	**1.480**
Dealers w/ Volume for Own Account	**356**	**1.294**	**0.015**	**1.253**
Dealers with ONLY BOC volume	**25**	**0**	**0.263**	**0.227**
Total Reporting Sheep & Goats	**397**	**0.221**	**0.054**	**0.264**
Dealers w/ Volume for Own Account	**364**	**0.221**	**0.016**	**0.233**
Dealers with ONLY BOC volume	**33**	**0**	**0.037**	**0.031**
Total Reporting Horses & Mules	**227**	**0.054**	**0.003**	**0.057**
Dealers w/ Volume for Own Account	**219**	**0.054**	**0.003**	**0.055**
Dealers with ONLY BOC volume	**8**	**0**	**0.002**	**0.002**

Dealers by Size –Estimate of Number of Dealers Subject to a Dealer statutory trust.

This study considers the effect of exempting dealers with average annual dealer purchases under a *de minimis* threshold from a potential livestock dealer statutory trust. The number of dealers and transaction volume subject to a dealer statutory trust would depend on whether BOC transactions were included and the level, if any, of a *de minimis* exemption. For this study, PSD considers the impact of a $500,000 *de minimis* threshold as specified under the packer trust. Table 5 below shows the distribution of dealers by size of reported own-account dealer volume.

Table 5. Dealer Size based on 2017/2018 Annual Reports – by Own-Account Dealer Volume

Category	Dealers (count)	Volume ($b) DLR	Volume ($b) BOC	Volume ($b) Total
Total Dealers Filing Annual Reports	**3,248**	**$16.799**	**$10.278**	**$27.077**
Dealers Filing with $0 Dlr. Volume	**1,136**	**$0**	**$7.026**	**$7.026**
Dealers Filing with any Dlr. Volume	**2,112**	**$16.799**	**$3.252**	**$20.050**
Dealers with $1 to $100,000	**313**	**$0.014**	**$0.120**	**$0.134**
Dealers with $100,000 to $250,000	**225**	**$0.038**	**$0.153**	**$0.191**
Dealers with $250,000 to $500,000	**231**	**$0.082**	**$0.244**	**$0.326**
Dealers with $500,000 to $1.3 Mil.	**364**	**$0.308**	**$0.426**	**$0.734**
Dealers with $1.3 Mil. to $2.6 Mil.	**275**	**$0.520**	**$0.380**	**$0.900**
Dealers with $2.6 Mil. to $5 Mil.	**196**	**$0.721**	**$0.344**	**$1.065**
Dealers with $5 Mil. to $100 Mil.	**478**	**$10.,038**	**$1.501**	**$11.538**
Dealers with More Than $100 Mil.	**30**	**$5.078**	**$0.084**	**$5.162**
Dealers Filing with > $0 Dealer Volume	**2,112**	**$16.799**	**$3.252**	**$20.050**
Dealers filing with > $250,000 Dlr. Vol.	**1,574**	**$16.747**	**$2.979**	**$19.726**
Dealers filing with > $500,000 Dlr. Vol.	**1,343**	**$16.665**	**$2.735**	**$19.399**
Total Dealers Not Filing Annual Reports	**171**	**$0**	**$0**	**$0**

PSD estimates that 70 of the 171 non-filing dealers have over $500,000 in volume,[43] so if a dealer trust applied only to dealers with over $500,000 in purchases, and did not apply to BOC transactions, the trust would apply to approximately 1,400 dealers. If there were no *de minimis* exemption, a dealer statutory trust that did not apply to BOC transactions would apply to approximately 2,200 active dealers with own-account dealer purchases.

Distribution of Dealers by Total Volume (Dealer Volume plus BOC Volume). When considering both dealers' own-account volume and BOC volume, the estimated number of dealers

[43] The estimate of the number of non-filers that would likely have over $500,000 in dealer volume is based on the size of their bonds and the distributions of filers by size.

subject to a trust increases. Table 6 below shows the distribution of dealers by size of reported total (own-account plus BOC) volume.

Table 6. Dealer Size Based on 2017/2018 Annual Reports – by Dealer Plus BOC Volume

Category	Dealers (count)	Volume ($b) DLR	Volume ($b) BOC	Volume ($b) Total
Total Dealers Filing Annual Reports	**3,248**	**$16.799**	**$10.278**	**$27.077**
Dealers Filing with $0 Total Volume	**319**	**$0**	**$0**	**$0**
Dealers Filing with any Volume	**2,929**	**$16.799**	**$10.278**	**$27.077**
Dealers with $1 to $100,000	**281**	**$0.010**	**$0.002**	**$0.012**
Dealers with $100,000 to $250,000	**233**	**$0.029**	**$0.011**	**$0.040**
Dealers with $250,000 to $500,000	**252**	**$0.067**	**$0.023**	**$0.091**
Dealers with $500,000 to $1.3 Mil.	**478**	**$0.242**	**$0.176**	**$0.418**
Dealers with $1.3 Mil. to $2.6 Mil.	**419**	**$0.447**	**$0.355**	**$0.802**
Dealers with $2.6 Mil. to $5 Mil.	**341**	**$0.634**	**$0.630**	**$1.265**
Dealers with $5 Mil. to $100 Mil.	**880**	**$10.167**	**$6.977**	**$17.145**
Dealers with More Than $100 Mil.	**45**	**$5.201**	**$2.104**	**$7.305**
Dealers Filing with > $0 Total Volume	**2,929**	**$16.799**	**$10.278**	**$27.077**
Dealers filing with > $250,000 Tot. Vol.	**2,415**	**$16.759**	**$10.265**	**$27.025**
Dealers filing with > $500,000 Tot. Vol.	**2,163**	**$16.692**	**$10.242**	**$26.934**
Total Dealers Not Filing Annual Reports	**171**	**$0**	**$0**	**$0**

If a dealer trust applied to both own-account and BOC transactions, but only applied to dealers with over $500,000 in total purchases, it would apply to approximately 2,300 dealers. If a dealer trust applied to both own-account and BOC transactions, but provided no *de minimis* exemption, it would apply to approximately 3,100 active dealers with total purchases.

Dealer Activity of SOCs. The Act requires auction markets or "Market Agencies Selling on Commission" (SOCs) be registered with PSD and to maintain custodial accounts and bonds (or bond equivalents). The Act also requires SOCs to maintain dealer bonds (or equivalents) for their own dealer activity. SOCs are not permitted to be cleared by others.

SOCs also must file PSD form 2110 "Annual Report of Market Agency Selling on Commission." In addition to reporting the volumes of livestock sold on consignment through the market, form 2110 requires SOCs to report the dollar volume of their own dealer and BOC purchases.

Table 7 below shows 1,166 active SOCs registered with PSD. Of those, 480, or 41.2 percent, maintained dealer bonds and/or reported dealer activity. These SOCs would be subject to a dealer statutory trust for their dealer activity. Of the 478 SOCs with dealer bonds[44], 260 reported non-zero dealer volume or BOC volume. 130 SOCs reported own-account dealer purchases over $500,00 and 148 reported total (including BOC) purchases over $500,000.

SOC dealer activity is highly concentrated. Of the total volume of $1.889 billion reported, 50.4 percent, or $953 million was reported by the three largest SOCs. Of the 236 SOC firms that reported non-zero own-account dealer volume, 130 reported dealer volume over $500,000.

Table 7. SOC Dealer Activity

Category	SOCs (count)	Volume ($b) DLR	Volume ($b) BOC	Volume ($b) Total
Active SOC firms	**1,166**	**1.222**	**0.667**	**$1.889**
SOCs w/ no CL2 Bond and $0 Volume	**686**	**0**	**0**	**0**
SOC firms reporting Dealer Volume, BOC Volume, or with CL2 bonds	**480**	**1.222**	**0.667**	**1.889**
SOC dealers not reporting	**9**	**-**	**-**	**-**
SOCs Reporting Dealer or BOC Volume	**260**	**1.222**	**0.667**	**1.889**
SOCs w/ Dealer Volume	**236**	**1.222**	**0.550**	**1.773**
SOCs w/ ONLY BOC Volume	**24**	**0**	**0.116**	**0.116**
SOCs w/ CL2 bonds but $0 Volume	**211**	**0**	**0**	**0**
SOCs w/ > $500,000 Dealer Volume	**130**	**1.206**	**0.530**	**1.736**
SOCs w/ > $500,000 Dealer + BOC Vol.	**148**	**1.207**	**0.663**	**1.870**
SOCs w/ $1 to $500,000 Dealer Volume	**106**	**0.016**	**0.020**	**0.036**

If a dealer trust applied to both own-account and BOC transactions, but only applied to dealers with over $500,000 in total volume, approximately 150 SOC firms would also be subject to the trust. If there were no *de minimis* exemption, a dealer statutory trust that applied to both

[44] Two of those 480 SOC firms reported dealer activity but did not have a clause 2 bond.

own-account and BOC transactions would also apply to the approximately 260 active SOC firms with total dealer or BOC purchases.

While the typical dealer activity of an SOC is small compared to its SOC activity, the large number of SOC firms that maintain dealer bonds (478), including 130 or 148 SOC firms that reported more than $500,000 in dealer or total volume, make SOC dealer activity relevant to this study.

Summary – Firms Subject to a Dealer statutory trust. The total number of registered dealers excluding packer buyers is 3,419. This study estimates that a dealer statutory trust that only includes own-account dealer transactions with no *de minimis* exemption would apply to about 2,200 dealers.[45] In addition, about 240 SOC firms with own-account dealer activity would also be subject. If a *de minimis* exemption of $500,000 were applied, the number would drop to about 1,400 dealers. In addition, there would be about 130 SOC firms that engaged in own-account dealer activity over $500,000 that would be subject.

A dealer statutory trust that includes both own-account dealer and BOC transactions with no *de minimis* exemption would apply to about 3,100 dealers.[46] In addition, about 260 SOC firms with dealer or BOC activity would also be subject. If a *de minimis* exemption of $500,000 were applied, the number would drop to about 2,300 dealers. In addition, there would be about 150 SOC firms that engaged in dealer activity over $500,000 that would be subject.

Table 8 shows the estimates of the number of entities, including SOC firms that had dealer and BOC activity that would be subject to a dealer statutory trust under differing scenarios.

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[45] This number excludes those dealers that reported zero volume (1,136) and an estimate of the non-filers that did not have own-account dealer activity.

[46] This number is the 3,419 total registered dealers less those dealers that reported zero volume (319) and less an estimate of non-filing dealers that had no activity.

Table 8. Number of Entities Subject to a Dealer Statutory Trust Under Differing Scenarios

Dealer statutory trust Scenario Dealer and or BOC Activity / Exemption Amount	Dealer Activity	BOC Activity	Dealer & BOC Activity
All Entities with Activity – No Exemption	2,459	1,552	3,343
De Minimis Exemption of $100,000	2,079	1,445	3,015
De Minimis Exemption of $250,000	1,813	1,332	2,720
De Minimis Exemption of $500,000	1,544	1,215	2,425

Note: The estimates in this table include SOC firms reporting dealer activity.

Record Keeping: With such a mix of business operations, it is important that livestock dealers keep distinct accounts and records for each business type they operate. Unfortunately, PSD has seen many smaller volume dealer operations co-mingle their farmer and producer activity accounts and records with their livestock dealer and/or market agency business accounts and records. This concern is typically not seen with packers, which generally maintain a more formal business structure that does not encourage the co-mingling of funds.

Public Comment Summary: Commenters did not address the multiple business models described above when discussing the unique circumstances of dealers. PSD can infer that this is due, in part, to the industry viewing dealers simply as buyers and sellers of livestock without regard for the mode of purchase and sale. Instead, in addressing the unique circumstances of livestock dealers, many commenters mentioned the speed of turnovers between dealer purchases and transfers or resales of livestock. They assert this aspect of the dealer business creates a challenge to the implementation of a dealer trust, but not an insurmountable one. Commenters also noted aspects of a potential dealer statutory trust they think important to its functionality. First, because livestock inventory moves in and out of the dealer's possession so quickly, the inclusion of proceeds/receivables for livestock purchased in cash sales as trust assets is important. For example, if a dealer purchases (but doesn't pay for) livestock at an auction market and resells the animals to a feed yard, commenters claim the proceeds the dealer received from the feed yard should be trust assets. This would be the case until unpaid cash sellers of livestock to the dealer are paid in full. Second, some commenters said unpaid sellers should not be required to trace their specific livestock as trust assets, i.e., a floating trust is preferred. Third, commenters maintain that sellers should be able to "claw-back" improperly diverted trust assets.

Commenters discussed the unique circumstances of dealers as compared to packers when acting as trustees in packer statutory trust situations. Generally, a packer is a larger operation than a dealer and has more resources than a dealer, and according to commenters, packers are more likely than dealers to have time and necessary resources, such as personnel with expertise, to serve as trustees. Commenters wrote that dealers may also not have the same professionally maintained financial statements that packers typically have. Commenters suggested that due to limited funds, and possibly an informal business structure, a livestock dealer may not be regularly audited professionally to ensure proper finances. All of this contributes to commenters' concerns that having dealers act as trustees might impair the functionality of a dealer statutory trust.

Study Finding: Existing packer statutory trust language is useful as a basis for understanding how trusts operate to protect sellers' interests in livestock transactions, but it does not precisely fit the livestock dealer business model. Livestock dealers may perform multiple commercial functions. Depending on their various roles, they might not carry their own bonds, might not take possession of livestock they purchase, and might not maintain adequate assets to cover defaults, thus jeopardizing the financial welfare of sellers with whom they do business. A dealer statutory trust could improve sellers' chances of obtaining full recoveries if it took into account each of the unique circumstances under which livestock dealers operate and the value of the livestock sales they manage.

VII. Effectiveness of Statutory Trusts in Other Segments of Agriculture; Independent Trustee

Study Element: Assess the effectiveness of statutory trusts in other segments of agriculture, whether similar effects could be experienced under a livestock dealer statutory trust, and whether authorizing the Secretary to appoint an independent trustee under the livestock dealer statutory trust would improve seller recovery.

Background: AMS administers the packer statutory trust and the poultry statutory trust, both created by amendments to the P&S Act, as well as the statutory trust provisions under PACA. Each of the amendments creating these statutory trusts followed a crisis or series of crises in the respective industry.

Packer Statutory Trust. The packer statutory trust was established by amendment to the P&S Act in 1976[47] in response to changing livestock marketing patterns that increased livestock producers' exposure to risks created by certain business practices engaged in by members of the packing industry.[48] Between 1958 and early 1975, 167 packer businesses failed, leaving livestock sellers unpaid for over $43 million in livestock. The largest of the failures by far was that of American Beef Packers (ABP), which went bankrupt in January 1975 and left producers across 13 states unpaid for over $20 million in livestock sales.[49] Making matters worse was the fact that ABP's principal source of financing, General Electric Acceptance Corp., stood ahead of unpaid livestock sellers as creditors in the bankruptcy because of its security interest in ABP's inventory, including livestock and derivative products that the producers sold on a cash basis, and for which

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[47] 7 U.S.C. 196, Pub. L. 94-410 § 8, 90 Stat. 1251, September 13, 1976. This amendment (1) required meat packers with annual livestock purchases of over $500,000 to be bonded; (2) provided trust protection for producers in the event of nonpayment for livestock by a meat packer;[47] (3) expanded P&S's jurisdiction over wholesale brokers, dealers, and distributors marketing meat in commerce; and (4) authorized the Agency to assess civil penalties of not more than $10,000 per violation.

[48] Senate Report No. 94-932, 94th Cong., 2d Sess.

[49] House Report No. 94-1043, 94th Cong., 2d Sess., April 14, 1976.

they had not been paid.[50] The money generated through producers' inventory, accounts receivable, and proceeds was distributed to ABP's secured creditors and not to ABP's unpaid producers and feeders.[51]

Prior to the 1976 amendments, the U.S. Supreme Court held that the P&S Act, and the regulations thereunder, provided for payment to livestock sellers before the close of the next business day following the purchase, but did not require a packer to hold cattle or carcasses in trust until the sellers actually convert the checks they receive into cash. The Court concluded that the regulations were designed to regulate payment procedures between buyer and seller, but were not intended to determine security rights between the sellers and third parties holding a valid security interest under State law on the packer's assets.[52]

In considering the amendments, Congress noted that under the law at that time, "a packer is able to offer as security for a loan the livestock, meat, meat food products, or receivables or proceeds therefrom which he has not paid for. The producer, who was responsible for raising, feeding, and caring for the livestock, is left unpaid, while secured creditors reap the reward of his labors."[53]

Congress noted within the 1976 statutory amendment itself, "It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that

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[50] Id.
[51] 94 Cong. Rec. S 9689, June 17, 1976.
[52] Mahon v. Stowers, 416 U.S. 100, 94 S. Ct. 1626, 40 L. Ed2d 79 (1974). The Court said, "Whatever might be the policy reasons for insuring that packers did not take unnecessary advantage of cattle sellers by holding funds for their own purposes, it is hard to see that those reasons would automatically require that such sellers stand on a better footing than persons who have extended secured credit to a packer."
[53] Senate Report No. 94-932, 94th Cong., 2d Sess.

such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest."[54]

The language establishing the packer trust states, "All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers…"[55] The language sets forth certain other requirements for establishing a statutory trust. First, it exempts packers whose annual livestock purchases total $500,000 or less. Second, it requires unpaid sellers to file claims on the trust within thirty days of the final date for making full payment under section 409 of the P&S Act. Third, unpaid sellers are not considered to have been paid if they receive a payment instrument that is dishonored; however, these sellers must file claims on the trust within fifteen business days after receiving notice that the payment instrument was dishonored. Finally, the trust provision instructs that the seller's rights under the trust are preserved by the seller giving timely written notice to the packer and by filing notice with the Secretary.

Poultry Statutory Trust. The poultry statutory trust was established by amendment to the P&S Act in 1987,[56] and arose in part due to changes in the structure of poultry production and financial failures affecting 1,700 poultry growers who were owed approximately $14 million.[57] In 1984, the United States General Accounting Office (GAO) released results of a study it conducted examining regulation of the poultry industry under the P&S Act. GAO found poultry growers in favor of legislation that would provide them protections that mirrored those afforded livestock producers.

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[54] 7 U.S.C. 196(a).
[55] 7 U.S.C. 196(b).
[56] 7 U.S.C. 197, Pub. L. 100-173, 101 Stat. 917, November 23, 1987.
[57] 7 U.S.C. 204, amended Sept. 13, 1976.

Congress recognized the changing nature of poultry production, noting that in 1935, when the Secretary took jurisdiction over live poultry handlers, poultry was a food reserved for "Sunday dinner."[58] Then, poultry was shipped live and sold directly to consumers in the cities. Large scale production of poultry, and particularly chickens/broilers, became widespread starting in the 1950's, and by the 1980's, poultry companies had instituted a centralized process with hatcheries, feed mills and processing plants situated nearer the growers' farms.[59]

The 1987 Poultry Producers Financial Protection Act, which included the creation of a poultry statutory trust, was enacted to bring the P&S Act in line with "contemporary business practices."[60] In addition, Congress noted, "Currently poultry producers are not afforded payment and trust protection comparable to that provided livestock producers under the Packers and Stockyards Act, 1921, and fruit and vegetable growers under the Perishable Agricultural Commodities Act of 1984. In addition, the Bankruptcy Reform Act of 1984 provided payment assurance for grain producers in the case of grain elevator bankruptcies. Further, the Act providing supplemental appropriations for the fiscal year 1984 included provisions to require that the Government pay poultry processors within seven days for poultry and eggs. The bill will provide poultry growers with protection similar to that granted producers of other agricultural commodities."[61]

Prior to creation of the poultry statutory trust, if a live poultry dealer declared bankruptcy, unpaid poultry growers were in the position of unsecured creditors. The poultry statutory trust protected poultry growers and sellers from circumstances that could inflict heavy losses on the U.S. agricultural economy. Like the packer statutory trust for livestock producers, the poultry

[58] 102 Cong. Rec. 9270 (1956)
[59] H.R. 100-397 (1987)
[60] *Id.*
[61] H.R. 100-397 (1987).

statutory trust placed the grower in the position ahead of secured creditors in case of buyer bankruptcy.

Congress's findings in the 1987 legislation creating the poultry statutory trust mirrored those in the 1976 legislation that established the livestock packer statutory trust. [62]

The statutory language establishing the poultry statutory trust states, "All poultry obtained by purchase in cash sales or by poultry growing arrangement, and all inventories of, or receivables or proceeds from the poultry or poultry products derived therefrom, must be held by the live poultry dealer in trust for the benefit of all unpaid cash sellers or poultry growers of the poultry, until full payment has been received by the unpaid cash sellers or poultry growers."

The language sets forth certain other requirements for establishing a statutory trust. First, it exempts live poultry dealers that do 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. Second, it requires unpaid sellers to file claims on the trust within 30 days of the final date for making full payment under section 410 of the P&S Act.[63] Third, unpaid sellers are not considered to have been paid if they receive a payment instrument that is dishonored,[64] however, such sellers must file claims on the trust within 15 business days after receiving notice that the payment instrument was dishonored. Finally, the trust provision instructs that the unpaid sellers' rights under the trust are preserved by the seller giving written notice to the live poultry dealer and by filing notice with the Secretary.[65]

Trusts, Bonds, and Prompt Payments. Section 409 of the P&S Act requires full payment by a packer by the close of the next business day following the purchase of livestock and transfer

[62] 7 U.S.C. 197(a).
[63] 7 U.S.C. 197(b)
[64] 7 U.S.C. 197(c).
[65] 7 U.S.C. 197(b).

of possession thereof, or in the case of a purchase on a carcass or "grade and yield" basis, the purchaser must make payment by the close of the first business day following the determination of the purchase price and deliver the full amount of the purchase price to the seller or the seller's duly authorized representative.[66]

The prompt payment provisions of the P&S Act permit livestock buyers and sellers to agree, in writing, to payment terms other than those set out in the Act.[67] That is, a seller of livestock to a packer may agree in writing to give the packer more time to make payment than permitted under the Act. However, by agreeing to these terms, the seller may forfeit the benefits of the packer trust, since the written agreement may be considered an extension of credit rather than a cash sale.

The definition of a cash sale is a sale in which the seller does not expressly extend credit to the buyer.[68] Section 201.200 of the P&S regulations requires packers who buy livestock on credit to obtain a written credit agreement from the seller that includes a waiver by the seller of their right to file a claim and recover under the trust.[69]

Section 410 of the P&S Act requires full payment by a live poultry dealer by the close of the next business day for cash sales of live poultry. Full payment to poultry growers under poultry growing arrangements must be made before the close of the 15th day following the week in which the poultry is slaughtered.[70] The Act does not provide for waiving prompt payment for poultry as it does in Section 409 for livestock.

Packers that purchase more than $500,000 of livestock annually are subject to the trust provisions of the P&S Act and are also required to maintain a bond to secure their livestock

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66 7 U.S.C. 228b(a).
67 7 U.S.C. 228b(b).
68 7 U.S.C. 196(c), 197(e).
69 9 CFR 201.200.
70 7 U.S.C. 197(a).

purchasing operations.[71] There are some important interactions between packer bond coverage and the packer trust provisions of the Act.

A bond claim is triggered when a livestock seller gives notice in writing to the surety or trustee of the bond (e.g. the bank or other insurer) or to PSD that a packer has failed to pay for livestock. Under the filing requirements for packer and poultry trust claims, the seller has thirty (30) calendar days after payment was due to file a valid trust claim. Unpaid sellers have sixty (60) calendar days after payment was due to file a valid bond claim.

Unless it believes the claim is frivolous, the surety or trustee or bank in the case of Trust Fund Agreements (TFA) or Trust Agreements with irrevocable Letters of Credit (TA/LOCs) must terminate the bond (or withdraw the funds and cancel the TFA or TA /LOC) when a claim is filed.[72] This is true not only for packer bonds, but also for dealer and market agency bonds. It is a violation of the Act for a packer, dealer, or market agency to operate without adequate bond coverage. Therefore, a bonded entity has a strong incentive to keep the surety or trustee of a bond from paying out from its bond.

When a packer fails to pay for livestock, the seller often files two claims for the same transaction – a claim on the packer's bond and a packer trust claim. A packer that wants to remain in business will typically make a significant effort to pay the amount owed so that the seller will withdraw any pending bond or trust claims. The bond claimant may receive payment as a result of the trust claim, or if no trust claim was filed, the packer may pay the amount owed (or a portion

[71] 9 CFR 201.29(a).

