

**§ 202.119**

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**§ 202.119 Rule 19: Fees of witnesses.**

Witnesses subpoenaed before the presiding officer, and witnesses whose depositions are taken, shall be entitled to the same fees and mileage as are paid for like services in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the witness appears or the deposition is taken.

**§ 202.120 Rule 20: Official notice.**

Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical or scientific fact of established character: *Provided*, That the parties shall be given notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

**§ 202.121 Rule 21: Intervention.**

At any time after docketing of a proceeding and before commencement of a hearing, oral or written, therein, the presiding officer may, upon petition, and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding; (b) the nature of the material the petitioner intends to present in evidence; (c) the nature of the argument the petitioner intends to make; and (d) the reasons why the petitioner should be allowed to intervene. Any such petition, and notice of the order thereon, shall be served on the parties and made a part of the record in the proceeding.

**§ 202.122 Rule 22: Ex parte communications.**

(a) At no stage of the proceeding between its docketing and the issuance of the final decision shall the presiding officer or judicial officer discuss ex parte the merits of the proceeding with any party, or attorney or representative of a party: *Provided*, That procedural matters shall not be included within this limitation; and *Provided further*, That the presiding officer or judicial officer may discuss the merits of the case with such a person if all parties to the proceeding or their attor-

neys or representatives have been served with notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(b) No party, or attorney or representative of a party, or other person not an employee of the Department, shall make or knowingly cause to be made to the presiding officer or judicial officer an ex parte communication relevant to the merits of the proceeding.

(c) If the presiding officer or judicial officer receives an ex parte communication in violation of this section, the one who receives the communication shall place in the public record of the proceeding:

(1) Such communication if written, or a memorandum stating the substance of such communication if oral; and

(2) A copy of any written response or a memorandum stating the substance of any oral response thereto.

(d) Copies of all such items placed or included in the record, as provided in this section, shall be served on all parties.

(e) For purposes of this section "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include a request for a status report on any matter or the proceeding.

**§ 202.123 Rule 23: Action by Secretary.**

The Secretary may act in the place and stead of a presiding officer or the judicial officer in any proceeding hereunder, or any matter in connection therewith.

**PART 203—STATEMENTS OF GENERAL POLICY UNDER THE PACKERS AND STOCKYARDS ACT**

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- 203.1 [Reserved]
- 203.2 Statement of general policy with respect to the giving by meat packers of meat and other gifts to Government employees.
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- dealers, stockyard owners, market agencies and dealers.
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- 203.16 Mailing of checks in payment for livestock purchased for slaughter, for cash and not on credit.
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AUTHORITY: 7 CFR 2.22 and 2.81.

**§ 203.1 [Reserved]**

**§ 203.2 Statement of general policy with respect to the giving by meat packers of meat and other gifts to Government employees.**

(a) In recent months, the Department has received information, confirmed by investigation, that a number of packers subject to the Packers and Stockyards Act have made gifts of meat to Government employees responsible for conducting service activities of the Department. Such gifts have the implications of fraud, even if not made specifically for the purpose of influencing these employees in the performance of their duties.

(b) It is a violation of the Meat Inspection Act for any person, firm, or corporation to give to any employee of the Department performing duties under such act anything of value with intent to influence such employee in the discharge of his duties, or for such employee to receive from any person, firm, or corporation engaged in inter-

state or foreign commerce any gift given with any intent or purpose whatsoever (21 U.S.C. 90). Under the Federal meat grading regulations, the giving or attempting to give by a packer of anything of value to any employee of the Department authorized to perform any function under such regulations is a basis for the withdrawal of Federal meat grading service (7 CFR 53.13). The receiving by an employee of the Department of any gift from any person for whom grading, inspection, or other service work is performed is specifically prohibited by Departmental regulations.

(c) Upon the basis of paragraphs (a) and (b) of this section, it is the view of the Department that it is an unfair and deceptive practice in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. 192(a)) for any person subject to the provisions of Title II of said Act to give or offer to give meat, money, or anything of value to any Government employee who performs inspection, grading, reporting, or regulatory duties directly relating to the purchase or sale of livestock or the preparation or distribution of meats, meat food products, livestock products in unmanufactured form, poultry or poultry products.