[72] 9 CFR 201.27(d). Bonds and bond equivalents shall be filed on forms approved by the Administrator. Paragraph k of the PSD bond and trust fund agreement forms (P&SP 2000 and 2200, respectively), and paragraph c of the trust agreement form (P&SP 2300) contain these termination requirements. In practice, PSD will assist the surety or trustee in determining the apparent validity of the claim, though the surety or trustee will make the final determination. The surety or trustee will not terminate the bond or equivalent coverage unless it has determined the claim was valid, and that it intends to pay the claim. The surety or trustee must also determine whether the claimant has received or is likely to receive acceptable recovery on the subject transaction, and will therefore rescind the bond claim.

thereof) from other available funds. If an unpaid seller files both valid bond and valid trust claims, a payout from the trust or other funds is usually more desirable than a bond payout from the packer's perspective, because the packer cannot lawfully continue operating if its bond has been terminated.

PSD encourages unpaid sellers to file both bond and trust claims where available. When both bond and trust claims are filed on the same transaction, the seller does not receive double payment. In most cases, the trust payments are made and recorded first, and bond proceeds are then distributed on a pro-rata basis to fulfill remaining obligations. In many cases, especially when multiple sellers file claims, the total amount claimed is greater than the bond amount. In those cases, the bond payout is pro-rated among the unpaid valid claims.

Bond claims are typically withdrawn when the claimant receives payment through a trust payout or another source of funds. In some cases, the claimant withdraws their bond claim upon reaching an agreement with the packer for a future payment or a payment plan.

Table 9 provides an overview of 21 instances when a packer failed to pay for its livestock purchases and sellers filed bond claims and trust claims. This represents all cases of packer defaults during the study period except one. Sam Kane Beef Processors, LLC (Kane), was involved in a significant packer default that resulted in the largest number and amount of trust and bond claims during the study period, with settlement continuing after the close of the study period. Kane is a unique case and is addressed separately and in greater detail later. Data on the Kane default is not included in Table 9.

Table 9. Packer Trust and Bond Claims

Incident #	# of Trust Claims	Total Trust Claim Amount	Valid Trust Claim Amount	Non-Valid Trust Claim Amount	# of Bond Claimants	Total Bond Claim Amount	Valid Bond Claim Amount	Non-Valid Bond Claim Amount
# 1	1	$31,627	$31,627	$0	1	$31,627	$31,627	$0
# 2	0	$0	$0	$0	1	$39,765	$0	$39,765
# 3	1	$85,778	$0	$85,778	0	$0	$0	$0
# 4	1	$112,789	$112,789	$0	0	$0	$0	$0
# 5	2	$114,992	$114,992	$0	1	$19,641	$19,641	$0
# 6	1	$19,781	$19,781	$0	0	$0	$0	$0
# 7	0	$0	$0	$0	1	$76,306	$0	$76,306
# 8	0	$0	$0	$0	1	$210,370	$0	$210,370
# 9	2	$928,593	$332,663	$595,930	2	$760,449	$369,970	$390,479
# 10	1	$747,113	$0	$747,113	1	$747,113	$0	$747,113
# 11	1	$47,025	$0	$47,025	1	$47,025	$0	$47,025
# 12	1	$19,403	$12,124	$7,279	2	$38,393	$38,373	$20
# 13	1	$79,564	$79,564	$0	0	$0	$0	$0
# 14	0	$0	$0	$0	1	$22,516	$22,516	$0
# 15	0	$0	$0	$0	1	$41,334	$41,334	$0
# 16	9	$938,818	$0	$938,818	14	$1,936,554	$0	$1,936,554
# 17	30	$2,073,774	$1,846,226	$227,548	40	$2,912,865	$2,620,760	$292,104
# 18	28	$1,337,600	$624,783	$712,817	38	$4,593,159	$3,286,764	$1,306,395
# 19	1	$18,723	$18,723	$0	1	$18,723	$18,723	$0
# 20	37	$3,298,188	$1,553,315	$1,744,873	41	$3,828,646	$3,161,604	$667,043
# 21	1	$4,727	$0	$4,727	0	$0	$0	$0
Total	118	$9,858,494	$4,746,587	$5,111,907	147	$15,324,486	$9,611,312	$5,713,174

Valid versus Non-Valid Bond and Trust Claims. Just under half (48%) of the packer trust claims during the study period were valid. Trust and bond claims may be deemed not valid for several reasons. The most common reason is that the claim was filed late. A trust claim is not valid if it is not filed within 30 days of the transaction for which payment is due.[73] Bond claims are not valid if not filed within 60 days of the transaction.[74] Over 70 percent of the non-valid trust

[73] 7 U.S.C. 196(b). "...the unpaid seller shall lose the benefit of such trust if, in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 409, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection."

[74] 9 CFR 201.33(d). "The surety on the bond or the trustee on the bond equivalent, as the case may be, shall not be liable to pay any claim if it is not filed in writing within 60 days from the date of the transaction on which the claim

claims were not valid due to timeliness. Nearly 57 percent of the non-valid packer bond claims were not valid because they were not timely filed. The remaining packer trust and bond claims were not valid for other reasons.

Trust and bond claims are not valid if they are not for livestock purchases. For example, claims are sometimes filed for freight or trucking charges or other non-livestock amounts owed. During the study period, one packer filed a trust claim for meat that was not delivered. Because this claim was for meat and not for livestock, it was not a valid claim. Claims can also be deemed invalid even if they are for livestock, for instance if there is a dispute about the quality, weight, or some other attribute of the livestock.

Claims are also invalid when filed against the wrong entity. In some cases, there is uncertainty surrounding the ownership of the livestock in question, resulting in a claim against a party that was not in fact liable for the purchase amount. Sometimes a claimant will file bond claims on both the principal buyer of livestock and the principal's agent, if the buyer was a bonded market agency buying on commission (a BOC or order buyer). In those situations, the trustee determines which of the claims is valid.

Evaluating the Effectiveness of the Packer Trust. Table 10 below shows unpaid sellers' recovery rate as a percentage of valid claims. Unpaid sellers often file trust and bond claims even if they know they are likely not valid. They do this hoping the packer or trustee will agree to pay the claims anyway. This is why some recovery rates on particular claims are greater than 100 percent - the valid portion plus some or all of the invalid portions were paid.

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is based or if suit thereon is commenced less than 120 days or more than 547 days from the date of the transaction on which the claim is based."

Measuring only the claims that are not withdrawn[75] results in a measure of recoveries that is lower than the measure for all claims. Claims are withdrawn when the claimant gets paid. Therefore, excluding withdrawn claims suggests a lower recovery rate than actual recoveries. Claim amounts remaining unpaid, especially in the case of bonds, usually result because the packer does not have the resources to pay. Remaining trust or bond claims are the last resort for sellers to receive payment, and therefore reflect those outcomes where the seller was most likely to remain unpaid, lowering the measure of recovery rate in the analysis through selection bias.

The total of amounts claimed may not reflect actual total amounts owed, as not all sellers file claims. Some unpaid sellers may use the threat of filing a bond or trust claim as leverage in negotiating payment with a packer without actually filing a claim. In this way, packer trust and bond provisions provide a deterrent effect, albeit an unmeasurable one.

Finally, reported recoveries are not always precise because packers and sellers sometimes agree on a payment plan. Payments made long after the claims have been withdrawn or after the bond has paid out may not be captured in PSD records.

Table 10 also shows the amounts paid out by the packer trusts and bonds in the 21 instances studied. Packers will pay on valid claims, if they can, to avoid bond claims and subsequent bond terminations. In the four incidents where bonds paid out, claimants were unable to make full recovery on valid trust claims.

[75] This is the reporting method used in the PSD annual reports. Claims that are withdrawn are not included in PSD reports.

Table 10. Trust and Bond Claim Recoveries

Incident #	Valid Trust Claim Amount	Valid Bond Claim Amount	Paid by Trust and Other[76]	Paid by Bond	Unpaid Valid Amount	Recovery Rate on Valid Claims[77]
# 1	$31,627	$31,627	$31,627	$0	$0	100.0%
# 2	$0	$0	$0	$0	$0	N/A
# 3	$0	$0	$0	$0	$0	N/A
# 4	$112,789	$0	$112,789	$0	$0	100.0%
# 5	$114,992	$19,641	$114,992	$0	$0	100.0%
# 6	$19,781	$0	$19,781	$0	$0	100.0%
# 7	$0	$0	$0	$0	$0	N/A
# 8	$0	$0	$0	$0	$0	N/A
# 9	$332,663	$369,970	$617,425	$0	($247,455)	166.9%
# 10	$0	$0	$0	$0	$0	N/A
# 11	$0	$0	$0	$0	$0	N/A
# 12	$12,124	$38,373	$7,259	$20,000	$11,114	71.0%
# 13	$79,564	$0	$79,564	$0	$0	100.0%
# 14	$0	$22,516	$22,516	$0	$0	100.0%
# 15	$0	$41,334	$41,334	$0	$0	100.0%
# 16	$0	$0	$0	$0	$0	N/A
# 17	$1,846,226	$2,620,760	$2,812,336	$0	($191,576)	107.3%
# 18	$624,783	$3,286,764	$625,033	$525,000	$2,136,731	35.0%
# 19	$18,723	$18,723	$0	$10,000	$8,723	53.4%
# 20	$1,553,315	$3,161,604	$1,720,097	$695,000	$746,507	76.4%
# 21	$0	$0	$0	$0	$0	N/A
Total	$4,746,587	$9,611,312	$6,204,753	$1,250,000	$2,464,044	75.2%

The total amount paid by the packer trust was 29.4 percent greater than the amount of valid trust claims. That trust payouts exceed valid trust claims is not surprising, given the discussion above about packers wanting to stay in business and keep their bonds, and the fact that bond claims exceeded trust claims by a sizable portion.

Two incidents that resulted in sellers receiving recoveries from the packer that exceeded the amount of valid bond claims were cases where there was no obligation for the bond or trust to

[76] In incidents 14 and 15, the unpaid sellers filed only bond claims. Both packers paid the full amount claimed from their own funds. Though not technically payments from the trust, these amounts are included as trust recoveries and total recoveries in the analysis.
[77] Recovery rates are calculated on the higher of valid bond or valid trust claim.

pay out on a portion of the claims, but the packer elected to pay some of the non-valid claims anyway. This can occur for a variety of reasons. For example, the packer may wish to maintain its reputation or goodwill, or to avoid future litigation and associated costs.

Payouts on packer bonds are tempered by the fact that, in most cases, the trust payments have already been made by the time the bond payout is determined. The bond payout is based on the remaining amount of the valid claims, if any, that remain unpaid after the trust payout, and is generally the unpaid sellers' last recourse for receiving payment. Table 11 below shows that during the study period, packer bonds paid out 13 percent of the total valid bond claim amount.

Table 11. Recovery from Packer Trusts and Packer Bonds

Total Trust Payout: $6,204,753				**Total Packer Bond Payouts: $1,250,000**			
Total Trust Claims	**Trust Payout (percent of total)**	**Valid Trust Claims**	**Trust Payout (percent of valid)**	**Total Bond Claims**	**Bond Payout (percent of total)**	**Valid Bond Claims**	**Recoveries (percent of total)**
$9,858,494	**62.9**	**$4,746,587**	**130.7**	**$15,324,486**	**8.2**	**$9,611,312**	**13.0**

Because of the interactions between the bond and trust, the appropriate way to evaluate the effectiveness of the bond and trust protections is to look at total recoveries. See Table 12 below. Total payments made to the sellers from the packer bonds and trust assets combined were in excess of total valid trust claims and were 77.6% of the valid bond claims. The best representation of recovery compares the higher of the valid trust or bond claim with total recoveries, which during the study period was 75.2%.[78].

[78] Note that the higher amount is more relevant than the sum of valid bond and trust claims, since bond and trust claims typically overlap, as a claimant may file on both the trust and bond for the same transaction. Bond claims are usually higher because of the longer period of time allowed for valid claims (60 days for bond claims, and 30 days for trust claims.)

Table 12. Total Recoveries (Bond, Trust and Other) from Packer Trust and Bond Claims Combined[79]

Total Trust and Bond Recoveries: $7,454,753			
Total Trust and Bond Claims Combined	**Trust Payout (percent of total)**	**Total Valid Trust and Bond Claims**	**Trust Payout (percent of valid)**
$15,890,619	**46.9**	**$9,918,796**	**75.2**

Because of the interaction between the trust and bond protections, one cannot assume that the impact of the packer trust is the difference between bond payouts and trust payouts. Had the packer trust protections not been in place, packer bond payouts may have been higher to make up some of the difference. There is no way to know for certain what bond claims or bond payouts would have been under that scenario. However, one way to evaluate this hypothetical question is to look at total bond coverage as potential bond payouts. See Table 13 below. If one assumes the bond would have paid out the full amount of total valid bond claims up to the available amount of bond coverage, total potential recoveries from bond payouts, had the packer trust not been in place, would have been $2,119,823, which is $5,334,930 less than the actual payouts of $7,454,753.

The Sam Kane Beef Processors, LLC, Default - 2016-2019. Numerous commenters, including both supporters and opponents of the dealer statutory trust concept, raised the matter of Sam Kane Beef Processors, LLC, in their comments. Kane was a meat packer operating in Corpus Christi, Texas. Livestock sellers filed trust claims against Kane starting in September 2016. Twelve claimants, consisting of feedlots and producers, filed valid trust claims. Claims continued through January 2017, when Kane and the USDA entered into a consent decision and order for violations of the P&S Act. The order, effective January 17, 2017, required Kane to cease and desist from failing to pay timely for its livestock purchases. At that time, valid trust claims totaled

[79] Total claims are based upon the higher of the trust or bond claims for each packer default incident.

$14,092,732. The full amount of those claims was paid pursuant to the packer statutory trust. Claims were not filed against Kane's $3.5 million surety bond.

Trust claims began again on February 22, 2017, after Kane violated the consent decision and Secretary's order. Kane continued to operate its meat packing business and paid many of the new trust claims. Kane paid trust claims on a "rolling" basis, first-in-first-out (FIFO). As claimants were paid, they withdrew their claims, often only to file new claims later for new transactions that were not paid. This process continued until June of 2018, at which point Kane stopped paying claims and paid for new purchases through its agent. By that time, total trust claims filed since February 2017 amounted to $159,869,490 from 114 claimants. Most of the trust claims were valid. Paid claims over this period totaled $124,644,500. Claimants that did not receive payment reached a settlement with Kane that included appointment of a chief restructuring officer and establishment of a payment plan.

Kane soon defaulted on a $20 million payment due per the payment plan, and the federal court assigned an independent receiver. Some of the unpaid sellers also filed valid bond claims. The Court ordered that Kane's current bond, a $3.5 million surety bond, be paid out in full to 28 unpaid bond claimants, prorated based on their outstanding unpaid claims as of June of 2018. Kane also made a court-ordered payment of $500,000 on August 8, 2018, to unpaid trust claimants. As part of the receiver's arrangement for Kane to continue operating, another bond equivalent, this time a TFA in the amount of $3 million, was put in place with funds lent by Compass Bank (BBVA Compass). The Court-assigned independent receiver was named as the trustee for the TFA.

After Kane filed for bankruptcy protection in January 2019, sellers continued to file new trust and bond claims on late 2018 and early 2019 transactions. These trust and bond claims totaled $1,163,864, of which $1,131,730 were deemed valid by the receiver / TFA trustee and were paid by the TFA. These trust claims were still technically part of the statutory trust that began in February 2017. The bond claims were on a the new bond equivalent (the $3 million TFA), and the claimants were paid 100 percent of their valid claims from the TFA.

As of June 30, 2019, the end date of the study period, there remained unpaid trust claims in the Kane case. All valid trust claims against Kane totaled $159,869,490. The packer statutory trust paid $124,644,500 on a rolling (FIFO) basis, the court ordered another $500,000 payment, and the first bond paid out $3,500,000. Thus, 80 percent of valid trust claims were paid, leaving 20 percent or $31,224,991 of valid trust claims unpaid.

On September 20, 2019, Kane, its finance company, and the trust claimants (referred to as "the Feeders") filed a Settlement Release Agreement with the Bankruptcy Court for the Southern District of Texas.[80] Under the Agreement, the Feeders receive $12,702,370.33 of "Debtor Held Receivables" in the possession of Kane, and at least $1,675,826.29 of "Collected Receivables" in the possession of the finance company. In addition, the finance company must forward to the Feeders any additional livestock receivables that come into its possession.

The Feeders are granted exclusive control of, and standing to pursue, all of Kane's pre-petition claims and causes of action. The Feeders also retain their disgorgement[81] actions against third parties who may have come into possession of trust assets.

[80] The Settlement Agreement between Kane and the trust claimants occurred after the end of the study period for this report. Information regarding the agreement is provided so the reader has as complete information as possible.
[81] Disgorgement is the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion. *Black's Law Dictionary* (10th ed. 2014: Bryan A. Garner, ed.) p. 568.

Table 13. Potential Recoveries from Packer Bonds

Incident #	Packer Bond Coverage	Total Max Claim Amount[82]	Valid Max Claim Amount	Total Actual Recovery	Total Potential Recovery[83]	Difference
# 1	$84,500,000	$31,627	$31,627	$31,627	$31,627	$0
# 2	$45,000	$39,765	$0	$0	$0	$0
# 3	$0	$85,778	$0	$0	$0	$0
# 4	$0	$112,789	$112,789	$112,789	$0	$112,789
# 5	$20,000	$114,992	$114,992	$114,992	$20,000	$94,992
# 6	$50,000	$19,781	$19,781	$19,781	$19,781	$0
# 7	$10,000	$76,306	$0	$0	$0	$0
# 8	$1,300,000	$210,370	$0	$0	$0	$0
# 9	$30,000	$928,593	$369,970	$617,425	$30,000	$587,425
# 10	$795,000	$747,113	$0	$0	$0	$0
# 11	$10,000	$47,025	$0	$0	$0	$0
# 12	$20,000	$38,393	$38,373	$27,259	$20,000	$7,259
# 13	$305,000	$79,564	$79,564	$79,564	$79,564	$0
# 14	$100,000	$22,516	$22,516	$22,516	$22,516	$0
# 15	$155,000	$41,334	$41,334	$41,334	$41,334	$0
# 16	$10,097,500	$1,936,554	$0	$0	$0	$0
# 17	$695,000	$2,912,865	$2,620,760	$2,812,336	$695,000	$2,117,336
# 18	$525,000	$4,593,159	$3,286,764	$1,150,033	$525,000	$625,033
# 19	$10,000	$18,723	$18,723	$10,000	$10,000	$0
# 20	$625,000	$3,828,646	$3,161,604	$2,415,097	$625,000	$1,790,097
# 21	$0	$4,727	$0	$0	$0	$0
Total	$99,292,500	$15,890,619	$9,918,796	$7,454,753	$2,119,823	$5,334,930

Evaluating the Effectiveness of the Poultry Statutory Trust. PSD records show 93 live poultry dealers operating subject to the P&S Act. These 93 entities range from large, vertically integrated companies to the small live bird markets and spent fowl dealers[84].

The poultry industry is dominated by large, vertically integrated firms that primarily obtain live poultry under poultry "growing arrangements" with contract growers or by marketing

[82] Maximum claim amounts are calculated as the higher of bond or trust claim. This implies that in the absence of the trust provisions, claimants would have filed bond claims for all amounts on which they actually filed trust claims.
[83] Calculated as the lesser of the bond coverage or total valid claim amount.
[84] Spent fowl are hens that were raised for commercial egg production, but are no longer viable in that capacity, and are destined for slaughter. See 7 U.S.C. 2702.

agreements with independent producers. The term vertical integration means one company owns and controls multiple stages of production, such as the breeder flocks, hatchery, grow-out operations, processing plant, feed mill, transportation, and marketing. In 2018, the top five vertically integrated firms controlled about 61% of the poultry industry. The top ten firms controlled about 82% of the industry. The existence of a vertically integrated and consolidated industry plays a significant role in explaining why there have been few poultry company failures, and in turn, so few poultry statutory trust claims.

Table 14 shows trust claims filed on live poultry dealers during the study period. Five sellers or growers filed trust claims against four live poultry dealers during this period. Only one of the incidents involved a valid poultry trust claim that was paid pursuant to the statutory trust. Another incident resulted in payments to claimants, even though the claims were not valid.

Table 14. Poultry Trust Claims; October 1, 2013 - June 30, 2019

Trust Claim Incident Number	Number of Trust Claims Filed	Total Trust Claim Amount	Non-Valid Amount	Valid Amount	Paid by Trust	Paid by Other	Recovery Rate on Valid Claims
1	**2**	**\$3,052,734**	**\$3,052,734**	**\$0**	**\$0**	**\$0**	**N/A**
2	**1**	**\$1,579,548**	**\$1,340,207**	**\$239,341**	**\$0**	**\$0**	**\$0.0%**
3	**1**	**\$82,840**	**\$0**	**\$82,840**	**\$82,240**	**\$0**	**\$100.0%**
4	**1**	**\$290,914**	**\$290,914**	**\$0**	**\$0**	**\$47,000**	**N/A**
Total	**5**	**\$5,006,036**	**\$4,683,855**	**\$322,181**	**\$82,840**	**\$47,000**	**\$40.3%**

The non-valid claims were not valid for various reasons. In some instances, part of the claim was timely filed, but the entire claim was not valid because it did not involve cash sales of poultry. In other incidents, a significant number of the claims were not valid because they were not timely filed. The remaining timely-filed claims were not paid because the live poultry dealer dissipated the trust funds, i.e., the live poultry dealer did not hold the funds in trust for the benefit of unpaid sellers or growers, and instead used those funds for some other purpose.

The Perishable Agricultural Commodities Act Statutory Trust. PACA was enacted in 1930 for the purpose of promoting fair trading practices in the marketing of perishable agricultural commodities.[85] The law was designed to protect producers, many of whom entrust their products to buyers or commission merchants who may be thousands of miles away, and depend upon the buyer's business acumen and fair dealing for payment.[86] PACA requires a covered "dealer" to "promptly pay" for the purchase of perishable agricultural commodities. Perishable agricultural commodities include fresh and frozen fruits and vegetables.[87]

A "dealer" for PACA purposes is any person engaged in the business of buying or selling in wholesale or jobbing quantities[88] in commerce, and includes (1) jobbers, distributers, and other wholesalers; (2) retailers purchasing more than $230,000 of produce during a calendar year; and (3) growers who market produce grown by others. The term "dealer" does not include persons buying produce, other than potatoes, for canning and/or processing within the State where grown, whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen, or packed in ice, or consists of cherries in brine.[89]

Prompt payment under PACA has different meanings depending upon the nature of the transaction and ranges between 5 and 30 days from a triggering event. [90] Parties to a transaction can elect to use different times of payment than those set forth in PACA regulations, as long as the agreement is first put in writing and maintained in their records.

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[85] *Consumers Produce Co., Inc. v. Volante Wholesale Produce Inc.*, 16 F3d 1347, 1377-78 (3d Cir. 1994).
[86] H.R. Rep. No. 1196 (1955), reprinted in 1956 U.S.C.C.A.N. 3699, 3701.
[87] See the USDA AMS PACA webpage for a list of covered commodities. AMS notes that given the scope of the produce industry, some covered commodities may not appear on the list. https://www.ams.usda.gov/sites/default/files/media/Commodities%20Covered%20by%20PACA.pdf
[88] "Wholesale or jobbing quantities" means aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received. 7 CFR 46.2(x).
[89] 7 CFR 46.2(m).
[90] 7 CFR 46.2(aa).

From the time of its enactment until it was amended in1984, PACA had two primary tools for protecting sellers of perishable agricultural commodities. First, it prohibited certain conduct by commission merchants, brokers, or dealers,[91] and made those entities liable to injured parties for the full amount of damages if they were found to have violated those prohibitions.[92] Second, it required any person carrying on the business of a commission merchant, dealer, or broker to obtain a license from USDA that was revocable upon a determination that the licensee engaged in prohibited conduct.[93] In addition, any person doing business without the required license could be assessed monetary civil penalties.[94]

The PACA statutory trust provisions were enacted as amendments to PACA in 1984. Congress determined that produce sellers were being put at risk by financing practices in use at that time. In support of the amendments, Congress stated, "[i]t is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. . . ."[95]

The PACA statutory trust requires dealers to hold the proceeds of the sale of perishable commodities for the benefit of the unpaid seller until full payment is made.[96] The trust is a floating,

[91] 7 U.S.C. 499b.
[92] 7 U.S.C. 499e(a), (b).
[93] See 7 U.S.C. 499c, 499d, 499h.
[94] 7 U.S.C. 499c.
[95] 7 U.S.C. 499e(c)(1).
[96] 7 U.S.C. 499e(c)(2).

non-segregated trust comprised of the perishable agricultural commodities purchased from the suppliers, all inventories of food or other products derived from the perishable agricultural commodities, and receivables or proceeds from the sale of the commodities or products.[97]

Unpaid sellers must give written notice of their intent to preserve their rights under the trust within thirty calendar days after payment must be made or they lose the benefits of the trust.[98] In a provision unique to PACA, licensees are able to use billing or invoice statements to give notice of their intent to preserve the trust. In such cases, the bill or invoice must include on its face the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."[99] Contrast this with the Packer and Poultry trusts, in which unpaid sellers preserve their trust rights by giving written notice to the packer and by filing notice with the Secretary.

Livestock dealers create their own purchase and sales invoices. Livestock sellers may not have the option to include language preserving their trust rights on the dealer's invoice. This suggests that the best way for sellers to preserve their trust rights under a dealer trust would be the same way that sellers preserve their rights under the packer and poultry trusts – by giving written notice to the packer and by filing notice with the Secretary.

Just as the defaulting packer or live poultry dealer is the statutory trustee in the P&S Act statutory trusts, the statutory trustee under the PACA trust is the delinquent "commission

[97] Id.
[98] 7 U.S.C. 499e(c)(3).
[99] 7 U.S.C. 499e(c)(4).

merchant, dealer, or broker."[100] As under the P&S Act statutory trusts, when a produce dealer is in bankruptcy, PACA trust assets are excluded from the bankruptcy estate. Those assets are not available for distribution to secured creditors. Unpaid suppliers have an interest in the trust corpus superior to the interest of any other lien or secured creditor.[101] This is because section 541 of the Bankruptcy Code specifies that property in which the debtor holds only legal title, and not an equitable interest, is not considered part of the bankruptcy estate.[102] The corpus, or principal, of a secured PACA trust is an equitable interest, which keeps it from being included in the debtor's bankruptcy estate.[103]

Unlike the P&S Act statutory trusts, Congress included specific remedial language for the PACA statutory trust: "The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.[104] As a result, there is little financial burden on the USDA. Produce sellers enforce their rights by bringing suit in the U. S. District Courts. AMS's PACA Division describes the PACA statutory trust as a "self-help tool" that requires little or no need for USDA involvement. Trust beneficiaries may file an action in U.S. District Court to enforce payment from the trust immediately following a buyer's failure to pay promptly. If the debtor is bankrupt, trust beneficiaries should file their claims for payment with

[100] 7 U.S.C. 499e(c)(2).
[101] See *Consumers Produce Co., Inc. v. Volante Wholesale Produce, Inc.,* 16 F.3d 1374, 1379 (3d Cir. 1994); *In re W.L. Bradley Co., Inc.,* 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987) (quoting *In re Prange Foods, Corp.,* 63 B.R. 211, 214 (Bankr. W.D. Mich. 1986).
[102] 11 U.S.C. 541(d).
[103] *East Coast Potato Distrib. v. Grant* (*In re* Super Spud, Inc.), 77 B.R. 930, 931 (Bankr. M.D. Fla. 1987); see also *In re* Fresh Approach, Inc., 51 B.R. 412, 419 (Bankr. N.D. Tex. 1985).
[104] 7 U.S.C. 499e(c)(5).

the bankruptcy court."[105] USDA does, however, retain authority to prevent and restrain dissipation of trust assets.

Evaluating the Effectiveness of the PACA Statutory Trust. AMS's PACA Division, which administers the PACA regulations, is not directly involved in the statutory trust process, and therefore does not maintain data on trust claims and recoveries. However, the PACA Division estimates that hundreds of millions of dollars have been recovered by produce sellers as a result of the PACA statutory trust.[106] The three largest payouts alone, involving Fleming Foods,[107] Winn Dixie Stores,[108] and AmeriServe Food Distribution,[109] totaled almost $100 million. Fruit and vegetable industry representatives estimate that more than $1 billion has been collected as a direct result of the PACA trust provisions.[110]

This study can speak in general terms as to the effectiveness of the PACA statutory trust using references and anecdotes from the industry. Overall, the PACA statutory trust is highly regarded, considered a "very powerful tool which when used properly, and gives produce sellers a unique and unprecedented opportunity to collect its delinquent accounts, especially when a buyer is on the verge of going out of business."[111] "The provisions of the PACA trust afford the unpaid seller a powerful means of recovery to ensure the public of a constant supply of perishable agricultural commodities."[112] Additional industry views on the PACA statutory trust are available in the Appendix to this report.

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[105] PACA Fact Finder Brochure. Available at https://www.ams.usda.gov/sites/default/files/media/PACAFactFinderBrochure.pdf
[106] 81 FR 90255.
[107] In 2003, The Fleming Companies paid over $40 million to PACA Trust creditors.
[108] In 2005, PACA Trust creditors received over $20 million in Winn Dixie's bankruptcy.
[109] In 2000, AmeriServe Food Distribution paid approximately $30 million in PACA claims.
[110] PACA Fact Finder Brochure.
[111] Meuers Law Firm, P.L., Naples, FL, https://www.meuerslawfirm.com/Articles/Using-the-Paca-Trust-to-Collect-Past-Due-Invoices.shtml
[112] Oleksa, Michelle G., Protecting the Power of the *PACA Trust: Contemplating the Effects of the Bona Fide Purchaser Defense,* 8 San Joaquin Agric. L. Rev. 173 (1998).

Trustee and Independent Trustee. In the packer and poultry statutory trusts, the trustee is the packer/poultry dealer who failed to pay for livestock/poultry. Likewise, the statutory trustee under the PACA trust is the delinquent "commission merchant, dealer, or broker."[113] The trustee has the fiduciary duty to hold cash, inventory and receivables in trust for the benefit of trust claimants.

An independent trustee would handle the trust in an orderly manner that ensures all claimants are protected equally. An independent trustee would ensure equitable payments between claimants and likely avoid preferential payments and dissipation of trust assets. However, an independent trustee would likely be paid for services from the trust, which would reduce assets available for payout to claimants.

Though trust dissipation is a violation of the Act, PSD lacks authority to recover funds from the paid parties. Claimants must file suit against the trustee and entities receiving preferential payments – typically a legal battle, where the cost may outweigh the benefit.

Analysis: Overall, the packer and poultry statutory trusts have significantly contributed to the recovery of previously unpaid funds to livestock and poultry sellers. Data analysis shows that while the number of packer and poultry statutory trust events during the study period was relatively small, the statutory trusts have been effective tools for seller financial protection. During the study period, packer trusts paid out 130.7% of valid trust claims, and packer bonds paid out 13.0% of the total valid bond claims. The greatest impediment to recovery for sellers is not filing claims timely. Extending the period for filing claims could increase the number of valid claims, but it could also diminish the funds available for payout on those claims. One of the greatest protections afforded under the packer and poultry statutory trusts is placing livestock sellers and poultry

[113] 7 U.S.C. 499e(c)(2).

growers in the position of secured creditors in cases of buyer bankruptcy. Of significant concern among commenters was the apparent ineffectiveness of the packer statutory trust in the Kane default and bankruptcy. PSD found that in Kane, the statutory trust paid 78% of the more than $150 million in valid claims, with disposition of just under 20% of claims still to be decided by the bankruptcy as of the end of the study period. Kane's continued operations were due, in part, to livestock sellers' desire to have an outlet for their cattle in that region. As a result, Kane continued to operate its meat packing business and paid trust claims on a "rolling" first-in-first-out (FIFO) basis. As claimants were paid, they withdrew their claims, only to file new claims for new transactions that were not paid.

Anecdotal evidence indicates that the PACA statutory trust has been a highly effective means for protecting produce sellers, giving trust beneficiaries the ability to file an action in U.S. District Court to enforce payment from the trust immediately following a buyer's failure to pay promptly, and excluding trust assets from the bankruptcy estate, making them unavailable for distribution to secured creditors. While aggregated data on trust recoveries is not maintained, both AMS's PACA Division and public commenters suggest that produce sellers have benefitted by more than $1 billion since the statutory trust was enacted in 1984.

Public Comment Summary: Commenters provided positive reviews of their personal experiences with the packer statutory trust and the PACA trust. Several commenters credited the trust provisions with saving their businesses during difficult situations where buyers failed to pay for their purchases.

Negative comments stemmed from experiences with the Sam Kane packer failure and bankruptcy and commenters' perception that the packer statutory trust failed to protect livestock sellers.

On the question of authorizing the Secretary to appoint an independent trustee, commenters were somewhat indifferent. Most recognized that an independent trustee would likely provide better accounting of trust assets, but they cautioned that funds available for seller recoveries could be reduced by trustee fees.

Study Finding: Statutory trusts in other segments of agriculture are effective in improving financial recoveries for unpaid sellers of agricultural products. Similar results could be expected under a livestock dealer statutory trust. Authorizing the Secretary to appoint an independent trustee could improve the trust claim payout process, but payment of trustee fees could reduce funds available for recoveries to livestock sellers.

VIII. Seller Recovery in The Event of a Livestock Dealer Payment Default

Study Element: Examine how the establishment of a livestock dealer statutory trust would affect seller recovery in the event of a livestock dealer payment default.

Background and Analysis: The P&S Act requires dealers, market agencies and packers to pay in full for their livestock purchases by the close of the next business day following the purchase and transfer of possession of livestock.[114] An exception to the prompt payment requirement provides that the parties may agree in writing to extend the time for payment beyond the required period for delivering payment.[115] The Act provides an administrative remedy for non-payment, which includes cease and desist orders, suspension of registrations where applicable, and

[114] 7 U.S.C. 228b(a)
[115] 7 U.S.C. 228b(b)

civil penalties.[116] This administrative process does not authorize orders to pay or make restitution to unpaid sellers.[117]

While the Act requires dealers to pay by the close of the next business day, often the relationship between livestock dealers and farmers and ranchers may be casual and informal, to the extent that the seller does not insist on strict adherence to payment rules laid out in the Act. With a longstanding business relationship, the seller may allow more time for payment, seven days or more, for example. Auction markets may develop a relationship with a dealer, too, where they do not enforce next-day payment rules, but auction markets are constrained by custodial account requirements. If payment is not received from a buyer within seven days, the auction market will have to use its own funds to reimburse the custodial account, which could result in financial hardship for the auction market.

In order to meet payment obligations, dealers need to maintain a stable financial position. This means a dealer needs access to credit such as a bank loan or a credit line to pay the seller in the next trade. Otherwise, when dealers take possession of livestock, they must be able to market the livestock promptly to generate revenue, which may be difficult.

Livestock sellers encounter situations where dealers send payment several days late. Producers (sellers) file complaints with PSD on late payments; even producers with longstanding dealer relationships file complaints with PSD if payment is not received within the 'usual'

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116 7 U.S.C. 193; 7 U.S.C. 204; 7 U.S.C. 213(b).

117 Restitution to unpaid sellers can be achieved through enforcement actions by use of a consent decision, in which the accused party agrees to a sanction, usually while neither admitting nor denying the violations. The parties may agree to reduce the sanction (suspension or civil penalty) if restitution is paid. Another avenue for recovering damages is through a reparation proceeding as set forth in 7 U.S.C. 210. This provision allows persons who believe they have been the victim of an unreasonable or unjustly discriminatory action by a market agency or dealer to file a complaint with the Secretary against that market agency or dealer. After a hearing, either written or oral, the Secretary may issue an Order awarding damages. That Order is enforceable in federal court.

timeframe they are accustomed to with a particular dealer. Auction markets also file complaints of 'slow pay' when a dealer is paying for livestock more than a week after the purchase.

Livestock producers and auction markets are not in a position to discern a dealer's financial condition, but banks have the ability to determine their credit-worthiness. With evidence of a deteriorating financial situation, a bank may call in a loan or freeze a dealer's credit line. Livestock dealers may continue to operate buying livestock, however, even though they do not have sufficient funds or access to credit to pay for livestock purchased. Meanwhile, sellers are unaware of the risks until the checks received as payment from the dealer are returned by the bank for insufficient funds.

If the dealer's insolvency leads to bankruptcy, unpaid livestock sellers typically do not receive any advantage. In a bankruptcy proceeding, secured creditors are paid before unsecured creditors. A secured creditor is a lender that has a lien on certain assets of a borrower – in this case, the bank that issued credit to the dealer.

Unsecured creditors are not eligible for reimbursement until the claims of all secured creditors have been settled. At that time, the unsecured creditors are paid on a pro rata basis along with all other creditors in the same classification. There are two types of unsecured creditors' claims – priority and nonpriority. Employee wages are considered priority unsecured claims. Claims of unpaid sellers are nonpriority unsecured claims. Hence, bankruptcy proceedings usually result in partial payments or perhaps no payments at all for unpaid producers and auction markets. Another disadvantage to unpaid sellers in bankruptcy is that payments made to livestock sellers within 90 days prior to the bankruptcy may be considered to be preferential transfers which must be paid back by the recipients.

Currently, recovery by an unpaid seller in the case of a livestock dealer payment default can be obtained by filing a claim on the dealer's bond. Recent bond claim and recovery data indicates total potential recoveries of 47 percent of valid claims if a dealer statutory trust were in place.

The P&S Act requires most dealers, all market agencies, and those packers with annual livestock purchases of over $500,000 to maintain a bond or bond equivalent.[118] Dealers operating solely as packer buyers for packers with annual livestock purchases of over $500,000 are not required to maintain dealer bonds because packer buyer purchases are covered by the employing packer's bond and the packer trust provisions of the P&S Act.

Dealer bonds must meet the conditions set forth in P&S regulations.[119] The condition clause 2 bond covers livestock purchases when the buyer purchases livestock for his own account or for the account of others. A number of registered livestock dealers also maintain condition clause 3 bonds.[120] Condition clause 3 bonds are required when a principal clears[121] other registrants buying livestock and thus is responsible for the obligations of those other registrants.[122]

A livestock seller is eligible to file a bond claim if he or she has not received payment from a dealer, market agency, or packer. Claims must be filed within 60 days of the date of the transaction for which payment has not been received.[123] To file a claim, unpaid sellers complete

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[118] 9 CFR 201.27. Bond equivalents include (1) a trust fund agreement governing funds actually deposited or invested, which are readily convertible to currency, or (2) a trust agreement under one or more irrevocable, transferable, standby letters of credit.
[119] 9 CFR 201.31(b) sets forth the requirements for a condition clause 2 dealer bond.
[120] 9 CFR 201.31(c) sets forth the requirements for a condition clause 3 clearor bond.
[121] *Hartford Accident and Indemnity Co. v. Volin*, 304 F.Supp. 289 (D. Minn., 1969). A clearing agency agrees to pay for livestock purchases made by specified clearees in consideration of a fee frequently calculated on a per-head basis. Clearees must be named upon the bond of the market agency providing the clearing services. (9 CFR § 201.29(c)).
[122] 9 CFR § 201.31(c).
[123] Claims are filed with the surety company, if any, or the trustee, or the Administrator. Whichever receives the claim is required to notify the other party or parties as soon as practical.

and submit PSD Form 2110 (market agencies selling on commission) or 2120 [dealers, market agencies buying on commission (BOCs)] to a PSD office or to the trustee on the bond.

Table 15 below summarizes bond claims filed on dealers and BOCs during the study period.[124] There were 82 instances of a nonpayment by a dealer or BOC that resulted in the filing of 184 bond claims during this period. The total dollar amount claimed was $26,020,417. Valid claims represented $22,228,654 of that total. In 19 of the 82 incidents of nonpayment, none of the bond claims were deemed valid. Almost half (48%) of the claims were filed by producers, and another 42% were filed by auction markets. The remaining claims were filed by other livestock dealers, a trucker, and a state beef council.

Table 15. Claims on Dealer Bond and Recoveries

Dealer Bond Amount[125]	Number of Claim Incidents	Number of Claimants	Total Claims	Timely / Valid Claims
$10,000	20	22	$514,175	$261,014
$15,000	7	7	$417,334	$212,229
$20,000	6	9	$344,795	$344,795
$25,000-$50,000	15	30	$1,593,131	$1,228,994
$50,000-$95,000	21	66	$3,224,969	$1,612,081
$100,000 and over	13	50	$19,926,012	$18,569,540
TOTAL	82	184	$26,020,417	$22,228,654

Dealer Bond Amount	Paid by Bond	Paid by Other	Total Recovered	Percent of Valid Claims Recovered
$10,000	$67,825	$198,771	$266,596	102.1%
$15,000	$15,000	$163,855	$178,855	84.3%
$20,000	$73,905	$169,764	$243,669	70.7%
$25,000-$50,000	$88,095	$907,382	$995,477	81.0%
$50,000-$95,000	$628,928	$489,510	$1,118,438	69.4%
$100,000 and over	$1,389,000	$6,249,608	$7,638,608	41.1%
TOTAL	$2,262,752	$8,178,890	$10,441,643	47.0%

[124] Additional detail regarding these claims is included in Appendix 4 to this report.
[125] Two of the incidents in the $10,000 bond category involved dealers whose bonds had expired. For more detail, see Table 16.

Most of the bond claims were for dealer-purchased livestock. Seven of the instances involved purchases by a BOC, and one claim was on an auction market's dealer bond. Two additional bond claims were filed during the latter part of the period covered by the study and are not included in the analysis because the cases were still open as of June 30, 2019.

As explained earlier, dealers have an incentive to avoid bond payouts if they intend to remain in business. Unless it believes the claim is frivolous, the surety (or trustee or bank in the case of TFAs or TA/LOCs) must terminate the bond (or withdraw the funds and cancel the TFA or TA/LOC) when a claim is filed. It is a violation of the Act for a dealer to purchase livestock without a bond. Once a claim is filed, dealers may attempt to convince the claimant to rescind their claim, usually by paying the claimant what is owed, or reaching an agreement on payment terms. In Table 15, the amount represented by "Paid by Other" is typically money paid by the dealer or BOC in addition to, or instead of, the bond proceeds.

Valid versus Non-Valid Bond Claims. Bond claims may be deemed non-valid for various reasons. The most common non-valid claims are those filed more than 60 days after the transaction for which payment was due.[126] Nearly 60 percent of the non-valid claims ($2,122,517, or 56.0%) were not timely filed. The remaining dealer bond claims ($1,669,246, or 44.0%) were deemed non-valid for other reasons.

The surety or trustee will deem bond claims not valid if the claims are not for livestock. For example, claims are sometimes filed for freight or trucking charges or other non-livestock amounts owed. Claims can be deemed not valid even if they are for livestock if there is a dispute

[126] 9 CFR 201.33(d). "The surety on the bond or the trustee on the bond equivalent, as the case may be, shall not be liable to pay any claim if it is not filed in writing within 60 days from the date of the transaction on which the claim is based or if suit thereon is commenced less than 120 days or more than 547 days from the date of the transaction on which the claim is based."

about the quality or weight of the livestock or some other dispute, especially if the relevant characteristics of the livestock are not verified, or the transaction is not adequately documented.

Claims will be deemed invalid if they are filed on the wrong entity. In some cases, there is uncertainty surrounding the ownership of the livestock in question, resulting in a claim against a party that was not in fact liable for the purchase amount. Occasionally, a claimant has filed bond claims on both the principal buyer of livestock and the principal's agent, if the agent was a BOC. In those situations, only one claim, depending on the circumstances, can be deemed valid.

In two of the incidents, claims were deemed not valid because there was no valid bond coverage in place at the time of the transaction. In one incident, the dealer obtained a bond two weeks after the date of the transaction, and in the other incident, the dealer's bond expired twelve days prior to the transaction, but the dealer paid the claim out of its own funds.

One large claim was deemed not valid because it was filed by a *buyer* who paid for livestock but did not receive delivery of the livestock purchased. Dealer bonds protect only *sellers* of livestock who do not receive payment. In this particular case, the surety company paid out the full amount of the bond anyway.

In the last two incidents described above, sellers received recoveries from the dealer or trustee on non-valid claims. There were a total nine incidents during the study period where total recoveries exceeded the amount of valid bond claims. These were cases where there was no obligation for the bond to pay out, but the dealer elected to pay anyway for a variety of possible reasons that PSD might expect, based on its experience with the industry. For example, the dealer may have wished to maintain its reputation or goodwill, or to avoid future litigation and associated costs. In the nine incidents studied, the dealer or trustee paid $424,509 in recoveries on non-valid claims.

Table 15 shows that during the study period, other sources, usually the dealer, paid out $8,178,890 in valid and non-valid bond claims, which was over 3.5 times the amount paid out by the bonds. Claimants received a total of $10,441,643 in total recoveries in 66 incidents of bond claims during the study period.

What Effect would a Dealer Statutory Trust have on Seller Recovery? It is common to see bond payout rates cited as 10 to 15 percent or even lower when livestock seller recovery rates are discussed. These numbers do not provide the full picture; they represent only bond payouts as a percent of total claims. In Table 15, the percentage of the valid claims that were paid from either the dealer bonds or other funds available from the dealer was 47 percent of the valid claim amount.

The difference between the bond payout and total recoveries could be an indicator of the effectiveness of a dealer statutory trust if one were to be enacted. This determination is made based upon several assumptions. First, the source for most of the difference between the bond payout and total recoveries is the dealer. As noted, the dealer has an incentive to avoid bond payouts and to convince the claimant to withdraw their claim if the dealer intends to remain in business. This is usually accomplished by paying the claimant if the dealer is able to do so. The funds that the dealer has on hand to pay the sellers would likely be deemed trust assets for purposes of a dealer statutory trust and would be required to be paid to the unpaid seller. Second, PSD assumes the sellers who file timely bond claims today would likely be the sellers who file timely trust claims under a dealer trust. It is unlikely that claimants who didn't file bond claims, or who filed late bond claims, would file timely trust claims, so the relationship between the bond payout and total recoveries in the study could be expected under a dealer statutory trust.

Dealers frequently pay bond claims, both valid and non-valid, from their own funds. In 46 of the 82 incidents studied, the dealer paid some or all of the bond claim from their own funds. In those 46 instances, the dealers paid $8,178,890 from their own funds on $16,814,128 in total bond claims, of which $15,135,353 was valid. The resulting recovery rates for those 46 instances was 48.6 percent of total bond claims and 54.0 percent of valid bond claims.

Using bond payout and total recovery data, Table 16 illustrates the potential recovery amount that could be attributable to a dealer statutory trust. As a percentage of total valid claims, a dealer statutory trust could have resulted in recoveries of at least $8,178,891, or 36.8% of the amount owed. Actual recovery would likely have been higher in the case of a dealer statutory trust for the simple reason that federal law would have required holding assets in trust and using those assets to pay unpaid sellers.

Table 16. Potential Recovery from a Dealer Statutory Trust.

Total Claims: $26,020,417				**Total Valid Claims: $22,228,654**			
Bond Payout	**Bond Payout (percent of total)**	**Total Recoveries**	**Recoveries (percent of total)**	**Bond Payout**	**Bond Payout (percent of total)**	**Total Recoveries**	**Recoveries (percent of total)**
2,262,752	**8.7**	**10,441,643**	**40.1**	**2,262,752**	**10.2**	**10,441,643**	**47**
Recovery potentially attributable to a dealer statutory trust: 31.4%				**Recovery potentially attributable to a dealer statutory trust: 36.8%**			

In every incident involving bond claims for which at least some of the claims were valid, claimants recovered some amount, either from the bond or from other sources. Over half (42 of 82) of the claim incidents resulted in full recovery of the unpaid amounts, including four where the amount recovered exceeded total valid claim amount. Two-thirds (42 of 63) of the claim incidents involving valid bond claims resulted in full recovery of the unpaid amount.

Public Comment Summary: Commenters reported that current law is insufficient to protect livestock sellers and that a dealer statutory trust would improve recoveries following dealer defaults. Commenters noted that both meat packers and livestock auction markets are covered by trusts and bonds, but livestock dealers carry only bonds to protect sellers.

Commenters opposing a dealer statutory trust argued that a statutory trust would be ineffective and discussed a recent packer failure (Kane) to illustrate their concerns.