(Sec. 407, 42 Stat. 169; 7 U.S.C. 228; 9 CFR 201.3)

[26 FR 710, Jan. 25, 1961; 29 FR 4081, Mar. 28, 1964]

**§ 203.3 [Reserved]**

**§ 203.4 Statement with respect to the disposition of records by packers, live poultry dealers, stockyard owners, market agencies and dealers.**

(a) *Records to be kept.* Section 401 of the Packers and Stockyards Act (7 U.S.C. 221) provides, in part, that every packer, live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. In order to properly administer the P&S Act, it is necessary that records be retained for such periods of time as may be required to permit the

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Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) a reasonable opportunity to examine such records. Section 401 of the Act does not, however, provide for the destruction or disposal of records. Therefore, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has formulated this policy statement to provide guidance as to the periods of time after which records may be disposed of or destroyed.

(b) *Records may be disposed of after two years except as otherwise provided.* Except as provided in paragraph (c) of this section, each packer, live poultry dealer, stockyard owner, market agency, and dealer may destroy or dispose of accounts, records, and memoranda which contain, explain, or modify transactions in its business subject to the Act after such accounts, records, and memoranda have been retained for a period of two full years; *Provided*, That the following records made or kept by a packer may be disposed of after one year: cutting tests; departmental transfers; buyers' estimates; drive sheets; scale tickets received from others; inventory and products in storage; receiving records; trial balances; departmental overhead or expense recapitulations; bank statements, reconciliations and deposit slips; production or sale tonnage reports (including recapitulations and summaries of routes, branches, plants, etc.); buying or selling pricing instructions and price lists; correspondence; telegrams; teletype communications and memoranda relating to matters other than contracts, agreements, purchase or sales invoices, or claims or credit memoranda; and *Provided further*, That microfilm copies of records may be substituted for and retained in lieu of the actual records.

(c) *Retention for longer periods may be required.* The periods specified in paragraph (b) of this section shall be extended if the packer, live poultry dealer, stockyard owner, market agency, or dealer is notified in writing by the Administrator that specified records should be retained for a longer period pending the completion of any investigation or proceedings under the Act.

(d) *Unauthorized disposal of records.* If it is found that any person subject to the Act has disposed of accounts, records, and memoranda which are necessary to fully and correctly disclose all transactions in its business prior to the periods specified in this statement, consideration will be given to the issuance of a complaint charging a violation of section 401 of the Act and seeking an appropriate order. The administrative proceeding initiated will be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 CFR 1.130 *et seq.*).

(Approved by the Office of Management and Budget under control number 0580-0015)

(7 U.S.C. 228, 7 U.S.C. 222, and 15 U.S.C. 46)

[49 FR 6085, Feb. 17, 1984, as amended at 54 FR 16357, Apr. 24, 1989; 68 FR 75388, Dec. 31, 2003]

### **§ 203.5 Statement with respect to market agencies paying the expenses of livestock buyers.**

It has become a practice in certain areas of the country for market agencies, engaged in the business of selling consigned livestock on a commission basis, to pay certain of the business or personal expenses incurred by buyers attending livestock sales conducted by such market agencies, such as, expenses for meals, lodging, travel, entertainment and long distance telephone calls. Investigation by the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), discloses that this practice tends to become a method of competition between similarly engaged market agencies and results in undue and unreasonable cost burdens on such market agencies and the livestock producers who sell their livestock through such market agencies.

It is the view of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) that it constitutes violations of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), for any market agency engaged in the business of selling consigned livestock on a commission basis, to pay, directly or indirectly, any personal or business expenses of livestock buyers attending

sales conducted by such market agency. In the future, if any market agency engages in such practice, consideration will be given by the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) to the issuance of a complaint charging the market agency with violation of the Act. In the formal administrative proceeding initiated by any such complaint, the Judicial Officer of the Department will determine, after full hearing, whether the market agency has violated the Act and should be ordered to cease and desist from continuing such violation, and whether the registration of such market agency should be suspended for a reasonable period of time.