Study Finding: Establishment of a livestock dealer statutory trust could improve livestock seller recovery in the event of a dealer default. Total recoveries under a statutory trust would likely be higher than what is achievable with only bond payouts. In cases of bankruptcy, livestock sellers would realize improved recovery compared to their potential recovery as unsecured creditors.

IX. Preferential Transfers in Bankruptcy

Study Element: Analyze how the establishment of a livestock dealer statutory trust would affect the treatment of sellers of livestock as it relates to preferential transfer in bankruptcy.

Background and Analysis: To analyze how the establishment of a livestock dealer statutory trust would affect the treatment of sellers of livestock as it relates to preferential transfer in bankruptcy, PSD considered public comments and examined bankruptcy law and the preferential transfer litigation involved with the Eastern Livestock Co., LLC (Eastern) bankruptcy case.

Bankruptcy law includes a provision called the "Preferential Payment Rule," which provides that when a debtor pays a creditor within 90 days of filing bankruptcy, the creditor can be forced to pay all money received back to the bankruptcy estate for distribution to general creditors.[127] The result of a preferential transfer can be devastating to creditors who may be livestock sellers that were paid by the debtor for their livestock. Creditors may have already disbursed those funds to their own creditors and would not have funds available to pay the bankruptcy court.

Section 547 of the Bankruptcy Code is intended to place similarly situated creditors on equal footing by giving bankruptcy trustees ability to set aside certain transfers by debtors prior to bankruptcy, which may tend to prefer one creditor over another. Since these payments may prevent equitable distribution among creditors, it is the effect of the transaction, rather than the debtor's or creditor's intent, that is controlling.[128]

If the bankruptcy trustee suspects a preferential payment has been made, he or she may file an adversary action in the Bankruptcy Court against the creditor for recovery of the alleged preferential payment. An adversary action lawsuit can also seek court costs and interest on the payment if it is deemed preferential.

In the Eastern bankruptcy case, the trustee filed 116 adversary actions including 68 preferential transfer claims.[129] The adversary cases citing violation of 11 U.S.C. 547 demanded over $29 million dollars from livestock industry payments or value of goods made by Eastern to livestock creditors during the time leading up to the bankruptcy. The majority of these actions were dismissed subject to terms of settlement agreements between the trustee and the defendants.

The Eastern bankruptcy adversary actions highlighted a vulnerability of livestock sellers. Livestock producers, feedlots, dealers, and market agencies (i.e. auction markets, order buyers)

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[127] 11 U.S.C. § 547
[128] *See, Barash v. Public Finance Corp.*, 658 F.2d 504 (7th Cir. 1981).
[129] EASTERN LIVESTOCK CO., LLC, Debtor, Bankruptcy No. 10-93904-BHL-11. [US Bankruptcy Court, S.D., Indiana, New Albany, Division], November 2010.

are unsecured creditors and are more typically subject to adversary actions involving preferential transfer because unsecured debt is easier to capture.

One of the adversary actions in the Eastern case provides an overview of the preferential transfer issue, the trustee's claims, and possible defenses to be raised by the seller/creditor.[130] In *Knauer vs. Krantz*, the trustee alleged that a livestock seller received preferential payment from Eastern for 644 head of cattle purchased from Krantz and delivered around October 15, 2010. Krantz had three separate agreements in place for the cattle that were purchased under contract in August and September 2010. The cattle were delivered on or around October 15, 2010. Partial payments were received in August and September 2010 per the contract terms from Eastern. On October 18, 2010, checks were issued to Krantz for the balances due for the delivered cattle. On October 20, the checks were voided and a lump sum wire payment totaling $456,189.20 was made, the subject of the alleged "preferential transfer" allegations brought to the court by the trustee. Eastern accounts were frozen on or about November 2, 2010. The bankruptcy filing occurred on December 6, 2010. In July 2012, the trustee initiated the adversary action against Krantz.

Krantz raised the defenses of contemporaneous exchange and ordinary course of business.[131] The "Ordinary Course of Business" defense is a commonly used defense in preferential transfer actions.[132] The rationale is that the payments were not efforts to reduce past indebtedness (at a greater amount than the creditor would receive pro rata in bankruptcy), but simply what had occurred between the creditor and vendor over a long period of business and part of their ongoing business. The defense requires that the payment (1) was on account of a debt

[130] *James A. Knauer, Chapter 11 Trustee for Eastern Livestock Co., LLC. Vs. Gary Krantz,* Case No. 10-93904-BHL-11, Adv. No. 12-59052 (Bnkr. S.D. Ind, October 2015).
[131] In re EASTERN LIVESTOCK CO., LLC, Debtor, Bankruptcy No. 10-93904-BHL-11. [US Bankruptcy Court, S.D., Indiana, New Albany, Division], July 27, 2012.
[132] 11 U.S.C. §547(c)(2).

incurred in the ordinary course of business or financial affairs of the debtor and the creditor; (2) that payment was made in the ordinary course of dealings between the debtor and the creditor; or (3) that payment was made according to ordinary business terms.

This generally requires examination of (1) the length of time the parties have engaged in the type of dealings at issue; (2) whether the subject transfer was in an amount more than usually paid; (3) whether the payments were tendered in a manner different from previous payments; (4) whether there appears any unusual action by either the debtor or the creditor to collect or pay on the debt; and (5) whether the creditor did anything to gain an advantage in light of the debtor's deteriorating financial condition.

In the Krantz case, the court did not find that the subject payments were made in the ordinary course of business. The court said that Krantz provided only a "limited transactional history," and did not prove that wire transfers were common practice prior to the Eastern failure. Payments to Krantz were initially made by checks that were later voided and replaced with a wire transfer that the court found to be not "ordinary."

The second part of Krantz's defense was that the payment was in contemporaneous exchange. Contemporary exchange transfers are those intended by the parties to occur at the same time as the sale or transfer of something. The Bankruptcy Code does not necessarily require immediate payment, but payment should be made relatively quickly after sale.

In the Krantz case, delivery of cattle was made October 15, 2010. The Eastern livestock representative testified that they would traditionally receive the cattle and send invoices after receipt and inspection of the livestock to the Eastern headquarters for payment per court documents. The trustee argued that the debt was incurred at the time the contracts were entered in August and September 2010, thus supporting the trustee's preferential transfer allegation and the "antecedent debt." The court ruled against the trustee, stating that the debt was incurred at the time the goods were delivered and not during the contract creation. The court found in favor of Krantz, stating "the exchange was in fact contemporaneous, and that the exchange was for new value."

While Krantz was successful in defending the preferential transfer claims made against him, the defense likely came at a significant cost. Krantz, and other similarly situated livestock sellers, may prevail in these cases absent a dealer statutory trust, but they are harmed nonetheless by expending resources to defend themselves. A dealer statutory trust would reclassify payments from "unsecured debt payment" to "trust debt payments" and prevent payments to livestock sellers from being considered preferential transfers, thus saving sellers considerable time and money.

Public Comment Summary: Commenters agree that a livestock dealer statutory trust would improve conditions for livestock sellers when it comes to preferential transfers in bankruptcy. Commenters recognize that even though valid defenses may apply, sellers must still expend considerable resources to defend their position. Commenters presume a dealer trust would exclude livestock purchases from the bankruptcy estate and eliminate livestock payments from the pool of potential preferential transfers.

Study Finding: Under bankruptcy law, a livestock seller may offer valid legal defenses against trustee claims of preferential transfer. However, mounting those defenses can be costly to sellers and offset the potential benefits of preserving livestock payment funds. A livestock dealer statutory trust could improve conditions for livestock sellers as to preferential transfers in bankruptcy. Under a trust, livestock purchase payments made to sellers within 90 days before a dealer files bankruptcy would not be considered preferential transfers and could not be reclaimed from sellers.

X. Exempting Low Volume Dealers from the Trust

Study Element: Consider the effects of exempting dealers with average annual purchases under a *de minimis* threshold from being subject to the livestock dealer statutory trust.

Background and Analysis: A *de minimis* threshold is a provision that would exempt certain dealers from the statutory trust requirements. The threshold would be set at a specific annual livestock purchase volume. If a dealer purchases less than the threshold level, that dealer would be exempt from the trust provisions. Livestock sellers that do not receive payment from a dealer who is exempt from the trust provisions would not be able to file a valid trust statutory trust claim on that dealer.

Dealers who purchase livestock in an amount equal to or in excess of the threshold would be subject to the trust. Sellers that do not receive payment from subject dealers could file valid statutory trust claims on those dealers. Recovery would be dependent upon the number and amount of valid claims and the value of any available trust assets. If valid claims are greater than the value of the trust assets, payment would be made to claimants on a pro rata basis.

A dealer's annual purchase volume would determine whether a dealer is subject to the statutory trust provisions. The type of livestock purchased by the dealer would not be relevant. For example, if the threshold is set at $500,000, as in the packer trust, a dealer whose total annual purchases were 500 head of fed cattle at a cost of $500,000, would be subject to the statutory trust, but a dealer whose total annual purchases were 3,500 goats at a cost of $450,000, would be exempt.

There are *de minimis* thresholds established in other segments of agriculture. The packer statutory trust, for example, exempts from its requirements packers who purchase less than $500,000 of livestock annually. The poultry statutory trust exempts from its requirements live poultry dealers who purchase, or obtain through poultry growing arrangements, less than $100,000 of live poultry annually. Retailers that purchase less than $230,000 of produce during a calendar year are exempt from all PACA requirements.

In addition to being exempt from the packer statutory trust requirements, packers who purchase no more than $500,000 of livestock annually are also exempt from the bonding requirements. All livestock dealers are required to maintain a bond to secure their purchase obligations; there is no *de minimis* threshold to exclude dealers under a certain purchase volume from the bonding requirements.

Dealer purchase volume, for purposes of determining whether a dealer would be subject to the statutory trust requirements, would derive from annual reports filed by the dealers.[133] The annual report filings require distinct reporting of purchases made on a dealer basis and those made on a commission basis. Table 6, earlier in this report, shows the distribution of dealers according to their reported total dealer and BOC volume.

PSD records show 3,419 active livestock dealers as of the 2017/2018 annual reporting period.[134] Annual purchase data is available for 3,248 of these dealers. Reports were not filed by 171 dealers. Nearly sixty percent of dealers reported annual dealer purchase volume under $500,000. This includes 1,136 dealers that reported no livestock purchases, but instead reported livestock purchases for which they earned a commission.[135] Annual livestock purchase volume of between $500,000 and $1.3 million was reported by 11.2 percent of dealers. The $1.3 million number is significant because it is the maximum purchase amount that still qualifies for the minimum required bond of $10,000. Another 8.5 percent of dealers reported total livestock purchase volume between $1.3 million and $2.6 million, which is the maximum purchase level

[133] 9 CFR 201.97.

[134] Detailed data on dealer purchase volume is found in Table 6 of this report.

[135] 1,136 dealers reported no dealer purchase volume. These dealers as a whole, reported $7.026 billion in BOC livestock purchases during the 2017/2018 reporting period.

requiring a $20,000 bond. Six percent of dealers report total annual purchase volume between $2.6 million and $5 million. Those reporting over $5 million in total annual livestock purchases make up 15.6 percent of all dealers.

Excluding BOC purchases and dealers with annual purchase volume under $500,000 leaves 1,343 dealers, or about 64 percent, who would be subject to a dealer statutory trust. Lowering the threshold to $250,000 results in 1,574, or about 75 percent of dealers who would be subject to the dealer statutory trust, and a $100,000 threshold leaves 1,799 or about 85 percent of dealers who would be subject to the trust requirements. Table 16, above, illustrates the impact of a *de minimis* threshold.

Dealer defaults occur among dealers of all sizes. During the study period, there were 82 bond claim incidents. The largest number of defaults (18) occurred among dealers with the lowest purchase volume ($10,000 bond level). The next highest number of defaults occurred among dealers with a relatively high purchase volume ($85,000 bond level). Table 17 illustrates the number of defaults for which bond claims were filed during the study period based upon the size of the dealers' bond. The table shows both total bond claims and valid bond claims. The recovery rates are calculated as a percentage of valid bond claims.

Table 17. Recoveries by Dealer Bond Amount

Number of Incidents	Bond Amount	Total Claim Amount	Valid Claim Amount	Paid By Bond	Recovery Rate - Bond (Valid Claims)	Paid By Other	Total Recovery Rate (Valid Claims)
2	No Bond	$85,226	$0	$0	N/A	$64,822	N/A
18	$10,000	$449,353	$261,014	$67,825	26%	$133,949	77%
7	$15,000	$396,930	$212,229	$15,000	7%	$163,855	84%
6	$20,000	$344,795	$344,795	$73,905	21%	$169,764	71%
1	$25,000	$28,000	$24,510	$0	0%	$24,510	100%
4	$30,000	$523,374	$512,143	$33,170	6%	$409,320	86%
5	$35,000	$332,269	$229,487	$7,000	3%	$219,487	99%
2	$45,000	$371,941	$350,916	$47,925	14%	$115,632	47%
3	$50,000	$393,548	$160,958	$0	0%	$187,453	116%
3	$60,000	$141,154	$108,754	$0	0%	$108,754	100%
2	$70,000	$94,323	$54,406	$54,406	100%	$0	100%
1	$75,000	$83,808	$83,808	$75,000	89%	$0	89%
5	$80,000	$350,637	$275,090	$86,566	31%	$188,198	100%
7	$85,000	$1,293,414	$1,090,022	$322,957	30%	$192,558	47%
1	$90,000	$924,194	$0	$90,000	N/A	$0	N/A
2	$95,000	$337,439	$0	$0	N/A	$0	N/A
13	>$100,000	$19,926,012	$18,569,540	$1,389,000	8%	$6,249,608	41%
82	Total	$26,020,417	$22,228,654	$2,262,752	10%	$8,178,890	47%

Recovery rates also vary among claims on different size bonds. The 18 claimants who filed timely claims on $10,000 bonds realized a 26 percent recovery rate from bond payouts. The seven claimants who filed timely claims on $85,000 bonds realized a 30 percent recovery rate from bond payouts. Overall, claimants realized a 10 percent recovery rate on the 82 claim incidences.

The number that approximates potential recovery if a dealer statutory trust had been in place is the total recovery rate, which combines the bond payout and the "paid by others" amounts. The "paid by others" amount represents funds typically paid by the dealer to satisfy purchase obligations after bond claims have been filed. Total recovery for the 18 claimants that filed claims on $10,000 bonds was 77 percent. For the 7 claimants on $85,000 bonds, total recovery was 47 percent. Overall, across the 82 incidents involving bond claims, total recovery was 47 percent of the valid claim amount. Figure 3 illustrates recoveries by dealer size.

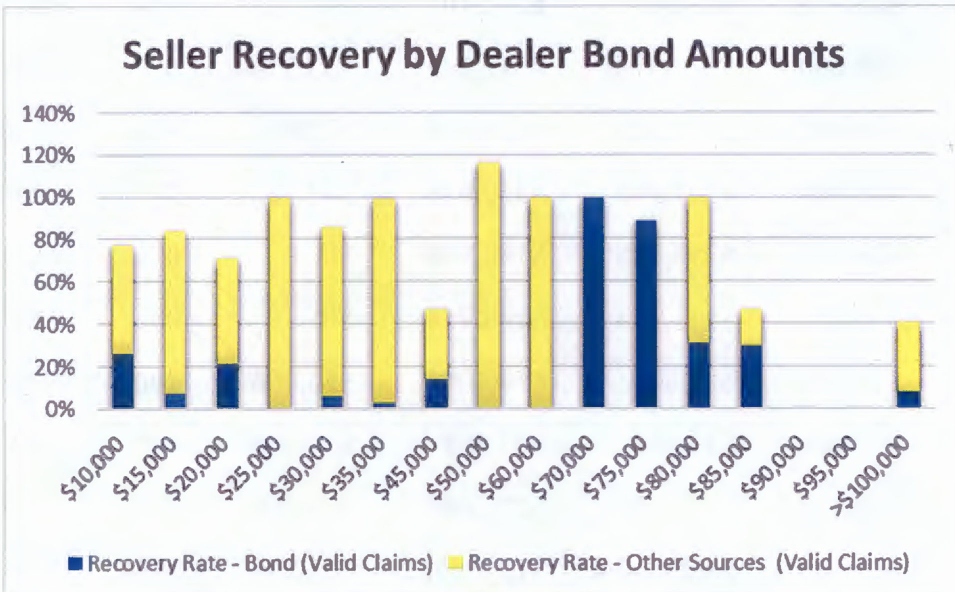

Figure 3. Seller Recovery by Dealer Bond Amount

The data suggest that the "paid by other" and total recoveries during the study period represent the minimum level of recovery that would have been realized under a dealer statutory trust. These amounts, in excess of bond coverage, were paid from funds that would likely be trust assets under a dealer statutory trust. The amounts paid were tendered without a dealer statutory trust dictating the disposition of those funds. If a statutory trust had been in place during the study period, higher total recoveries might have been realized. Livestock dealers are required to file a report with PSD on an annual basis. PSD uses livestock purchase volume data from these reports to determine the dealer's required bond amount. Dealers typically complete and submit their reports themselves since there is no requirement that they use a professional accountant when reporting financial information. Such a requirement could place an undue burden on small businesses. This means, however, that annual reports may not always be accurate, and dealers with reported purchase volume close to any threshold amount could be inaccurately deemed to be subject or not subject to the trust. Some livestock sellers could lose benefit of the trust due to inaccurate reporting.

Public Comment Summary: Commenters did not support using the same $500,000 threshold applicable to the packer statutory trust because it would exclude too many dealers from the statutory trust requirements. A majority of commenters wrote that a dealer statutory trust should have a very low or no purchase volume threshold for exempting dealers from the trust. Commenters maintain sellers should be able to recover what they are owed, regardless of the size of the dealer to whom they sold their livestock.

Study Finding: A *de minimis* annual threshold of $500,000 exempting smaller dealers from a statutory trust could exclude a significant percentage of dealers, offering better protection only to those sellers who do business with larger livestock dealers.

XI. Buyer and Seller Behavior in Markets for Livestock

Study Element: Analyze how the establishment of a livestock dealer statutory trust would affect buyer and seller behavior in livestock markets.

Background and Analysis: Dealers play an important role in the livestock industry by adding valuable competition for livestock sold in the country (for instance, at farms), at traditional auction markets, and through internet sales. This competition helps insure that producers receive a competitive price for their livestock. The following analysis reflects public comments submitted in response to the April 25, 2019, Federal Register notice and PSD's knowledge of the industry.

Commenters were asked how the establishment of a livestock dealer statutory trust would affect buyer and seller behavior in markets for livestock. Approximately five percent of commenters addressed the question at all, and their comments were mostly anecdotal. Of those who addressed the question, 70 percent supported establishment of a dealer statutory trust and predicted that a trust would have no impact on buyer and seller market behavior. Commenters in this group explained that individuals will continue to raise and sell livestock as they do now, but that a trust would give sellers added security in that livestock sellers would be given priority in the case of a dealer default or bankruptcy. One commenter noted that the ability to recover livestock or proceeds in the event of a default would stabilize the marketing process.

Several commenters noted that many auction markets already implement what they called good business practices, and that those practices would not change with the addition of dealer trust protection. For instance, many auctions currently screen buyers (dealers) by checking PSD's website to make sure dealers are bonded. Some auctions enforce prompt payment (e.g. cash on the day of sale) policies. One market auction commenter confirmed that he would not change the way he does business or relax his business practices with a trust in place. Commenters recognized that defaults can happen even when sellers employ prudent business practices, but they saw a statutory trust as another layer of potential financial recovery in addition to the dealer bond.

Assuming a statutory trust would apply to every dealer purchase, unless the statute allowed for a waiver or excluded dealers below a certain *de minimis* sales threshold, PSD concurs that if a dealer statutory trust were implemented, livestock commerce in general would continue as usual. It is possible that implementation of a livestock dealer statutory trust could increase the number of animals sold to dealers, as market participants might view the statutory trust as a means to limit risk associated with selling livestock through dealers. In turn, some livestock sellers might limit the number of animals they sell through other marketing avenues, preferring the additional security offered by the trust. Such shifts might impact competition for business among dealers and others, which could influence prices in those markets. Price impacts would presumably be negligible as market participants would continue to have multiple marketing options, including traditional auction markets, that may be perceived as equal to or less risky than selling directly to a dealer.

Commenters opposed to a trust were concerned that it could diminish the availability of credit, which many dealers rely on, and force many dealers to leave the industry or to adopt alternate roles in the market. Again, commenters thought fewer dealers would mean less competition among buyers in the livestock market and lower prices to sellers. The potential impact of a trust on credit availability is explored more fully in section XII of this report. There, PSD concludes that a dealer statutory trust alone would likely have little impact on credit availability.

It is unlikely that a significant number of dealers would exit the market for want of credit. Lenders who submitted comments explained that they consider the creditworthiness of each individual dealer or dealer firm when making lending decisions, and that wouldn't change under a statutory trust. It is likely that most dealers already pledge non-transient assets such as land as collateral against their loans, in addition to the more transient asset of livestock, which may move in and out of their possession relatively quickly. One lender admitted they might mitigate their risk under a trust by demanding additional collateral if the lender was not in a first lien position on livestock inventory. Other commenters feared the demand for additional collateral could force otherwise reputable dealers out of business simply because they would be unable to pledge additional collateral. Still others suggested that reduced availability of credit might discourage bankers from financing the livestock industry at all levels.

Sellers who enter credit agreements with dealers forfeit their rights to recover under the trust. Thus, sellers would be less likely to extend credit to dealers. Reducing the credit extended to dealers by sellers could reduce the overall impact of dealer financial failures, but it could also force some dealers to exit the market. It is arguable that those dealers who might exit the market because of the dealer trust are the dealers who are causing more risk in the market due to having insufficient capital to collateralize their operating loans. In that case, the loss or gain to the overall market would be a function of the number of dealers exiting the market, resulting in some loss to competition, balanced with a possibly stronger, less risky market due to the absence of less credit-worthy dealers that would have been more likely to default on their obligations.

Commenters suggested other ways in which buyer and seller behaviors might change as a result of a dealer statutory trust. Commenters speculated that a trust would encourage dealers to keep better records in order to segregate potential trust assets from personal or non-dealer assets and to better track payments. Better financial recordkeeping could help dealers avoid overextending themselves and deter default situations. Commenters thought sellers might have more incentive to file trust claims on late payments on time, knowing they'd have better chances of financial recovery, and possibly avoid the need to file bond claims.

There is some risk that livestock sellers could develop a false sense of security when selling to dealers covered by a statutory trust. Some sellers may be less diligent about evaluating the risk associated with selling livestock to any particular dealer. There would still be varying risks associated with individual dealers, including the risk of not being promptly paid as required by the Act. As a result, the enactment of a trust could cause market participants, in some cases, to enter into riskier transactions because they are selling to a livestock dealer.

Livestock dealers succeed in the marketplace based on their knowledge of the livestock purchased, their relationship with sellers (knowing where to buy livestock), and their relationships with buyers (knowing where to sell livestock). Even if some dealers were unable to obtain financing because of a dealer trust and were required to exit the dealer market, they would still retain the underlying knowledge and expertise required to be a successful livestock dealer in alternative roles, for instance as a market agency buying on commission or being cleared on another livestock dealer's bond. It is conceivable that the expertise of these individuals and the competition they represent would not be lost to the livestock industry, as many of these dealers could still participate in the market in a way that did not require the capital needed to buy and sell livestock as dealers.

One commenter, a livestock auction, described their efforts to develop and maintain good relationships with buyers and the producers whose livestock move through the auction. The commenter explained that the logistics of the business demand that the auction both pay the seller and ship the livestock quickly, leaving the auction to "take the hit for any unpaid stock." The commenter supported implementation of a dealer statutory trust not only because it would increase the likelihood of financial recovery, but because it would help preserve the livelihood of employees and affiliated businesses whose survival depend on the auction.

Public Comment Summary: Most commenters stated that a dealer statutory trust would not have a significant impact on buyer and seller behavior in markets for livestock. Many expect that business would continue as usual, the only difference being improved chance of recovery in the case of a dealer default. Several commenters described their personal experiences in states where livestock lien laws were recently enacted and reported no significant changes in buyer or seller behavior.

Other commenters suggested that a dealer statutory trust could cause dramatic changes in the way livestock is marketed. Some commenters believe livestock dealers would have less access to credit, which would result in elimination of many buyers and decreased competition.

Study Finding: Establishment of a livestock dealer statutory trust would likely have little effect on buyer and seller behavior in livestock markets. In general, commerce would continue as usual. Livestock sellers would enjoy a greater chance of financial recovery in the case of a dealer default.

XII. Credit Availability

Study Element: Consider what potential effects a livestock dealer statutory trust would have on credit availability, including impacts on lenders and lending behavior and other industry participants

Background and Analysis: A livestock dealer statutory trust would give unpaid sellers of livestock first priority to the livestock inventories and accounts receivable of dealers who file for bankruptcy protection. Trust assets would be excluded from the dealer's bankruptcy estate and would be available to other creditors only after all unpaid livestock sellers received full payment. This situation raises concern among some in the industry that lenders may limit the credit available to their dealer customers because livestock, cash, and accounts receivable would be less appealing as collateral to secure a loan or line of credit.

The packer and poultry statutory trusts, PACA trust, and at least one state livestock lien law place unpaid livestock, poultry, or produce sellers in a superior position to secured creditors in bankruptcy. In none of these instances have market participants reported a lack of available credit on account of the trusts or lien law. PSD spoke with several lenders in the development of this report. Lenders explained that the decision to loan money depends on the overall financial condition of the borrower and perceived risks the lender associates with the borrower.

In discussions regarding lending to livestock dealers, specifically in the event of a dealer statutory trust, lenders described what would be a multi-faceted process. Lenders rely on borrowers to provide information to them regarding the collateral securing the loan. The lending industry generally refers to this collateral as the borrowing base. Lenders require borrowers to regularly provide borrowing base reports to determine the amount of money they are willing to loan the livestock dealer, based on the value of the collateral as stated in the borrowing base report multiplied by a discount factor. According to some lenders, dealers pledge accounts receivable as collateral, but the borrowing base report used to determine lending also requires borrowers to deduct accounts payable from the borrowing base. If a dealer trust was enacted, the accounts payable for unpaid livestock would be subject to the trust. As an industry practice, lenders currently discount accounts payable against accounts receivable, dealer credit availability would arguably not be impacted by a dealer trust because lenders have already excluded those funds subject to a potential trust.

Commenters' main concern about dealer credit availability is that the creditor would lose security interest in the accounts receivable if a trust were established. As lenders crosscollateralize[136] loans, they may require a dealer to post additional or alternative collateral, depending on the risks associated with that livestock dealer. A dealer without access to additional capital may have limited access to credit. Some lenders may require borrowing dealers to post bonds, letters of credits, or tri-party agreements in addition to their capital assets, and they may closely scrutinize riskier borrowers to avoid losses.

While lenders might be more cautious about offering credit to dealers with a statutory trust in place, lenders who provide loans to livestock sellers favor establishment of a dealer trust. Those lenders suggest the availability of credit for livestock sellers would increase because sellers would have better chances of recovery in case of dealer default under a dealer trust.

Concerns about changes in lending behavior due to creation of a statutory trust are not new. Congress considered those concerns and addressed them in their xiv

xiv related to establishment of the PACA trust in 1983. "The Committee believes that the statutory trust requirements will not be a burden to the lending institutions. They will be known to and considered by prospective lenders in extending credit. The assurance the trust provision gives that raw products will be paid for promptly and that there is a monitoring system provided for under the Act will protect the interests of the borrower, the moneylender, and the fruit and vegetable industry. Prompt payment should generate trade confidence and new business which yields increased cash and receivables, the prime security factors to the money lender."[137]

Packers and poultry dealers of all sizes who operate subject to P&S Act trust provisions have continued to obtain credit and borrow funds. Typically, because lenders are aware of the trust provisions, packer and live poultry dealer loans often include the provisions in loan documents acknowledging that some assets of the borrower are subject to the statutory trust.

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136 Cross-collateralization is offering assets acquired through one loan as collateral against another loan.

137 H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405,407.

Historically, AMS has not observed problems related to credit availability attributable to statutory trusts involving packers, live poultry dealers, or produce buyers. Lenders understand the trust laws and respond accordingly to minimize risk related to lending in the affected industries.

The State of Oklahoma passed the Oklahoma Livestock Owner's Lien Act of 2011[138] following a large livestock dealer default. The law protects the rights of livestock sellers by granting statutory liens to secure payment of the sales prices negotiated by livestock sellers. A security lien gives a creditor rights, such as the right to seize property, in order to enable recovery. This is different from a trust, which provides the trust beneficiary an equitable proprietary interest in the assets themselves. The Oklahoma law applies to all livestock transactions and is not limited to persons operating as livestock dealers. Commenters familiar with the Oklahoma livestock lien law reported no concerns about the availability of credit since the law's enactment.

Public Comment Summary: PSD received 960 public comments that addressed credit availability related to a potential statutory trust. The majority maintained that a statutory trust would have little or no impact on credit availability. Several commenters discussed the Oklahoma lien law that has been in place for eight years and reported the law has had no significant impact on credit availability.

Commenters opposing creation of a dealer statutory trust were most concerned about credit availability. Several lenders commented that it would be unfair for the party taking the risk and lending money to not have secured rights in dealer's livestock inventory and proceeds. This argument was countered by commenters who said it would be unfair for the farmer who fed, raised,

[138] 4 Okla. §§ Stat. 201.1-11, effective November 1, 2011.

and cared for the animals to not be paid for their livestock and instead see that money go to the bank.

Commenters who asserted that a dealer statutory trust would impact credit availability and lending tended to be geographically concentrated in Texas and a few surrounding states. These commenters said a livestock dealer trust would cause more problems than it would solve, in that it would limit credit availability from traditional secured lenders to the livestock industry. Commenters feared that changing lien priority in default situations, thereby giving livestock sellers priority over secured lenders, would negatively impact producers, dealers, and livestock markets that rely on lenders to finance their operations.

Several commenters distinguished between a lender's right to livestock that was paid for versus livestock for which payment was not made. They explained that trust assets in a floating trust created for dealers would include all livestock inventories, cash proceeds, and accounts receivable from the sale of livestock until all unpaid sellers are paid. Those assets could derive from livestock for which the dealer has not paid, or they could derive from livestock for which payment has been issued. Some commenters appear more supportive of a trust that encumbers livestock, proceeds and accounts receivable from livestock for which the dealer has not paid, than including assets for which payment was issued using borrowed funds. In the latter case, some commenters would support the lender having priority over those assets.

Study Finding: Implementation of a livestock dealer trust would be unlikely to significantly impact credit availability or lender behavior.

XIII. Electronic Funds Transfer for Livestock Purchases

Study Element: Study the feasibility of the industry-wide adoption of electronic funds transfer or another expeditious method of payment to provide sellers of livestock protection from nonsufficient funds payments.

Background and Analysis: Electronic funds transfers (EFT) are payments sent electronically from a buyers' financial institution to a sellers' financial institution. EFT payments comply with the P&S Act's prompt payment requirements and are, therefore, authorized as a form of livestock payment. EFT payments offer the parties to a transaction a faster means to complete payment than waiting for a check to clear. With EFT payments, the seller typically knows very quickly whether funds will transfer, and thus the seller's risk associated with the transaction is reduced.

Costs associated with EFTs vary depending on the bank and customer. Payment by ETF helps individuals and organizations save on costs such as printing checks, as well as the time to deliver or collect checks and deposit them in the bank for processing. Generally, funds are verified within 24 to 48 hours of the transaction being initiated. As long as the payer has sufficient funds available in their account, the transaction is cleared within 3 to 5 business days, and the funds are moved from the payer's account to the payee's account.

Section 409 of the P&S Act was added by the same 1976 amendments that created the packer statutory trust. This section requires payment by livestock dealers, market agencies, and packers to be made by the close of the next business day after the purchase and transfer of possession of livestock.[139] Congress included specific language to say that "payment by check or

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[139] 7 USC 228b.

wire transfer" was acceptable for meeting the prompt payment requirements. The delivery of a draft would not satisfy this requirement.

The Act was amended in 2016 to clarify that electronic payments were acceptable methods of payment for livestock purchases.[140] The 2016 amendments explicitly allowed for the use of electronic funds transfer payments to meet prompt payment requirements and made acceptable "any other [payment] method determined appropriate by the Secretary."

Automated Clearing House (ACH) transfers are the most economical form of EFT. The cost to transfer money between banks and clients varies. External transfers are free at some banks, and cost from $3 to $10 at others. These transfers are processed through the ACH electronic network, much like other ACH transfers, such as bill payments and direct deposits, at minimal cost.

There are disadvantages associated with EFT payments. For example, the process cannot be reversed if a sender enters an incorrect account number or amount. There is a potential for hacking of personal banking details. Periodically, there are technical difficulties with the internet or electronic banking systems, which can delay funds transfers. Livestock industry participants note that they conduct business when the financial institutions are closed, which means there are sometimes problems communicating with financial institutions to initiate payment.

Across the livestock industry, the use of paper checks remains the payment method of choice. Checks can be used anywhere at any time of day, whether the financial institution is open for business or not. They are not dependent upon an electronic network that may not function from time to time, and they are relatively inexpensive, as compared to various EFT payment methods.

[140] Public Law No: 114-237 (10/07/2016).

The primary argument against industry-wide adoption of EFT payments for livestock transactions is aimed simply at how the industry currently operates. Switching from payment by check to payment by EFT would be highly disruptive to the industry and could drive some participants out of business. Dealers often rely on the "float" when purchasing livestock. Float is the time between the writing of a check and the time that the check clears the bank account on which it is drawn. For example, Dealer Jones writes a check for $8,000 and mails it on Wednesday to ABC Livestock Market for purchases made at Tuesday's sale. The check will not clear ABC Livestock Market's checking account until Monday. Dealer Jones therefore has $8,000 of float between Wednesday and Monday. During that time, Dealer Jones expects to receive payment from sale of livestock and to deposit those proceeds into the bank to cover the check written to ABC Livestock Market.

EFT payments would greatly reduce or eliminate the float upon which many dealers rely. Dealers unable to maintain sufficient funds at all times to cover purchases would likely reduce their purchasing or exit the business. Fewer buyers could lead to decreased competition for livestock and lower prices to sellers.

Public Comment Summary: Commenters presumed that the creation of a dealer statutory trust would not change current P&S Act prompt payment requirements and were opposed to limiting payment options. At the same time, commenters noted that regardless of the payment method, the risk of a dealer default remains. Several industry trade associations noted that while electronic funds transfers could speed up transactions, there remains the possibility of payments being returned for insufficient funds. One auction operator said, "[w]hen sellers are not paid, it is generally because the funds do not exist. The payment method is irrelevant."

Commenters also expressed concern that changing the method of payment from a check in the mail to an electronic transfer and its impact on the float would significantly change the way the livestock industry functions. Many of the commenters expressed concern that this shift would put small- and medium-sized dealers out of business or would significantly reduce their buying power. One livestock auction operator estimated that 25% of the buyers attending his sale would not be able to participate if purchase funds were required to be wired the same day as the sale.

One trade group representing small- and midsized banks commented that the problem with dealer defaults could largely be addressed by an expeditious EFT system. The group maintains that industry-wide adoption of EFT would solve the nonsufficient funds problem without causing market disruption. Under this commenter's suggestion, producers and auction barns would be instructed – or even required – to obtain bank-to-bank wire transfers before releasing their cattle for shipment. The commenter wrote that payments would be more certain because banks only wire money out if the sender has the funds available. According to the commenter, once the money arrives at the seller's bank, it is typically available within one business day.

Study Finding: Industry-wide adoption of EFT payments for livestock purchases would significantly change the way the industry functions. To date, relatively few entities – predominantly the larger ones – have adopted that payment method. Making EFT payments mandatory under the Act is generally opposed by the industry. If adopted industry-wide, EFT payments would likely improve on-time payments and diminish the incidence of dishonored checks due to non-sufficient funds. However, an EFT payment requirement provides sellers little payment protection if the dealer takes possession of the livestock but does not have sufficient funds to cover the purchase price.

XIV. Glossary of Terms

Auction Market: A person or entity selling livestock on a commission basis also referred to as a Market Agency Selling on Commission. "Market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services. Traditional auction markets are operated in facilities that include a sales ring, through which livestock is routed for viewing by buyers, seating for persons attending livestock sales, and pen areas where livestock is kept. Under the Clarification of Treatment of Electronic Sales of Livestock Act of 201616, such term includes any person who engages in the business of buying or selling 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. (§301(c) (7 U.S.C. 201))

Trust Asset: In the context of a possible livestock dealer statutory trust, a trust asset includes: 1) all livestock purchased by the dealer; 2) all inventories of, or receivables or proceeds from, livestock transactions; 3) any assets obtained with funds derived from the sale of livestock; and 4) any payment of funds derived from livestock sales that are used to pay for non-livestock debts, assets, or other transactions. "Assets" are anything of value that is owned by a person or entity, whether fully paid for or not.

Bond: A written guarantee of payment up to the face amount stated on the bond. Three types of bonds are authorized under the Packers and Stockyards Act and regulations: 1) a surety bond obtained from a surety or insurance company; 2) a Trust Agreement with a Letter of Credit issued by a financial institution; or 3) a Trust Fund Agreement based on funds deposited into a federally-insured account or invested in fully negotiable obligations of the United States of America. Any person harmed by the principal's failure to pay for livestock as required by law may file a claim against the principal's bond. If the surety company or trustee on the bond deems the claim to be timely filed and valid, the claimant may recoup some or all losses from the bond.

Bond Claim: A legal action that a livestock seller can take against a bonded principal, such as a livestock dealer or market agency, if the principal violates the law by failing to pay for livestock.

Brand Inspection Agency: Livestock brand inspectors check brands on livestock. They also check any documents, such as shipping manifests and bills of sale, that show ownership when livestock is sold.

Breach of Contract: A failure, without legal excuse, to perform any promise that forms all or part of the contract. It includes failure to pay sums of money due under the contract, and failure to perform in a manner that meets the standards of the industry or the requirements of any express or implied warranty, including the implied warranty of merchantability. Civil liability can result from breaching a contract.

Breach of Trust: Either intentional or negligent failure by a trustee to discharge the duties imposed on the trustee by the terms of a trust or by the general law governing the administration of trusts or trust property.

Breeder Flocks: A flock of poultry consisting of hens and roosters (unless artificial insemination is used, as with some turkey breeder flocks) for purposes of producing fertilized eggs that are hatched into chicks or poults that will be grown for purposes of slaughter.

Cash Sale: A sale in which the seller does not expressly extend credit to the buyer.

Carcass/Dressed Weight: The carcass weight or more commonly known as the dressed weight refers to the hot or unchilled weight of the carcass after slaughter and the removal of the head, hide, intestinal tract, and internal organs. The carcass weight is used to determine yield grade and also dressing percentage. Dressing percentage is the percentage of the live animal that ends up as carcass and is calculated by dividing the carcass weight by the live weight of the animal.

Cease and Desist Order: A legally enforceable order from a court or government agency directing someone to stop engaging in a particular activity that is in violation of the law or contrary to governing law.

Civil Penalty: A civil penalty or civil fine is a financial penalty imposed by a government agency as a civil, non-criminal penalty, as a form of compensation to the government for a party's wrongdoing. The wrongdoing is typically prohibited by a statute, regulation, or administrative order.

Clearee: A market agency or livestock dealer whose buying operations are covered (or cleared) under the bond maintained by another market agency. The clearee must be named on the bond filed and maintained by the market agency that is registered to provide clearing services. (9 CFR §201.29 (c))

Clearor: A market agency that is registered to provide clearing services (bond coverage) for other market agencies or livestock dealers. (9 CFR §201.29 (c))

Commerce: Means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. (Section 2(a)(11) of the Packers and Stockyards Act, 7 U.S.C. § 182(11))

Commission: 1) A fee paid by a livestock seller or consignor to an auction market (market agency selling on commission) for the market's services in selling livestock; and 2) A fee paid to an agent (market agency buying on commission) for purchasing livestock, usually on a per-hundred-weight (CWT) or per head basis.

Contract Production System: A system where a producer, grower, or farmer contracts with a live poultry dealer, swine contractor, or other party, and in which the producer, grower, or farmer provides the land, buildings, equipment, utilities, and daily care and management of the birds or livestock, while the poultry or livestock company supplies the chicks, piglets or other young animals, feed, and any necessary health or technical assistance.

Credit Agreement: A written agreement allowing for the purchase of livestock or poultry on credit (non-cash basis).

Credit Availability: The amount of credit to which a borrower has access at a given time.

Dealer: The term "dealer" means any person, not a market agency, engaged in the business of buying or selling livestock in commerce, either on his own account or as the employee or agent of the vendor or purchaser. (Section 301(d) of the Packers and Stockyards Act, 7 U.S.C. § 201) A dealer typically operates independently to purchase livestock for resale at a profit. Some dealers, however, are employees of other entities, including packers, and purchase for their employer's account.

Default: An instance in which a buyer has failed to pay for livestock when due.

***De minimis*:** Too trivial or minor to merit consideration, especially in law.

Distributor: An agent who supplies goods to stores and other businesses that sell to consumers.

Electronic Funds Transfer (EFT): The electronic transfer of money from one bank account to another.

Failure: Refers to a person or entity ceasing business operations.

Farming or Feeding Operation: Breeding and/or raising livestock to grow to a suitable size and weight for slaughter.

Feedlot: A large area with groups of pens in which livestock is fed to grow to a suitable size and weight for slaughter. Some feedlots are operated solely to grow their own livestock, while others are operated commercially and feed livestock for others.

Feed mill: A facility that mixes and mills ingredients to produce animal feed. Poultry integrators operate their own feed mills to produce the feed that is delivered to farms raising their birds.

First-In-First-Out (FIFO): The oldest inventory items are recorded as sold first, but the oldest physical object has not necessarily been tracked and sold. In other words, the cost associated with the inventory that was purchased first is the cost expensed first.

Floating Trust: A trust in which all livestock inventory and proceeds/receivables are held in trust until all unpaid sellers are paid in full.

Grade and Yield Basis: A method of pricing livestock on a dressed weight basis and on quality and yield grades.

Poultry Grower: 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 by another, but not an employee of the owner of the poultry. (Section 2(a)(8) of the Packers and Stockyards Act, 7 U.S.C. § 182(8))

Grow-Out Operation: A facility in which poultry is grown to a suitable size and weight for slaughter. In a vertically integrated system, the grow-out operation is typically located on farms owned and managed by independent contract growers.

Hatchery: A facility in which fertile eggs from breeder flocks are hatched and then delivered to broiler farms for growing poultry for slaughter.

Integrator: A poultry or swine company that owns and controls multiple stages of production, such as the breeder flocks, hatchery, grow-out operations, processing (or slaughter) plant, feed mill, transportation, and marketing.

Live Basis: The purchase of livestock based on their live, pre-slaughter weight.

Market Agency Buying on Commission (BOC): A person or entity buying livestock for others on a commission basis. Also referred to as an "Order Buyer." The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services. Under the Clarification of Treatment of Electronic Sales of Livestock Act of 2016, such term includes any person who engages in the business of buying or selling 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. (Section 301(c) of the Packers and Stockyards Act, 7 U.S.C. § 201)

Market Agency Selling on Commission (SOC): See Auction Market, above.

Meat Food Products: Products or byproducts of the slaughtering and meatpacking industry, if edible. (Section 2(a)(3) of the Packers and Stockyard Act, 7 U.S.C. § 182(3))

Nonsufficient Funds (NSF): A payment instrument (i.e., check or draft) written on a financial account that has insufficient funds to cover the amount of the payment instrument. The instrument is often called a bad check, bounced check, returned check, or dishonored item and is typically returned unpaid to the payee due to insufficient funds.

Non-Valid Claim: A trust or bond claim that is reviewed and found to be invalid due to failure to meet claim requirements (for example, lack of signature, documentation, mailing, or timeliness).

Order Buyer: A buyer who purchases livestock for the account of another.

Packer: Any person or entity 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. (Section 201 of the Packers and Stockyards Act, 7 U.S.C. § 191) Informally, packers are sometimes called a processor or slaughterer. Livestock slaughtering facilities are sometimes called an abattoir, processing plant, or slaughtering plant.

Packer Buyer: A person purchasing livestock as an employee of a packer for the packer's account.

Perishable Product: A produce or meat product that goes bad within a short time frame. The product often requires refrigeration or freezing to slow deterioration.

Live Poultry Dealer: A person or entity 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 in commerce, or if the poultry is sold or shipped in commerce, or if poultry products from poultry are sold or shipped in commerce. (Section 2(a)(10) of the Packers and Stockyards Act, 7 U.S.C. § 182(10)

Preferential Transfer: The transfer of an interest (i.e., payment or property) of the debtor during a specified period, usually 90 days, before a bankruptcy filing.

Principal: A person or firm that owns or takes delivery of an asset. The principal often gives permission for an agent to act on the principal's behalf.

Processing Plant: A facility that slaughters livestock, also called an abattoir or slaughtering plant.

Processor: A packer that slaughters livestock, also referred to as slaughterer or packer.

Producer: A person that raises, tends to, or cares for livestock and/or crops for production and/or farm uses. A producer is often called a farmer.

Prompt Payment: The Packers and Stockyards Act requires that every regulated entity purchasing livestock must deliver the full amount of the purchase price to the seller. In the absence of a valid credit agreement, payments for livestock purchases are due before the close of the next business day following the purchase and transfer of possession. (Section 409 of the Packers and Stockyards Act, 7 U.S.C. § 228b)

Receivables: Monies owed to a business or individual; often counted as an asset.

Recovery: The collection of receivables or monies owed to an individual or company.

Registrant: Any person or entity operating or desiring to operate as a dealer, market agency buying on commission, market agency selling on commission, or clearing agency, for which registration is required under the Packers and Stockyards Act

Regulated Entity: any person operating or desiring to operate as a dealer, market agency buying on commission, market agency selling on commission, live poultry dealer, packer, swine contractor, or clearing agency, and who is subject to the provisions of the Packers and Stockyards Act and regulations issued under the Act.

Restitution: The financial restoration of monies or property that is lost or stolen; to be made "whole" again financially in a breach, failure, or default.

Secured Creditor: A creditor with a security interest in all or portion of a debtors' assets, such as a mortgage on real property or a lien on personal property.

Solvent/Insolvency: Refers to a person's or entity's financial condition. Insolvency exists when the current assets are less than current liabilities. Solvency exists when current assets exceed current liabilities.

Statutory Trust: A trust created by operation of federal or state law in which property or other assets are held by a trustee for the benefit of beneficiaries of the trust.

Stockyard: Any place, establishment, or facility commonly known as a stockyard, and that is 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 enclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. (Section 302 of the Packers and Stockyards Act, 7 U.S.C. § 202) Informally, an enclosed facility with pens and sheds where livestock are held temporarily for public sale.

Surety: A promise by one party to assume responsibility for the debt or obligation of another party if that party defaults. The person or company providing the promise is also known as a "surety" or as a "guarantor."

Terminal Market: A central location where agriculture products/commodities are traded.

Trucking: Refers to the transportation of livestock or other agriculture commodities from one location to another.

Trust Account: A financial account established by a responsible third party to handle the collection and disbursement of trust assets or payments. A Custodial Account maintained by a market agency selling on commission is a type of trust account in which payments for livestock by buyers are deposited as trust funds that are held under a fiduciary duty for the benefit of individuals or entities who consigned livestock to the market for sale.

Trust Agreement/Letter of Credit (TA/LOC): A standby Letter of Credit is used in conjunction with a Trust Agreement in lieu of a surety bond by regulated entities. The standby Letter of Credit is an agreement by a financial institution to cover the regulated entity's purchases to sellers up to the amount stated on the Letter of Credit/Trust Agreement. The Trust Agreement is a legal document that gives title of assets to a trustee to secure the principal's credit.

Trust Beneficiary: A person or entity entitled to the benefit of trust assets.

Trust Claim: A request document filed by a creditor requesting payment from trust proceeds for monies owed.

Trustee: A natural person or entity to whom property is legally committed to be administered for the benefit of one or more beneficiaries (such as unpaid livestock sellers).

Trust Fund Agreement (TFA): A type of agreement that allows currently held assets and accounts to be held in trust. TFAs may be used in lieu of surety bonds by regulated entities.

Unsecured Creditor: A creditor with no security interest in the event of a default or failure.

Valid Claim: A claim request that meets all the claim requirements including signature, timely filing, and appropriate documentation.

Vertically Integrated Company: A business strategy where one company owns or controls its suppliers, distributors, or retail locations to control its value or supply chain. Example: poultry integrators own or control the hatchery, feed mill, slaughtering plant, further-processing plant, and distribution system.

Wholesaler: A business or individual that buys products from a manufacturer and resells the products to retailers, typically in large quantities.

XV. Appendices (including detailed comment summaries)

a. Circumstances Unique to Livestock Dealers

PSD posed the following question for public comment: "*How would the unique circumstances common to livestock dealers impact the functionality of a livestock dealer statutory trust?*" PSD identified 334 comments that addressed this question. Of the 334 comments, 212 comments said that circumstances would have a negative impact and 120 comments suggested a positive impact. Two comments provided suggested minimal impact on circumstances impacting the functionality of a dealer trust.

Many of the commenters mentioned the speed of turn-over between purchase of livestock and transfer/resale of livestock. Prompt seizure of monies and/or cattle inventory would be necessary in a dealer trust scenario. One organization commented that "Livestock dealers purchase and quickly resell large volumes of livestock. Because of this, there are three components of statutory trust function that make a dealer statutory trust a good fit. First, the inclusion of proceeds/receivables for livestock purchased in cash sales as trust assets is important. Second, a statutory trust not requiring unpaid sellers to trace specific assets is crucial. Third, the ability to claw-back improperly diverted trust funds also improves functionality. Due to the rapid speed of livestock inventory coming in and out of a dealer business, the inclusion of proceeds/receivables for livestock purchased in cash sales as trust assets is important. For example, if a dealer purchases (but doesn't pay for) livestock at an auction market and resells them to a feed yard, the proceeds the dealer received from the feed yard would be trust assets. This would be the case until unpaid cash sellers of livestock to the dealer are paid in full."

Commenters discussed the dealer as a trustee compared to the packer as a trustee in packer statutory trust situations. Generally, a packer is a larger operation than a dealer with more resources than a dealer. Packers are more likely to have personnel with expertise to serve as trustee, whereas a dealer is less likely to have the time and resources necessary to serve as trustee. Similarly, livestock dealers are less likely to have a formal business structure with a bookkeeper and accountant, or software programs for managing business.

Dealers may therefore not have the same professionally maintained financial statements that packers typically have. Due to limitation of funds, and possibly an informal business structure, a livestock dealer may not be regularly audited professionally to ensure proper finances.

Some commenters said that defining a "dealer" is at the core of their concerns. "Who is considered a livestock dealer, how will their business activities be differentiated, and will Packers and Stockyards have adequate resources to oversee the program." One commenter noted that there were 304 bonded packers, 129 live poultry dealers and 4,634 registered dealers subject to the P&S Act. The question becomes, can PSD, at its current resource level, adequately administer and enforce a dealer statutory trust? Or, will the agency require additional staff and funding?

b. Effectiveness of Statutory Trusts in Other Segments of Agriculture

PSD posed the following set of questions for public comment: "How effective are statutory trusts in other segments of agriculture? Could similar effects be experienced under a livestock dealer statutory trust? Would seller recovery improve if the Secretary was authorized to appoint an independent trustee under the livestock dealer statutory trust?"

There were 261 comments related to the effectiveness of statutory trusts in other segments of agriculture. Several commenters from the banking industry assert that statutory trusts in other areas of agriculture are not effective and therefore do not support the establishment of a livestock dealer statutory trust. These commenters pointed to the Sam Kane packer default and the number of livestock sellers who did not receive payment. These banking commenters wrote that a dealer statutory trust would limit the amount of money a buyer could borrow. Commenters opposed to the creation of a livestock dealer statutory trust stated that the existence of a statutory trust does not in and of itself prevent nonpayment or ensure seller recovery. They state the current statutory trusts provide unpaid sellers with an opportunity to argue a priority claim on any trust assets that may exist. However, there is no guarantee that trust assets will be sufficient to pay trust claims, leaving unpaid sellers to make their case in court against other responsible parties.

One commenter wrote that the dealer statutory trust proposal is an ineffective solution that would not have helped in situations such as the Eastern Livestock collapse. Another commenter wrote that using the packer trust and the PACA trust as the pattern for a dealer statutory trust concept is flawed. The dealer segment of the livestock industry has different issues than the packer segment or the fruit and vegetable industry. This commenter mentioned differences to consider, including perishability of commodities, number of buyers and markets, and varying levels of competition.

For example, sellers of calves, stockers and feeder cattle have many options and locations to sell their cattle. They have the ability to choose their buyers, the option to reject payment terms offered, and they have the ability to set the payment terms or requirements for their buyer. Since livestock dealers are already regulated by PSD, sellers have a right to hold the livestock dealer accountable for being bonded and making prompt payments. Sellers can file a complaint with PSD to investigate instances of non-payment or late payment and can make a claim on the bond set by PSD for that livestock dealer.

Some commenters expressed concern over the speed at which cattle and cash move through a dealer's operation, arguing that neither an independent trustee nor the trust itself could keep up. One commenter asked whether they have thought through how it would work in a day-to-day manner, how much time it takes for everyone to set up a trust, and whether the trust can really keep up with the movement of all the transactions.

Commenters also argued that regulating all buyers was not the answer and only the buyers who don't pay should be punished. At the same time, another commenter said insufficient bonding is the problem, but acknowledged that raising bond requirements would increase the capital requirement and drive small dealers out of business. Many commenters were concerned that a livestock dealer statutory trust would limit the amount of money a buyer could borrow, which in turn would decrease the value and create a hardship for all producers of livestock.

One commenter raised concerns of the unintended consequences a livestock dealer statutory trust would have in areas such as title insurance. The commenter stated, "Following court cases like Kim[141] and Chiquita Fresh,[142] title insurance companies have also become increasingly concerned that PACA Trust (and if passed, Dealer Trust) claims, which are not required to be recorded in any real estate records, could nonetheless impact lenders' and owners' real estate title policies. Accordingly, a number of national title companies have begun to include title exceptions for potential PACA Trust claims (as well as claims under similar statutes such as the Packers and Stockyards Act and in the future Dealer Trust) on such policies. Evolving case law has given rise to uncertainty as to the reach of the PACA, PSA and possibly the proposed Dealer Trust and the assets affected thereby. In a lending context, this uncertainty gives rise to increasing costs, additional documents and due diligence considerations and, in a title insurance context, the changing legal landscape has already prompted title companies to add a standard exception to owners and lenders policies for similar federal and state statutes."

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[141] *The Bank of New York, as Trustee, for the benefit of CWMBS, Inc. v. Kim*, Index No. 1443-2008 (N.Y. Sup. Ct. filed Apr. 3, 2013) (County of Rockland).
[142] *Chiquita Fresh N. Am., LLC v. Fierman Produce Exch., Inc.*, 198 F. Supp. 3d 171 (E.D.N.Y. 2016).

This commenter was referring to a series of cases in which courts have imposed the PACA Trust on real property and other assets. In a recent case, a District Court issued a preliminary injunction on transfer of a litany of assets, including real property (both commercial and residential), office equipment, automobiles, severance and retirement benefits, and bank accounts.[143]

Other commenters wrote favorably about the effectiveness of the packer statutory trust, some citing Sam Kane as a success story. These commenters noted that the "statutory trust process works if industry participants allow it to work and file timely claims. They note that there has been a slow pay problem at the Sam Kane plant for many years, but also that Sam Kane is vital to the South Texas feeding industry. Because of that, some feeders went to great lengths to keep the plant open, buying cattle, and rapidly losing money to the detriment of the packer trust. When a trustee is allowed to and even encouraged to operate such that trust assets are dissipated, the statutory trust cannot be blamed when recovery is less than 100%." Commenters noted that the packer statutory trust will ultimately be responsible for sellers receiving more than they would have as unsecured creditors. See Sam Kane discussion above.

One commenter wrote that in his experience, the packer statutory trust has worked remarkably well. The packer trust will not provide protection for unpaid sellers that fail to file claims in a timely manner or that otherwise fail to meet the statutory requirements; but, when claims are filed on time and other statutory requirements are met, the packer trust has proven itself to be an extremely valuable tool for unpaid cash sellers of livestock.

Commenters described their positive experiences with both the packer statutory trust and PACA trust. In particular, one commenter said he filed a trust claim with PSD when a packer was

[143] *Epic Fresh Produce, LLC v. Olympic Wholesale Produce, Inc.*, 2018 WL 1311994 (N.D. Ill. Mar. 7, 2018).

very slow in paying for livestock, and "[i]t wasn't long and we had our money." Another commenter stated they received all of the money owed within six months after timely filing a packer trust claim. Another commenter described their experience this way: "We filed our Packer Statutory Trust claims with Packers and Stockyards and notified Bartels.[144] Because of the [packer statutory] trust, we didn't have to sue the packer, we didn't have to go to court, we had zero legal expenses, and never had to worry about a preferential transfer claim. It took a few months for the process to work its way out, but in the end, we received full payment for what we were owed." One commenter described the success of the PACA trust and the similarities of the livestock industry and compared to those the produce industry was facing when PACA was seeking to establish a trust. The commenter described the success of the PACA trust, stating: "Actually, the PACA Trust has made for a stronger industry, and at the end of the day with those dollars flowing back to the farmer who produced the crop, it ensures they get paid for their efforts to raise and sell a crop. This Trust tool has helped farmers stay in business. The same benefit by implementing a similar Trust for cattle dealers can also protect the entire supply chain to insure an even more vibrant industry." Another commenter stated, "The produce industry is so pleased with PACA in the U.S. that an attempt is in process to expand the program to sales of product to Canadian buyers as well."

Another commenter stated, "After all, shouldn't the producers who raised the animals, or the livestock markets who paid these producers and sold the livestock on their behalf, be paid first?" One commenter noted that the packer trust is an incredibly valuable tool and the dealer trust should be no different. He said he knew of several trust situations where markets received 100% recovery after filing packer trust claims.

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[144] See https://www.ams.usda.gov/content/usda-assist-ranchers-bartels-packing-claims.

On the issue of appointing an independent trustee, one commenter had first-hand knowledge of a successful trust situation involving Bartels Packing where a third-party trustee was appointed.[145] This commenter recommended including a provision to appoint a neutral trustee in any legislation to create a dealer statutory trust, and encouraged lawmakers to consider modifying the packer statutory trust to do the same.

Another commenter had a successful experience with the packer statutory trust in the case of the Future Beef Operations, LLC,[146] bankruptcy. This commenter noted that he represented a number of feedlots that had not been paid for livestock. When all was said and done, from a combination of the surety bond and packer statutory trust, the feedlots collected funds equal to 93% of the total amount owed. A majority of those funds came from the packer statutory trust. The commenter noted as well that the feedlots were able to avoid preferential transfer claims for the payments they had received.

In another packer statutory trust case, the commenter represented five livestock markets that had not been paid for livestock purchased by a packer, Agriprocessors, Inc.[147] Because of the packer statutory trust, all five of those livestock markets collected 100% of the funds due to them and avoided preferential transfer claims for payments they had received.

Several commenters discussed initiatives taken at the state level. One commenter described a solution the State of Florida has implemented. "In Florida, we have expanded our state lien law to give sellers priority in livestock. This is a positive step and we have not yet experienced

[145] Defunct Oregon beef packer seeks to pay out $600,000, *Capital Press,* June 22, 2018. https://www.capitalpress.com/state/oregon/defunct-oregon-beef-packer-seeks-to-pay-out/article_afc2f672-8408-593a-8bdf-1f45e380a0ed.html
[146] Future Beef Operations, LLC was a vertically coordinated production to retail beef system that filed for bankruptcy protection in 2002 after less than a year in business.
[147] Agriprocessors, Inc., of Postville, Iowa, filed for Chapter 11 Bankruptcy Protection in 2008. Twenty-four sellers filed valid claims totaling over $2 million. All of the claimants received 100% of the amount owed. See https://www.meatandpoultryonline.com/doc/livestock-sellers-to-receive-2m-in-0001.

unintended consequences as a result. However, it is a limited tool when cattle are purchased by people outside the state, which is not uncommon with Florida calves purchased to be back-grounded and fed out in other regions of the country."

Another commenter described a similar solution the State of Oklahoma implemented. "The purpose of the Oklahoma Act is to protect the rights of Oklahoma livestock owners by granting a statutory lien to secure payment of the sales price in the transaction between livestock owner and buyer. The intended benefit of the Oklahoma Act was to put Oklahoma producers in the position of holding a secured claim in either (i) the livestock sold, or (ii) the proceeds from the resale of the livestock. The statutory lien goes away upon full payment of the sales price to the livestock owner.

An important aspect of the Oklahoma Act is to ensure that the statutory lien does not interrupt commerce or discourage the resale or secondary purchase of the livestock. As noted, the Oklahoma Act has been in effect for nearly eight (8) years helping protect the integrity of Oklahoma livestock transactions."

One commenter who had personal experience with the PACA Trust supports the proposed livestock dealer statutory trust and describes his experience. "With the current Federal Register notice from the cattle dealers on the feasibility of a Trust, I could not help but to reflect on the similarities between the marketplace dynamics in 1982-1983 where the produce industry was seeking the hand-up from government to allow industry to have a self-help tool (Trust) in order to position the produce industry to control their own destiny and here is the cattle industry in 2019 endeavoring to do the same thing. Actually, the PACA Trust has made for a stronger industry, and at the end of the day with those dollars flowing back to the farmer who produced the crop, it ensures they get paid for their efforts to raise and sell a crop. This Trust tool has helped farmers stay in business. The same benefit by implementing a similar Trust for cattle dealers can also protect the entire supply chain to insure an even more vibrant industry."

One state fruit and vegetable association provided detailed and extensive comments describing the success of the PACA Trust and how the livestock industry could experience the same success:

> "Within PACA there is the concept of the PACA Trust, the purpose of which gives produce sellers a legal and important priority to be paid first, before other creditors of a produce buyer such as lenders who provide secured financing to the buyer. The provisions of PACA have resulted in the collection of millions of dollars in past-due receivables that otherwise would have had no chance of been recovered.
>
> The PACA law that the produce industry is fortunate enough to benefit from has three main important features. First, PACA makes it illegal to engage in the produce marketing industry without first obtaining and complying with the USDA's licensing requirements. Second, PACA makes various types of unfair trading conduct illegal, and provides an administrative complaint procedure as an alternative to enforcing PACA in a lawsuit in court. Third, and as important as anything, is the fact that PACA establishes the aforementioned PACA Trust, which maximizes the likelihood that sellers of produce will be paid in full before any other creditors of the buyer. These components have repeatedly protected produce sellers over the years, and these very types of protections are the same ones that seemingly could be most valuable to sellers of livestock products as well. The produce industry is so pleased with PACA in the U.S. that an attempt is in process to expand the program to sales of product to Canadian buyers as well.
>
> In other industries, when invoices go unpaid the supplier is simply owed money. Produce suppliers that proper[ly] invoke their Trust rights, however, are not simply owed money; under the PACA Trust the receiver is actually holding the supplier's money. This difference is pivotal; in the eyes of the law it's as if the delinquent buyer is holding the produce supplier's wallet. The supplier's wallet is not part of the buyer's assets; it is not the buyer's money and that money needs to be returned to the supplier before the interests of ordinary, or even secured creditors, are considered.

PACA for the produce industry came about in response to the increasing number of "no pay" situations whereby produce sellers were not paid or short paid, and/or being relegated to "the back of the line" as unsecured creditors when insolvent buyers filed for bankruptcy. Subsequently, Congress created the statutory PACA Trust that the produce industry enjoys today. When produce is loaded or delivered (depending on the contract wording and when the seller obtains ownership), the seller is deemed to have only transferred legal, but not equitable, title to the produce. The buyer is deemed to be a PACA trustee who holds the produce in trust for the seller, as a PACA Trust beneficiary. The Trust continues in existence until all sellers of produce to the buyer are paid in full.

The Trust is not a subsidy; rather, it is a realization that the produce industry (and seemingly the livestock industry too) is unique. For the free trade of fruits and vegetables to succeed (and meat products theoretically), it has been deemed important that pay within well understood parameters, no more than 30 days for produce, be law. If the subject were steel or aluminum, prompt pay would not be such a big deal. But produce (and meat products) are living things, commodities that quickly change and spoil, hence the need for prompt pay. The produce industry recognizes the importance of the Trust, all parties understand how it works, and the courts have given it credibility and validity.

"Congress was kind to the produce industry by giving produce sellers trust protection when buyers do not pay. When the PACA Trust rights are used properly, produce sellers have an unprecedented opportunity to recover monies when their buyers do not pay or go out of business. The PACA Trust gives the produce industry a measure of financial security. The entire industry, buyers and sellers alike, benefit when produce revenue is returned to the produce supply chain. In the past three years, USDA resolved approximately 3,350 PACA claims involving more than $63 million. It seems as though the livestock industry overall could benefit in a similar manner if a livestock dealer statutory trust were established in a means comparable to that of the PACA Trust."

Several commenters, including bankers, countered the claims that banks would limit lending to buyers. Commenters stated that comfort in lending to a producer would certainly be enhanced by mitigating the risk of buyer payment. Commenters cited the packer statutory trust and PACA statutory trust as being effective in similar circumstances within the agricultural industry.

Commenters who addressed the question of whether authorizing the Secretary to appoint an independent trustee under the livestock dealer statutory trust would improve seller recover had mixed opinions. Commenters found the idea "interesting," but felt it would not improve recoveries for unpaid sellers. Their reasoning was that any independent trustee would have to be paid a fee for their services. That fee would be paid from trust assets, thus reducing the total funds available to unpaid sellers. Some commenters suggested the Secretary should instead share more information with the unpaid sellers regarding the solvency of the operation and the amount of trust assets. Sharing such information would allow sellers to make better business decisions and allow unpaid sellers to initiate the claims process sooner.

Some commenters suggested that while appointing an independent trustee would improve the trust claim process it, doesn't increase the funds available and could increase legal costs to the seller. Commenters said that the dealer statutory trust would likely increase the complexity of recovery and legal bills, creating additional financial burdens on unpaid sellers.

Other commenters supported the concept of appointing an independent trustee. One commenter representing livestock markets suggests a dealer statutory trust should grant the Secretary the clear authority to enforce the trust, including appointing an independent trustee. Another commenter proposed that the dealer statutory trust language automatically appoint an independent trustee. In packer statutory trust situations involving bankruptcy, the bankruptcy trustee separates packer statutory trust assets from other assets, making clear the priority unpaid livestock sellers have in those assets. Commenters agreed it would helpful to have a neutral third party filling this role.

One commenter wrote that an independent trustee should be appointed to oversee the dealer statutory trust to assure trust assets are segregated and not released until unpaid cash sellers of livestock are made whole. Another commenter preferred an independent trustee instead of having the defaulting dealer overseeing trust assets. An independent trustee would give priority to unpaid livestock sellers and properly apply payments according to the trust.

Commenters who support the concept of an independent trustee still have concerns. One commenter had concerns with who would pay for the appointed trustee. This commenter wrote, "in some instances, this may facilitate seller recovery given the large volume of sales a typical dealer may execute in a short period of time. Of course, the addition of such authority should be balanced against USDA resources and whether the agency, the defaulting dealer, or the unpaid seller would have to pay for the appointed trustee."

One commenter suggested the state department of agriculture for the dealer's principal place of business be the trustee, or alternatively, the PSD serve in that role. Another commenter said that whether an independent trustee should be named depends on the complexity of the situation. "If it is just one set of cattle or a couple sets, then the dealer trust priority is likely enough. However, in complex situations, an independent trustee might help. The issue is that someone has to pay the trustee. Perhaps a trustee should be appointed in situations where doing so has a high likelihood of improving recovery beyond the costs of the trustee."

c. Seller Recovery in The Event of a Livestock Dealer Payment Default

PSD posed the following question for public comment: "*How would the establishment of a livestock dealer statutory trust affect seller recovery in the event of a livestock dealer payment default?*" Approximately 842 commenters addressed this question. Of those, 637 commented in support of the establishment of a livestock dealer statutory trust, while 204 were opposed and 2 comments were neutral.

Those who expressed support generally agreed that the creation of a statutory trust would significantly improve recovery for unpaid livestock sellers in the case of a livestock dealer default. Commenters assert that current law does not adequately protect unpaid livestock sellers and used the example of meager payouts from bonds in dealer defaults providing recovery of pennies on the dollar.

Commenters often wrote of their personal experience with dealer default situations, many citing instances where they lost money and were not made whole from existing bond coverage. There were commenters who were directly impacted by the Eastern Livestock failure and who believe that a dealer trust would have helped them recover a larger portion of what they lost. Some commenters compared their experience with a packer payment default and the positive outcome because of the packer statutory trust, receiving full payment and incurring no legal expenses.

Commenters that wrote to oppose the establishment of a livestock dealer statutory trust addressed this question using the recent Sam Kane packer failure as an example. Most described the packer trust as resulting in a poor outcome for livestock sellers. The Kane situation is described in further detail earlier in this report.

Some commenters opposed a dealer statutory trust because they feel that dealer payment defaults are not a significant problem in the industry when taking into consideration the total dollar volume traded annually. One commenter wrote that historical losses from livestock sales to dealers have been 0.01% of the total value of livestock traded over the past 18 years.

A few commenters suggested that instead of enacting a livestock dealer statutory trust, a better option would be to increase the required bond coverage for dealers. Some suggested that an alternative already exists in the form of an insurance product that could be used instead of a statutory trust.

Still other commenters opposed the creation of a dealer statutory trust stating that markets ought to be more aware of risks in their operations. A few commented that PSD just needs to enforce current laws.

d. Preferential Transfers in Bankruptcy

PSD posed the following question for public comment: "*How would the establishment of a livestock dealer statutory trust affect the treatment of sellers of livestock as related to preferential transfers in bankruptcy?*"

Public comments to the *Federal Register* notice included 120 responses to the preferential transfer issue. Nearly all commenters wrote that a dealer statutory trust would benefit livestock sellers by decreasing the chance for "clawback" by the Bankruptcy court in dealer bankruptcy cases.

One commenter said, "It would prevent a preferential transfer from affecting unpaid sellers because those funds would be trust funds, which is highly beneficial. Unpaid sellers of livestock should have access to funds they are owed without the issue of having 90-days' worth of money be clawed back by a bankruptcy trustee." Some responders had first-hand experienced the "clawbacks" of a dealer bankruptcy, one stating, "we had…a default for about $700,000. The trustee came after us for preferential transfer. We fought it and ended up having to pay $20,000 to settle the claim. I shouldn't have had to pay this but did so willingly. Going back 90 days of business with this buyer would have ruined my business. The animals involved were fat cattle and cows. Had a packer bought them directly from us, we would have been protected by the packer trust even if the check had been bad. Since there was a dealer in the middle, we didn't get paid and had to deal with preferential transfer."

e. Exempting Low Volume Dealers from the Trust

PSD posed the following set of questions for public comment: S*hould dealers with average annual purchases under a de minimis threshold be exempt from being subject to the livestock dealer statutory trust; What purchase level should be considered for exemption; and What effect would such an exemption have on the effectiveness of a livestock dealer statutory trust?"*

There were forty-three (43) comments that specifically addressed a *de minimis* threshold for a dealer statutory trust. Nearly all commenters suggested either there should be no threshold, or if a threshold was included, it should be set at a low purchase volume, typically $250,000 annually or less.

Commenters to the Federal Register notice were split on whether there should be a threshold and those who did suggest a threshold thought it should be a low threshold. One commenter summed things up saying, "a bad check is a bad check. All defaults are harmful to my business and my customers, and I believe I should have the ability to get the money I am owed." Several commenters suggested a low threshold by highlighting the difference between dealers who deal in different species, with one commenter saying, "for a market like mine that sells sheep, there are a handful of buyers that don't pile up in terms of a ton of money a year purchased but still run a risk of doing harm to our business if they ever were to default." Another said, "For those selling sheep and goats or working with smaller operations, a significant amount of business could be done without meeting the threshold. Any default is a bad situation, and I think there should be protection for all transactions."

Still another commenter said he "would like every dealer to be subject to the trust. Twenty-five or fifty thousand dollars is a lot to a small operation." One commenter said that his business has struggled more with small dealers than with large dealers and therefore did not believe there should be a threshold.

Some commenters tried to balance the need for trust protection with the potential burden it could place on small businesses. One said, "I believe the threshold for the law should be $250,000 of annual sales. This would catch more dealer transactions but not make the trust a barrier for business." Another said, "I believe the threshold should be $250,000 of annual sales, which would include most buyers of cattle doing a dealer business."

Some commenters discussed that dealer purchase volume can change from year to year. One wrote, "I think it should be low if it exists at all. What an established sale barn could handle as a hit, another might not be able to. For a small barn selling just 300 head a week, a default from a small dealer might absolutely wreck their ability to stay in business. Also, it would be important that the threshold be updated to reflect current buying levels and not on last year's volume if there was a change in buying. A little dealer can become a big dealer overnight. Someone who spent just $50,000 on cattle last year can all of the sudden get to a $250,000 level in just a day of purchases. That isn't that many cattle." Another commenter said, "I think a threshold will leave loopholes and uncertainty. Dealer businesses may differ from year to year and may also not share the fact that their businesses are not subject to the dealer trust openly with producers or markets. I think that it will just cause too much extra work, research, and uncertainty."

Some commenters wrote of personal experiences with dealer defaults. One commenter said, "I do not think there should be a minimum threshold under which dealers would not be subject to the trust. The volume an individual buyer can change rapidly. We had a situation like this where a small buyer came to the sale one day and purchased a couple loads of cattle which they then sent to another sale barn to re-sell. They never paid us for those cattle... Because of this experience, I would recommend the Dealer Statutory Trust apply to dealers of all sizes."

One commenter who identified herself as a producer said, "I don't believe any dealers should be exempt from this law, regardless of their level of purchases. It only takes one big, bad transaction to ruin a producer or a market's business." Another commenter representing a producer organization wrote, "Exempting small dealers from the trust would not provide sellers with more protection and would be extremely difficult to regulate. How would P&S ensure that the level was not exceeded? How would P&S notify sellers that a certain dealer was subject or not subject to the trust for purposes of filing a claim?"

One organization suggested that because on average dealers purchase smaller volumes of livestock annually than packers, the threshold for a dealer statutory trust should be less than the $500,000 packer threshold. The organization suggested that if a threshold is to apply, a possible level could be $250,000, which is the threshold below which online and video auctions are not considered market agencies.[148]

One commenter suggested that sophisticated dealer businesses may set up multiple operating units, each separately registered, in order to keep purchase levels below any threshold that may apply, and therefore keep their business exempt from the statutory trust.

Finally, a lender commented that even though payment problems can occur with any dealer, they tend to be more prevalent among smaller volume dealers, therefore any "exemption would seem inequitable."

[148] 7 U.S.C. 201(c).

f. Buyer and Seller Behavior in Markets for Livestock

PSD posed the following question for public comment: *"How would the establishment of a livestock dealer statutory trust affect buyer and seller behavior in markets for livestock?"* There were approximately eighty-five (85) commenters who specifically addressed this question. Of those, 58 wrote in favor of the dealer statutory trust, 24 opposed, and 3 did not express an opinion. Commenters displayed wide-ranging opinions on this topic. A majority of those commenting wrote that implementing a dealer statutory trust would have little to no impact on buyer and seller behavior. A number of other commenters felt the dealer statutory trust would have serious detrimental effects on the livestock industry. Commenters from both points of view expressed well-reasoned arguments in support of their positions, and some who were opposed to the dealer statutory trust offered alternative solutions.

One commenter echoed the sentiment of most who wrote in support of a dealer statutory trust when he said, "I do not believe that the implementation of a dealer trust would dramatically change the way we do business or the way dealers conduct business in our markets." Another commenter pointed out that there is a "hole in the system," meaning that packers are required to have bonds and are subject to a statutory trust, auction markets are required to have bonds and maintain a custodial (trust) account to protect livestock sellers, but the only requirement imposed on dealers is the bond, which often does not provide full protection to sellers. If the bond requirement for packers and auction markets alone is not enough to protect sellers, then it isn't enough to protect sellers in transactions with dealers either.

One commenter said that, "as long as buyers continue to pay for their livestock, nothing will be different. The only change we will notice is that sellers to dealers will improve their recovery in the event that dealer defaults." Another commenter added that the statutory trust would stop risky buyers from coming and buying cattle they can't pay for because they will know there is a process in place for that money to be recovered.

One commenter offered an observation regarding a state law that provides similar protection. The commenter wrote that, "in 2011, Oklahoma changed our lien laws to give unpaid livestock sellers, their agents (livestock auctions), and lenders priority in livestock and proceeds until they are paid for the livestock. To this day, eight years later, I have not experienced or seen any changes in credit availability or day-to-day behavior because of this change in Oklahoma law. The dealer [statutory] trust would be similar but would expand the protection to apply across the United States."

Several commenters wrote that they, "don't believe the establishment of a dealer trust would change the behavior of either buyer or seller." These commenters referenced the auction markets' good business practices, and said the dealer statutory trust would provide another tool in the case of default. The commenters noted that the dealer statutory trust would protect not only auction markets but anyone selling livestock to a dealer, including farmers, ranchers and even other dealers.

One commenter noted that, "a dealer trust would have saved our family millions of dollars. Another commenter noted that he, as a market owner, would not change the way he does business or relax his business practices if a dealer statutory trust was enacted. He expects payment by the next business day after sale and that won't change. But, he noted, defaults can happen even when you are careful. "This is where the dealer trust comes in, not to guarantee 100 percent payment, but to add a layer of recovery in addition to the bond.

Among those who felt the livestock dealer statutory trust would have a negative impact on buyer and seller behavior was a dealer who wrote that he has been in the business for a long time and takes pride in the value and integrity of the service he provides to the industry. He believes the dealer statutory trust would, "effectively close our doors" because he wouldn't be able to acquire credit from any bank. This commenter said the statutory trust would disrupt or shut down all livestock dealers, causing every animal to be sold through auctions, which he described as a very inefficient marketing method for producers. The commenter recommended requiring larger bonds for dealers or setting up a mandatory fund that all dealers pay into for use in the event of defaults.

Access to credit was a common theme among commenters who opposed the dealer statutory trust. One commenter wrote that the dealer statutory trust, "would restrict the ability for many dealers to get credit from commercial banks. No banker would loan money to a dealer if they were not able to secure a first lien on their livestock. Most buyers would not buy cattle from a dealer if this law was in place, because of the uncertainty of clear title from a dealer." Finally, this commenter argued that the packer statutory trust did not work when Kane[149] went into default.

Some commenters provided additional detail on the credit concerns stating that fewer buyers could obtain financing, which would lead to less competition and therefore less money to producers. Commenters said the answer to the problem is good business practices by auction markets and producers. One commenter said the dealer statutory trust is a step in the wrong direction; it will incentivize more risk taking and bad business behavior, and ultimately offers no assurance that recoveries will improve in cases of default.

Several livestock trade organizations submitted comments. The majority were supportive of a dealer statutory trust. Organizations opposed to the concept made several arguments regarding additional burdens such a trust would impose on the industry. One organization wrote that

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[149] Sam Kane refers to Sam Kane Beef Processors, LLC, a Texas meatpacking company which was the subject of numerous packer trust claims between 2016 and 2018. Sam Kane is discussed in greater detail earlier in this report.

additional seller record keeping would be required and that buyers would have to be treated differently based on their dealer or non-dealer status. This organization thought the thirty-day[150] window for giving notice of a claim might have a negative impact on buyer/seller relations "much like a false accusation of wrong doing."

Another organization expressed concern that "a dealer statutory trust would have the unintended consequence of reducing the number of buyers at livestock markets and in the country trade, especially in Texas and Oklahoma. While a dealer statutory trust may provide some livestock markets with an added sense of security and deter some unethical dealers, the additional capital requirement would likely force a number of smaller, reputable dealers from the market." This would "limit the number of buyers in livestock auctions and merchandisers of feeder and stocker cattle, causing a significant market disruption." The commenter wrote that a dealer statutory trust "would significantly decrease the trade between dealers and stockers/feed yards."

Other organizations commented more positively regarding buyer and seller relations in the event of a livestock dealer statutory trust. One organization wrote, "We feel that creating a dealer trust mitigates risk in the livestock industry but will not significantly change the way our producers are able to market the product of their hard work and stewardship. People will continue to raise and sell livestock, but now they will also be given priority if a dealer defaults." Another organization said, "For producers who sell through a sale barn, a dealer trust will help ensure that sale barn stays in business, which is vital to farmers and rural communities. Without these barns, producers lose an important marketing outlet and tool for price discovery. A dealer trust will not significantly change the way the livestock industry does business. People will continue to raise

[150] The *Federal Register* notice did not mention specific details of how a dealer statutory trust would operate. The commenter may be assuming a dealer statutory trust would have the same filing requirements as the current packer statutory trust, for which claims must be filed within 30 days of the date payment is due.

and sell cattle just as they do today. The only thing different is that the seller of livestock will now be given priority in a dealer default. It has no role unless a dealer defaults, essentially sitting on the sidelines until it is needed."

Some organizations noted that the "livestock industry can be a very risky business." One organization said that "the best way to manage risk is to mitigate it. Not only will a dealer trust do that, but it will do so without disrupting regular business practices in our industry. We do not believe that a dealer trust will change how anyone in our industry does business, and see this as yet another value-add of a dealer trust."

One organization asserted the dealer statutory trust would have a positive impact on seller behavior, as it would allow sellers to be more confident that payment would be recovered in the event of a dealer default. Another organization echoed that, stating, "Relations between dealers and sellers would improve."

Overall, organizations in favor of the dealer statutory trust favor this idea because it improves seller recovery without substantial changes to the structure of the livestock marketing industry and behavior of participants. One organization reiterated that "individuals would continue to buy and sell livestock just as they do today." "The only real change is who takes priority in livestock and proceeds/receivables in the event of a dealer default."

One commenter offered the following to illustrate support for a dealer statutory trust. "In the case of already existing statutory trusts in adjacent industries, the mere existence of a statutory trust and related risk of claims have caused payments to be procured that may not have been otherwise. For example, [auction markets] have experienced packers who have been slow to pay or presented dishonored instruments suddenly paying for livestock because the unpaid seller filed a packer statutory trust claim or gave notice of intent to file such a claim." Sellers to a defaulting dealer would likely also act more quickly to remedy the issue if the timeframe for making a dealer statutory trust claim follows that of a packer statutory trust claim. In the context of the packer statutory trust, an unpaid seller must give notice within thirty days of the final date for making prompt payment in accordance with Section 409 of the Packers & Stockyards Act if a payment instrument has not been received or within fifteen days of receiving notice that the dealer's payment instrument has been dishonored. This is quicker than the 60-day requirement to file a valid bond claim.[151] If a dealer statutory trust is created, unpaid sellers would be incentivized to file timely claims, which could put other industry participants on notice of a default issue more quickly. Also, if a dealer statutory trust is created, sellers would likely be less inclined to enter into credit agreements for fear of losing their statutory trust rights. Sellers who have entered into credit agreements with buyers lose their status as a "cash seller" and are thus no longer statutory trust beneficiaries. The creation of a dealer statutory trust could encourage dealers to keep clearer records. Although a dealer statutory trust would not require dealers to operate a separate account segregating their livestock dealer activity from other non-dealer (producer) activity, the existence of a dealer statutory trust could encourage dealers to keep separate accounts in order to segregate potential trust assets from personal or non-dealer assets. Operating a separate dealer business account is a best practice already in use by many dealers. Finally, a dealer statutory trust could make dealer defaults more manageable in size. Under current law, a dealer's lender is in an unfairly advantageous position with respect to priority in livestock the dealer never paid for and knowing well before producers or livestock markets when a default is likely to occur. This unfairness in priority and knowledge of an impending default have played out such that a dealer's lender might encourage increased buying activities until it selects a beneficial time (from the lender's

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[151] 9 CFR § 201.33.

perspective) to exercise its priority position under the Uniform Commercial Code (UCC). At that point, the lender grabs the money in the dealer's bank account, the dealer's livestock on-hand, and the receivables and proceeds from the dealer's already sold livestock. This leaves the producers and markets who sold those livestock to the dealer unpaid. If this priority was adjusted, lenders would no longer have an incentive to draw out the situation and encourage irresponsible buying activity. Lenders would likely instead adjust a dealers financing in a timelier manner, resulting in a smaller total default."

Commenting lenders generally opposed the concept of a livestock dealer statutory trust and wrote that it would disrupt the livestock industry and limit credit availability. One lender noted the, "dealer trust will not deliver the safety net to sellers that it proposes. Its first limit is that it does not address sales to anyone but a dealer. More importantly, it cannot deliver on its promise of protection of payments to sellers who sell to dealers. A mandatory law that promises the kind of protection that dealer trust proponents are promoting needs to undeniably deliver it or a seller's reliance on it will be even more dangerous."

Another lender said it would demand additional collateral if it was not in a first lien position on livestock inventory. A different lender said that if bankers can't be assured that the livestock they are financing "are free of liens when we pay for them, I don't believe bankers will continue to finance livestock." The result is lower available credit for livestock producers at all levels of production and marketing.

Some lenders also suggested that in the long term, a dealer statutory trust would result in less competition and lower prices for livestock. Others commented that if dealers were adequately bonded, the problem could be solved. One suggested that the dealer should be bonded and backed by an insurance policy, similar to what is being used with buyers of grain.

One lender acknowledged that most of its customers are livestock sellers and that a dealer statutory trust would not likely affect present behaviors.

A feedlot operator commented that the "floating trust" nature of the proposal would hinder relationships between sellers and buyers, stating that "buyers may be reluctant to buy from dealers because it is possible that claims from suppliers to the dealers could occur after the buyer concludes its transaction with a dealer and might even be asserted for sales the buyer was not involved in. If the statutory trust does not contain strong protections for buyers who pay dealers but then are sued by suppliers the dealer failed to pay, then we believe that buyers will be less likely to buy from dealers. This could reduce the number of middleman type sellers in the marketplace which has the potential to increase transaction costs at the expense of cattle producers."

An attorney with experience in Packers and Stockyards Act matters wrote, "until there is a breach of a sale contract there will be little if any impact on buyer and seller in the livestock markets. The proposed dealer statutory trust is patterned after the packer statutory trust, which has been a significant feature of the Packers and Stockyards Act since 1976. The livestock industry and its buyer/seller participants have been operating smoothly with this feature for over four (4) decades. The dealer statutory trust would not change this. The only impact is what happens in the event of non-payment, and here the Dealer Trust would bring significant benefits to the market."

g. Credit Availability

PSD posed the following question for public comment: "*What potential effects would a livestock dealer statutory trust have on credit availability, including impacts on lenders and lending behavior and other industry participants?*"

Concerns about changes in lending behavior due to creation of a statutory trust are not new. In considering the PACA trust in 1983, Congress made the following finding: "The Committee believes that the statutory trust requirements will not be a burden to the lending institutions. They will be known to and considered by prospective lenders in extending credit. The assurance the trust provision gives that raw products will be paid for promptly and that there is a monitoring system provided for under the Act will protect the interests of the borrower, the money lender, and the fruit and vegetable industry. Prompt payment should generate trade confidence and new business which yields increased cash and receivables, the prime security factors to the money lender."[152]

Approximately 960 commenters addressed this question. Of those, 431 believed a dealer trust would potentially impact credit availability and lending behavior, while 529 believed there would be no, or minimal, impact.

In general, those commenters who believe that any impact on credit availability and lending would be minimal were in favor of implementing a dealer statutory trust that would give unpaid livestock sellers first priority on livestock in the event of a dealer default. Several discussed the Oklahoma lien law that has been in place for eight years and reported it has had no significant impact on credit availability.

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[152] H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405,407.

Commenters who believe a dealer statutory trust would have an impact on credit availability and lending are geographically concentrated in Texas and a few surrounding states. These commenters believe a livestock dealer trust will create more problems than it will solve, and they are specifically concerned that it will result in less credit availability from traditional secured lenders to the livestock industry. The changing of the lien priority in default situations, giving the livestock seller a priority over the secured lenders is the concern. Commenters urge that eliminating first lien rights will lead to lending issues and will have a negative impact on producers, dealers and livestock markets that rely on lenders to finance their operations.

Commenters voicing concern with the implementation of a dealer statutory trust also noted the vagueness of the definition of "dealer" in the Act. They argue that since there is no clear test to determine who is a dealer under current law, it is impossible to know exactly who is subject to the proposed dealer statutory trust. Unique circumstances of dealers are discussed earlier in this report.

A majority of the auction markets that commented expect there would be minimal impact on credit availability and lending behavior, a majority of the livestock dealers that commented expect to experience an impact on credit availability and lending behavior.

One commenter, who identified himself as a livestock dealer and former auction market owner said he discussed the potential of a dealer statutory trust with his lender, and learned it would not change his situation, nor should it change the credit availability for other dealers. The commenter said credit worthiness is based on the borrower's own history, assets and a personal guarantee, not on livestock for which he has not yet paid. This commenter noted that auction markets want as much competition as possible for producers' cattle, but that buyers should not have to compete against dealers who do not have the ability to pay for cattle. "If someone is lending to a dealer based only on having priority in a default, that is not a good lending practice and could be a problem waiting to happen." The commenter said, "a dealer trust has much less likelihood to disrupt an individual's buying power than other options that have been offered to address this issue. For example, greatly increasing the required bond levels would have the direct effect on dealers having to provide additional assets to warrant the larger bond. Mandating quicker payment as discussed below also could cause a change in the amount of livestock a dealer is able to buy. Neither of these options address the preferential transfer issue. Speaking of this, lenders of all sort should feel more comfortable in a world where money they've already received for livestock are no longer in question."

Many commenters wrote that a dealer statutory trust would not change a lender's decision with its customers. One wrote that "a dealer trust should improve lending conditions for sellers of livestock, including livestock auctions and producers. It should not significantly change the credit available for dealers, unless their lenders have concerns about their current financial standing." Another, "I do not believe it would affect lending relationships. Lenders will continue lending money to those who are qualified for those funds."

One commenter said, "I know of very few, if any, dealers who obtain financing in today's world based on cash flow or their rolling inventory. Lines of credit are typically secured with hard assets anyway, so the trust would in no way change that lending relationship. When the discussions on this topic arise, the talk always seems to go to how the trust might change lending relationships for dealers. I would appreciate a little consideration of the relationship the rest of the industry has with its lenders because this threat hangs over our heads. There are far more farmers, ranchers, stockyards and feedlots financing through banks than there are dealers. I sincerely believe that providing assurance that the appropriate entities would be made whole in a default would improve the overall access to credit in our industry."

Some commenters noted that lenders typically lend to all aspects of the livestock marketing chain. "If someone is lending is to a dealer, there is a good chance they are also lending to producers and livestock markets. A dealer trust would give protection to all of those individuals and could be beneficial to lenders." Another wrote, "A dealer statutory trust will also stabilize credit availability for all parties as any default could be properly handled in a more timely and stable manner."

Several commenters mentioned discussing the issue with their bankers. One said, "A dealer trust would not reduce borrowing capacity for dealers. It's a non-issue for all of the bankers I have talked with about the topic. The bankers do not give anything up as long as their dealer customer pays for cattle. At the same time, a lot of ag bankers finance farmers and ranchers and have expressed that the law right now is not good for them and their customers. It is hard to follow the flow of cattle in and out of a dealer's possession. Lenders generally don't look at those as collateral because of how fast they move and uncertainty about if they've been paid for. Sure, every bank is going to throw a blanket out to have the best position to collect any assets possible. But the bankers I talk to aren't going to touch a quickly rotating cattle inventory to justify the size of a dealer's note. They're wanting them to put up other assets that have more of guarantee of recovery." Other commenters echoed these thoughts, "we know our lenders are making credit decisions based on secured assets and past performance, not unpaid-for livestock and/or accounts receivable."

Writing in opposition to a dealer statutory trust, one commenter suggested that "traditional lending institutions will likely exit the industry when hampered by the inability to perfect their security interest in the collateral pledged, i.e., livestock and accounts receivable." The commenter noted "the prompt payment for livestock requires the dealer or purchaser to pay for livestock within a 24-hour period. Without available credit to the dealer or purchaser through traditional lending institutions, the auction market will be forced to make bad decisions since the dealer trust would force some dealers and purchasers to slow pay the livestock auction market and make the auction market depend on the dealer trust to collect their money."

Multiple lenders commented to voice opposition to a dealer statutory trust. Similar comments stated, "Today I write to voice my opposition to the establishment of a livestock dealer statutory trust. As a banker whose primary line of business is providing rural Texas farmers and ranchers with access to credit, I know that a livestock dealer statutory trust will have unintended consequences and potentially disastrous effects for my community. Practically speaking, a dealer's trust could displace banks from priority lien status, thus granting primary lien status to a party that did not take the initial risk that precipitates the loan at the beginning of the buying process. If I know that my priority lien on a farm product could be jeopardized through no fault of mine or my customer's, there would be a stark disincentive to make these types of loans. Further, if local community banks are dissuaded to lend because of the potential for loss from an unrelated third party as a result of the creation of dealer's statutory trust, it will have the effect of suppressing access credit in agricultural communities served by rural banks. This will not only hurt community banks in these communities, but, ultimately, those a dealer's trust is purported to help. A livestock dealer trust has the potential to negatively disrupt and impact all involved: buyers, sellers, and lenders."

A commenter from the banking industry wrote, "It is important to remember that in most transactions, everyone has a lender, both the seller and the buyer. The current law in the livestock space prefers the buyer and their lender over the seller and their lender. Most everyone will agree a farmer or rancher who raised livestock and has not been paid for the livestock (or their lender) should retain the right to reclaim those livestock. A dealer statutory trust would achieve this, while affecting the smallest necessary class of assets. A dealer statutory trust is limited to livestock sold in cash sales which the livestock dealer did not pay for and the proceeds/receivables from these livestock.[153] The livestock dealer's lender retains priority in all other assets. This change would not fundamentally adjust access to capital for livestock dealers. Banks typically originate loans based on solid forms of collateral. Even if a lender is taking into account a customer's accounts receivable when making a loan, these should be discounted by at least the amount of the accounts payables. So long as this is happening, no trust assets would be being taken into consideration. In short, dealer trust would be a positive change to the law that would help correct and imbalance between sellers (and their lenders) and buyers (and their lenders) without making fundamental changes to credit availability."

Another banker wrote, "The Dealer Statutory Trust will provide additional recourse for the sale barn owner as well as all producers to help ensure payment for the livestock they market." One commenter suggested, "Perhaps lenders or dealers might decide that sales proceeds must be segregated into trust and non-trust accounts, creating a type of custodial account. For a dealer with multiple transactions this could be difficult to manage for both for the dealer and for the lender which is trying to monitor its collateral."

Finally, a commenter who said he was both a livestock producer and a banker for more than 30 years said, "A dealer trust would improve recovery for producers selling livestock when a livestock dealer defaults. Having the ability to reclaim cattle and related proceeds would greatly

[153] This statement is factually incorrect. Under a "floating trust," all livestock inventory and proceeds/receivables are held in trust until all unpaid sellers are paid in full. Statutory trust assets are not limited to only those animals/proceeds for which payment was not issued.

improve many of these unfortunate situations for the producer who raised the livestock is not paid by the dealer, either because no check comes or because a check comes back dishonored. For producers who sell through a sale barn, a Dealer Trust would help ensure that sale barn stays in business, which is vital to farmers and rural communities. A dealer trust would not require significant changes to our businesses today. People would continue to raise cattle and sell cattle just as they do today. They would continue to want to be paid timely for livestock. The only change would be priority in default. With a dealer trust, no separate bank account or other changes are needed. It is unlikely there would be a significant change in a dealers financing because the change in their lenders status only occurs if their customer does not pay for livestock and, if this happens, only affects assets not paid for. A dealer trust would improve recovery in dealer defaults without making significant changes to industry structure or requirements."

Trade organizations also commented on the issue of credit availability. "By allowing sellers of livestock to be the priority recipient of livestock and proceeds/in a dealer default situation, lenders across the nation could benefit by extension as well. In the state of Arkansas, lenders have more producer/seller customers than dealer customers. Therefore, lenders should have more confidence in making credit available to producers while also having confidence that they would still obtain first priority in non-trust assets such as land, equipment, vehicles, etc."

Another organization did not believe a livestock dealer statutory trust would have a significant impact on credit availability for livestock dealers. "In most instances, lenders who extend credit to dealers should not rely heavily on potential trust assets as collateral to secure loans. Furthermore, the only time a dealer trust should impact lender/dealer relationships is the unlikely event of a default. Unlike a dealer bond, a dealer trust would not necessitate additional capital outlays. If a lender were to require additional capitalization or additional credit, it is likely the dealer was insufficiently capitalized in the first place. To that end, a dealer trust would work to ensure that lenders and dealers alike are conducting their due diligence to ensure each can operate sustainably and operate as responsible participants in the livestock industry. Finally, it is worth noting that a lender is in the position to require a dealer to pledge assets for collateral other than inventory and accounts receivable, whereas a livestock seller is not in a position to make such demands due to the nature of their relationship with a dealer."

A commenter who identified himself as a practicing attorney in Oklahoma representing livestock producers, commission companies, auctions, dealers, and feeding operations wrote in support of the dealer statutory trust. He said, "Many of my clients were impacted by the Eastern Livestock bankruptcy. Producers and livestock markets that sold cattle to Eastern Livestock just prior to the bankruptcy received little to nothing in the bankruptcy while Eastern's bank received the proceeds from Eastern's sale of the same cattle. This was the inequitable result of UCC and Food Security Act rules that were not consistent with the practical standards of the industry. As a result we assisted some of our clients in drafting and introducing the Oklahoma Livestock Owners Lien Act.[154] The [Oklahoma] Act is very similar to the proposed Dealers Trust. It creates a statutory lien in favor of a seller of livestock which exists until the seller actually receives payment. If the buyer resells the Livestock to a good faith purchaser the lien jumps from the livestock to the proceeds of the sale. The act benefits both Oklahoma sellers and livestock markets who act as an agent for the seller. This state law was vetted by Oklahoma's livestock groups, feeder interests, and banking interests. After the Act became law, it has been used on multiple occasions to protect sellers of livestock who for a variety of reasons were put into a situation where they sold livestock but were not paid. The Act has not had a negative impact on Oklahoma's Livestock Industry. It

[154] 4 Okla. §§ 201.1 – 201.11.

has been a success in practice. The proposed Dealers Trust will likewise have a positive impact on the US livestock industry."

"Lenders are a valued partner of the livestock industry for producers, dealers, markets, feeders, and packers alike. Giving sellers of livestock—and by extension their lenders—priority in unpaid-for livestock and proceeds/receivables, would correct an imbalance in the current law while not significantly reducing credit availability for livestock dealers." One organization noted discussions it had with rural lenders who pointed out that the "vast majority of lenders in the livestock industry have more producer customers than dealer customers. These lenders confirmed for their dealer customers a Dealer Statutory Trust would not change their lending relationships." This commenter also noted it is important to remember that "lenders would retain their first priority in non-trust assets such as land, vehicles, and equipment." This commenter also referenced the state lien laws such as Oklahoma's and Florida's. "In neither of these states has there been reports of livestock buyer financing being negatively impacted." The commenter pointed out that even though the state livestock lien laws have been helpful in default situations, they do not protect against preferential transfer claims in the event of a dealer bankruptcy; and questions exist as to the efficacy of the laws for transactions where parties and livestock are located in multiple states.

Opponents to the dealer statutory trust also spoke out on this issue. In particular, on banking association raised concerns over "the unintended consequences it would have on credit availability for our members' agriculture customers in Texas and the rural communities supported by this type of credit. Specifically, a livestock dealer's trust could displace banks from priority lien status, thus granting primary lien status to a party that did not take the initial risk involved in making the loan. This is not only unfair, it could potentially be a disincentive for banks to make this type of loan and lead to less credit availability in rural areas in Texas and throughout the country. If a banker knows that its priority lien on a farm product could be jeopardized through no fault of the bank or its customer, there will be fewer banks willing to make these types of loans and it will ultimately hurt those customers the dealer's trust is purported to help."

Another commenter wrote, "Lenders are a critical factor in the livestock industry as in all of agriculture. However, agriculture is not a critical industry for the financial industry as a whole. Therefore, while the large banking and lending organizations may be silent on this issue, the independent and community bankers in Texas have clearly stated their opposition to creation of a livestock dealer statutory trust as placing a seller who may use poor judgement or risky business practices ahead of the lending institution."

A banking association wrote, "Our first concern is that any such trust should not receive a priority lien on livestock dealer accounts receivable or other funds. Credit facilities to livestock marketers depend on the cash flow from the receivables. An impairment of that collateral through the resulting inferior treatment of the contractual lien would create a significant impediment to this credit line. The end result would be reduced credit availability. Further, lenders would likely require a secondary source of repayment, which could actually evolve into the primary source. In addition, lenders would expect higher liquidity, reducing the margins for some of these livestock marketers. Credit would become more expensive — due to the enhancements that a prudent lender would insist upon as well as through higher interest rates to accommodate the higher risk. At least one significant, large agricultural bank has assured us that it would consider these loans to be "undesirable." We would respectfully suggest that alternatives to a trust fund should be explored, such as the use of Livestock Market Payment Insurance, which we understand is available in the marketplace. This option would reduce the payment risk but do so in a more cost effective — and less market disruptive — manner. We concur that electronic verification of payments and more expeditious electronic processing is another tool in assuring the soundness of the payment system. Efforts to achieve this are in process. In fact, we are encouraging the Federal Reserve System to develop timely payment systems that would be widely available to all banks."

h. Electronic Funds Transfer for Livestock Purchases

PSD asked commenters to address whether *"industry-wide adoption of electronic funds transfer or another expeditious method of payment feasible, and would such adoption provide sellers of livestock with protection from nonsufficient funds payments?"* Only 61 of the 1597 comments received specifically discussed this topic. Several commenters mentioned that this issue was unrelated to considering the feasibility of a livestock dealer statutory trust, which may explain the low response rate on this question. The 61 comments came from a variety of commenters, including auction markets (25), dealers (14), trade associations (11), and one who identified as a producer.

Commenters on this topic were generally well informed regarding the prompt payment provisions of the P&S Act. On commenter, an attorney from Florida, wrote, "[a]s proposed, the dealer trust would not change prompt payment requirements of the Act. Currently, dealers, livestock markets, and packers must pay for livestock before the close of the next business day. The prompt payment requirement is one of the critical components of the Act and remains unaffected by the dealer trust."

Other commenters agreed that the creation of a dealer statutory trust would not change current P&S Act prompt payment requirements and were opposed to limiting payment options. At the same time, commenters noted that regardless of the payment method, the risk of a dealer default remains. Several industry trade associations expressed that while an electronic fund transfer could speed up transactions, there remains the possibility of payments being returned for insufficient funds. One auction operator said, "[w]hen sellers are not paid, it is generally because the funds do not exist. The payment method is irrelevant."

Commenters also expressed concern that changing the method of payment from a check in the mail to electronic transfer would significantly change the way the livestock industry functions. Many of the commenters also expressed concern that this shift would put small- and medium-sized dealers out of business or would significantly reduce their buying power. One livestock auction operator estimated that 25% of the buyers attending his sale would not be able to participate if purchase funds were required to be wired the same day as the sale.

One trade group representing small- and midsized-banks commented that the problem with dealer defaults could largely be addressed by an expeditious EFT system. The group believes industry-wide adoption of EFT would solve the nonsufficient funds problem without causing market disruption. Under this commenter's suggestion, producers and auction barns would be instructed or even required to obtain a bank-to-bank wire transfer before releasing their cattle for shipment. Payments would be more certain because banks only wire money out if the sender has the funds available. Once the money arrives, it is typically available within one business day.

i. Section 12103, 2018 Farm Bill

"(2) EFFECT.—Nothing in paragraph (1) shall be construed to terminate a contract, grant, cooperative agreement, or other legal instrument entered into during the period specified in such paragraph.".

SEC. 12102. SHEEP PRODUCTION AND MARKETING GRANT PROGRAM.

Section 209(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1627a(c)) is amended by striking "$1,500,000 for fiscal year 2014" and inserting "$2,000,000 for fiscal year 2019".

SEC. 12103. FEASIBILITY STUDY ON LIVESTOCK DEALER STATUTORY TRUST.

(a) IN GENERAL.—The Secretary shall conduct a study to determine the feasibility of establishing a livestock dealer statutory trust.

(b) CONTENTS.—The study conducted under subsection (a) shall—

(1) analyze how the establishment of a livestock dealer statutory trust would affect buyer and seller behavior in markets for livestock (as defined in section 2(a) of the Packers and Stockyards Act, 1921 (7 U.S.C. 182));

(2) examine how the establishment of a livestock dealer statutory trust would affect seller recovery in the event of a livestock dealer payment default;

(3) consider what potential effects a livestock dealer statutory trust would have on credit availability, including impacts on lenders and lending behavior and other industry participants;

(4) examine unique circumstances common to livestock dealers and how those circumstances could impact the functionality of a livestock dealer statutory trust;

(5) study the feasibility of the industry-wide adoption of electronic funds transfer or another expeditious method of payment to provide sellers of livestock protection from nonsufficient funds payments;

(6) assess the effectiveness of statutory trusts in other segments of agriculture, whether similar effects could be experienced under a livestock dealer statutory trust, and whether authorizing the Secretary to appoint an independent trustee under the livestock dealer statutory trust would improve seller recovery;

(7) consider the effects of exempting dealers with average annual purchases under a de minimis threshold from being subject to the livestock dealer statutory trust; and

(8) analyze how the establishment of a livestock dealer statutory trust would affect the treatment of sellers of livestock as it relates to preferential transfer in bankruptcy.

(c) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report describing the findings of the study conducted under subsection (a).

SEC. 12104. DEFINITION OF LIVESTOCK.

Section 602(2) of the Emergency Livestock Feed Assistance Act of 1988 (7 U.S.C. 1471(2)) is amended in the matter preceding subparagraph (A) by striking "fish" and all that follows through

j. House Bill 4058; SALE Act of 2017

115TH CONGRESS
1ST SESSION

H. R. 4058

To amend the Packers and Stockyards Act, 1921, to provide for the establishment of a trust for the benefit of all unpaid cash sellers of livestock, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 12, 2017

Mr. MARSHALL (for himself, Mr. ROUZER, Mr. COMER, Mr. YOUNG of Iowa, Mrs. HARTZLER, Mr. SMITH of Missouri, Mr. KING of Iowa, Mr. THOMPSON of Pennsylvania, Mr. YOHO, Mr. COSTA, Mrs. BUSTOS, Ms. SEWELL of Alabama, Mr. SOTO, Mr. ARRINGTON, and Mr. LUCAS) introduced the following bill; which was referred to the Committee on Agriculture

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A BILL

To amend the Packers and Stockyards Act, 1921, to provide for the establishment of a trust for the benefit of all unpaid cash sellers of livestock, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Securing All Livestock Equitably Act of 2017" or the "SALE Act of 2017".

SEC. 2. ESTABLISHMENT OF TRUST FOR BENEFIT OF UNPAID CASH SELLERS OF LIVESTOCK.

The Packers and Stockyards Act, 1921, is amended by inserting after section 317 (7 U.S.C. 217a) the following new section:

"**SEC. 318. STATUTORY TRUST ESTABLISHED; DEALER.**

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—All livestock purchased by a dealer in cash sales and all inventories of, or receivables or proceeds from, such livestock shall be held by the 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.

"(2) EXEMPTION.—Any dealer whose average annual purchases of livestock do not exceed $500,000 shall be exempt from the provisions of this section.

"(3) EFFECT OF DISHONORED INSTRUMENTS.—For purposes of determining full payment under paragraph (1), a payment to an unpaid cash seller shall not be considered to have been made if the unpaid cash seller receives a payment instrument which is dishonored.

"(b) ENFORCEMENT.—If a dealer fails to perform the duties required by subsection (a), the Secretary shall take such action as is necessary to enforce the trust.

"(c) PRESERVATION OF TRUST.—An unpaid cash seller shall lose the benefit of a trust under subsection (a) if the unpaid cash seller has not preserved the trust by giving written notice to the dealer involved and filing such notice with the Secretary—

"(1) within 30 days of the final date for making a payment under section 409 in the event that a payment instrument has not been received; or

"(2) within 15 business days after the date on which the seller receives notice that the payment instrument promptly presented for payment has been dishonored.

"(d) NOTICE TO LIEN HOLDERS.—When a dealer receives notice under subsection (c) with respect to a trust, the dealer shall, within 15 business days, give notice to all persons who have recorded a security interest in, or lien on, the livestock held in such trust.

"(e) CASH SALES DESCRIBED.—For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.".

k. Senate Bill 3140; SALE Act of 2018

115TH CONGRESS
2D SESSION

S. 3140

To amend the Packers and Stockyards Act, 1921, to provide for the establishment of a trust for the benefit of all unpaid cash sellers of livestock, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 26, 2018

Mr. INHOFE (for himself, Mr. DAINES, Mr. MORAN, and Mrs. FISCHER) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

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A BILL

To amend the Packers and Stockyards Act, 1921, to provide for the establishment of a trust for the benefit of all unpaid cash sellers of livestock, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Securing All Livestock Equitably Act of 2018" or the "SALE Act of 2018".

SEC. 2. ESTABLISHMENT OF TRUST FOR BENEFIT OF UNPAID CASH SELLERS OF LIVESTOCK.

Title III of the Packers and Stockyards Act, 1921 (7 U.S.C. 201 et seq.), is amended by adding at the end the following:

"SEC. 318. STATUTORY TRUST ESTABLISHED; DEALER.

"(a) DEFINITION OF CASH SALE.—In this section, the term 'cash sale' means a sale in which the seller does not expressly extend credit to the buyer.

"(b) ESTABLISHMENT.—

"(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), all livestock purchased by a dealer in cash sales and all inventories of, or receivables or proceeds from, that livestock shall be held by the dealer in trust for the benefit of all unpaid cash sellers of that livestock until full payment has been received by those unpaid cash sellers.

"(2) EXEMPTION.—This section shall not apply to a dealer the amount of average annual purchases of livestock of which does not exceed $250,000.

"(3) WAIVER.—

"(A) IN GENERAL.—A dealer and a cash seller may voluntarily waive the applicability of this section to the dealer and cash seller through a written agreement described in subparagraph (B) that is signed before any sale to which the written agreement applies takes place.

"(B) WRITTEN AGREEMENT.—A written agreement referred to in subparagraph (A) shall indicate whether the written agreement applies to—

"(i) 1 sale;

"(ii) all sales before a specific date; or

"(iii) all sales until the dealer or cash seller terminates the agreement in writing.

"(C) EFFECT ON PAYMENT TERMS.—A waiver under subparagraph (A) shall not affect the payment terms of the sale.

"(4) EFFECT OF DISHONORED INSTRUMENTS.—For purposes of determining full payment under paragraph (1), a payment to an unpaid cash seller shall not be considered to have been made if the unpaid cash seller receives a payment instrument that is dishonored.

"(c) ENFORCEMENT.—If a dealer fails to perform the duties required by subsection (b), the Secretary shall take such action as is necessary—

"(1) to enforce the trust, including by appointing an independent trustee; and

"(2) to preserve the assets of the trust.

"(d) PRESERVATION OF TRUST.—An unpaid cash seller shall lose the benefit of a trust under subsection (b) if the unpaid cash seller has not preserved the trust by—

"(1) providing a written notice to the applicable dealer of the intent of the unpaid cash seller to preserve the benefits of the trust; and

"(2) filing that notice with the Secretary—

"(A) not later than 30 days after the final date for making a payment under section 409 in the event that a payment instrument has not been received; or

"(B) not later than 15 business days after the date on which the seller receives notice that the payment instrument promptly presented for payment has been dishonored.

"(e) NOTICE TO LIEN HOLDERS.—Not later than 15 business days after the date on which a dealer receives notice under subsection (d)(1) with respect to a trust, the dealer shall give notice of the intent of the unpaid cash seller to preserve the benefits of the trust to all persons who have recorded a security interest in, or lien on, the livestock held in that trust.

"(f) PURCHASE OF LIVESTOCK SUBJECT TO TRUST.—

"(1) IN GENERAL.—Notwithstanding section 1324 of the Food Security Act of 1985 (7 U.S.C. 1631), a buyer in the ordinary course that purchases livestock that is held in trust by a dealer under subsection (b), including from a dealer that engages in farming operations, shall receive good title to the livestock free of the dealer trust—

"(A) if the buyer receives the livestock in exchange for payment of new value; and

"(B) without regard to whether—

"(i) the dealer trust has been preserved in accordance with this section; or

"(ii) the buyer knows of the existence of the dealer trust.

"(2) PAYMENT.—Payment shall not be considered to have been made under paragraph (1)(A) if a payment instrument given in exchange for the livestock is dishonored.

"(g) TRANSFER OF LIVESTOCK SUBJECT TO TRUST.—A transfer of livestock that is held in trust by a dealer under subsection (b) shall not be considered to be for new value under subsection (f)(1)(A) if the transfer is—

"(1) in satisfaction of an antecedent debt; or

"(2) to a secured party pursuant to a security agreement.".

I. 2000 Statutory Trust Legislation

SEC. 5. STATUTORY TRUST FOR THE PROTECTION OF SELLERS OF LIVESTOCK TO MARKET AGENCIES AND LIVESTOCK DEALERS.

Title III of the Packers and Stockyards Act, 1921 (7 U.S.C. 201 et seq.) is amended by adding at the end the following:

"SEC. 318. LIVESTOCK DEALER TRUST.

"(a) FINDINGS.—Congress finds that—

"(1) a burden on and obstruction to commerce in livestock is caused by financing arrangements under which dealers encumber, give lenders security interest in, or place liens on, livestock obtained by such persons by purchase in cash sales, or on inventories of or receivables or proceeds from such livestock, when payment is not made for livestock; and

"(2) such financing arrangements are contrary to the public interest.

"(b) PURPOSE.—The purpose and intent of this section is to remedy such burden on and obstruction to commerce in livestock and protect the public interest by creating a trust for the benefit of unpaid cash sellers of livestock.

"(c) DEFINITIONS.—In this section:

"(1) CASH SALE.—The term 'cash sale' means a sale in which the seller does not expressly extend credit to the buyer.

"(2) DEALER.—The term 'dealer' includes a market agency purchasing livestock on a commission basis, for all purposes under and related to this section.

"(3) TRUST CORPUS.—The corpus of a trust established under this section shall include the assets of a dealer that are held for the benefit of all unpaid cash sellers of livestock—

"(A) including—

"(i) all accounts receivable and proceeds derived from the sale of livestock purchased by the dealer in cash sales; and

"(ii) all livestock inventories of the dealer; and

"(B) not including—

"(i) livestock purchased by a dealer for its own account for feeding in a feedlot or on pasture; and

"(ii) livestock purchased by a bona fide third-party purchaser for value.

"(d) HOLDING IN TRUST.—

"(1) IN GENERAL.—The accounts receivable and proceeds generated from livestock purchased in a cash sale by a dealer, and the inventory of the dealer, shall be held by the dealer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers.

"(2) DISHONOR OF INSTRUMENT OF PAYMENT.—Payment shall not be considered to have been made if the seller receives a payment instrument that is dishonored.

"(3) LOSS OF BENEFIT OF TRUST.—The unpaid seller shall lose the benefit of the trust under paragraph (1) unless the seller gives written notice to the dealer and to the Secretary—

"(A) within 15 business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored; or

"(B) within 30 days after the final date for making payment under section 409.

"(4) SMALL ENTITY EXEMPTION.—Any dealer whose average annual purchases of livestock do not exceed $250,000 is exempt from the provisions of this section.

"(5) CATTLE FEEDING EXEMPTION.—Purchases by a dealer of livestock for its own account for feeding in a feedlot or on pasture shall not be considered dealer transactions for the purposes of this section.

"(6) RIGHTS OF THIRD PARTY PURCHASER.—The trust established under paragraph (1) shall have no effect on the rights of a bona fide third-party purchaser who has purchased livestock from a dealer for value, without regard to whether the livestock are delivered to the bona fide purchaser.

"(7) ANIMAL CARE PROVIDER EXEMPTION.—Nothing in this section shall affect the rights of an animal care provider created by statute or common law.

"(e) JURISDICTION.—

"(1) IN GENERAL.—The district courts of the United States shall have jurisdiction in a civil action by—

"(A) the beneficiary of a trust described in subsection (d)(1) to enforce payment of the amount due the seller from the trust funds; and

"(B) the Secretary, to prevent and restrain dissipation of a trust described in subsection (d).

"(2) NO EFFECT ON OTHER REMEDIES.—Nothing in this section shall limit or diminish in any way any other remedy available to a trust beneficiary or to the Secretary under this Act, any other law, or at common law, but the provisions of this section are in addition to such remedies.

"(f) DAMAGES.—If any dealer subject to this section violates any of the provisions of such section, the dealer shall be liable to the person injured thereby for the full amount of damages sustained as a consequence of such violation.

"(g) PENALTIES.—

"(1) IN GENERAL.—Whoever violates the provisions of this section shall be liable to, and the Secretary may assess, a penalty of not more than \$10,000 nor less than \$1,000 for each such violation.

"(2) CONSIDERATIONS.—In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the annual purchases of livestock by the person involved, and the effect of the penalty on the person's ability to continue in business.

"(3) ENFORCEMENT.—If the person against whom a penalty is assessed under this section fails to pay such penalty, the Secretary shall refer the matter to the Attorney General, who shall recover such penalty by an action in the appropriate district court of the United States.".

m. 1996 Statutory Trust Legislation

Subtitle D—Miscellaneous

SEC. 541. LIVESTOCK DEALER TRUST.

Title III of the Packers and Stockyards Act, 1921 (7 U.S.C. 201 et seq.), is amended by adding at the end the following:

"SEC. 318. LIVESTOCK DEALER TRUST.

"(a) FINDINGS.—Congress finds that—

"(1) a burden on and obstruction to commerce in livestock is caused by financing arrangements under which dealers and market agencies purchasing livestock on commission encumber, give lenders security interests in, or have liens placed on livestock purchased by the dealers and market agencies in cash sales, or on receivables from or proceeds of such sales, when payment is not made for the livestock; and

"(2) the carrying out of such arrangements is contrary to the public interest.

"(b) PURPOSE.—The purpose of this section is to remedy the burden on and obstruction to commerce in livestock described in paragraph (1) and protect the public interest.

"(c) DEFINITIONS.—In this section:

S 1541 ES

"(1) CASH SALE.—The term 'cash sale' means a sale in which the seller does not expressly extend credit to the buyer.

"(2) TRUST.—The term 'trust' means 1 or more assets of a buyer that (subsequent to a cash sale of livestock) constitutes the corpus of a trust held for the benefit of a seller and consists of—

"(A) account receivables and proceeds earned from the cash sale of livestock by a dealer;

"(B) account receivables and proceeds of a marketing agency earned on commission from the cash sale of livestock;

"(C) the inventory of the dealer or marketing agency; or

"(D) livestock involved in the cash sale, if the seller has not received payment in full for the livestock and a bona fide third-party purchaser has not purchased the livestock from the dealer or marketing agency.

"(d) HOLDING IN TRUST.—

"(1) IN GENERAL.—The account receivables and proceeds generated in a cash sale made by a dealer or a market agency on commission and the inventory of the dealer or market agency shall be held by the dealer or market agency in trust for the benefit of the seller of the livestock until the seller receives payment in full for the livestock.

"(2) EXEMPTION.—Paragraph (1) does not apply in the case of a cash sale made by a dealer or market agency if the total amount of cash sales made by the dealer or market agency during the preceding 12 months does not exceed $250,000.

"(3) DISHONOR OF INSTRUMENT OF PAYMENT.—A payment in a sale described in paragraph (1) shall not be considered to be made if the instrument by which payment is made is dishonored.

"(4) LOSS OF BENEFIT OF TRUST.—If an instrument by which payment is made in a sale described in paragraph (1) is dishonored, the seller shall lose the benefit of the trust under paragraph (1) on the earlier of—

"(A) the date that is 15 business days after date on which the seller receives notice of the dishonor; or

"(B) the date that is 30 days after the final date for making payment under section 409,

unless the seller gives written notice to the dealer or market agency of the seller's intention to preserve the trust and submits a copy of the notice to the Secretary.

"(5) RIGHTS OF THIRD-PARTY PURCHASER.—The trust established under paragraph (1) shall have no effect on the rights of a bona fide third-party purchaser of the livestock, without regard to whether the livestock are delivered to the bona fide purchaser.

"(e) JURISDICTION.—The district courts of the United States shall have jurisdiction in a civil action—

"(1) by the beneficiary of a trust described in subsection (c)(1), to enforce payment of the amount held in trust; and

"(2) by the Secretary, to prevent and restrain dissipation of a trust described in subsection (c)(1).".