(Secs. 407, 4, 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228. Interprets or applies secs. 304, 307, 312, 42 Stat. 164, 165, 167; 7 U.S.C. 205, 208, 213)

[29 FR 311, Jan. 14, 1964; 29 FR 3304, Mar. 12, 1964, as amended at 32 FR 7700, May 26, 1967]

#### § 203.6 [Reserved]

#### § 203.7 Statement with respect to meat packer sales and purchase contracts.

(a) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) receives numerous complaints concerning the failure or refusal of buyers to pay the full purchase price for, or to accept delivery of, their purchases of meat and meat food products and sellers failing to meet contractual specifications. Most such complaints arise out of disputes concerning condition, grade, weight, or shipping instructions.

(b) It is believed that both seller and buyer should take the following points into consideration when selling and buying meat and meat food products:

(1) *Terms of shipment and time of arrival.* Terms and conditions of shipment and delivery should be specified in the contract and both parties should understand fully all terms and conditions of the contract. Any deviation from normal practices, such as a guaranty by the shipper as to the date of arrival at destination, or a deviation from the normal meaning of terms, should also be fully understood and made a part of the contract.

(2) *Quality and condition.* (i) A seller has the responsibility of making certain that the meat and meat food products shipped are in accordance with the terms of the contract specifications.

(ii) When a buyer believes that the shipment does not meet the terms of the contract, he should immediately contact the seller or the seller's agent and advise him of the nature of the complaint. This affords the seller an opportunity to renegotiate the contract, to personally inspect the meat or meat food products, or to have an impartial party inspect or examine the meat or meat food products. Inspection and examination service of this type is available nationally through the USDA meat grading service and locally through various impartial persons or agencies.

(iii) All terms of a transaction should be made clear in the contract, whether written or verbal. If there is any chance of misunderstanding, a written confirmation should be exchanged between the parties. In any case where a contract dispute cannot be settled between the parties and either party intends to file a complaint, such complaint should be brought to the attention of the nearest Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) area office as soon as possible. However, a concerted effort on the part of both buyer and seller to negotiate clear and complete contracts will greatly reduce misunderstandings which can result in the filing of complaints with the Administration.

(c) If the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has reason to believe that any packer unjustifiably (1) has refused to pay the contractual price for meat or meat food products purchased, (2) has refused to accept a shipment of meat or meat food products, or (3) has failed to ship meat or meat food products in accordance with the terms of the contract specifications, consideration will be given to the issuance of a complaint charging the packer with violation of section 202 of the Act. In the formal administrative proceeding initiated by any such complaint, the Judicial Officer of the Department will determine,

upon the basis of the record in the proceeding, whether the packer has violated the Act and should be ordered to cease and desist from continuing such violation.

(Secs. 407(a), 4, 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies sec. 202, 42 Stat. 161 et seq., as amended; 7 U.S.C. 192)

[30 FR 14966, Dec. 3, 1965, as amended at 32 FR 7701, May 26, 1967]

§§ 203.8–203.9 [Reserved]

**§ 203.10 Statement with respect to insolvency; definition of current assets and current liabilities.**

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 et seq.), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. United States Department of Agriculture*, 363 F. 2d 81 (5th Cir. 1966).

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) *Current assets* means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) *Current liabilities* means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) Cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating

cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accrued interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) land and other natural resources; and (6) depreciable assets.

(e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; (5) accruals such as taxes, wages, social security, unemployment compensation, etc., due and payable as of the date of the balance sheet; and (6) all other liabilities whose regular and ordinary liquidation is expected to occur within one year.

(Sec. 407(a), 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies secs. 202, 307, 312, 502, 505; 42 Stat. 161 et seq., as amended; 7 U.S.C. 192, 208, 213, 218a, 218d)

[32 FR 6901, May 5, 1967]

§ 203.11 [Reserved]

**§ 203.12 Statement with respect to providing services and facilities at stockyards on a reasonable and nondiscriminatory basis.**

(a) Section 304 of the Packers and Stockyards Act (7 U.S.C. 205) provides that: "All stockyard services furnished

pursuant to reasonable request made to a stockyard owner or market agency at such stockyard shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatory \* \* \*.”

(b) Section 305 of the Act (7 U.S.C. 206) states that: “All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory \* \* \*.”

(c) Section 307 (7 U.S.C. 208) provides that: “It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services \* \* \*.”

(d) Section 312(a) (7 U.S.C. 213(a)) provides that: “It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.”

(e) Section 301(b) (7 U.S.C. 201(b)) defines “stockyard services” as any “services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.”

(f) It is the view of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) that it is a violation of sections 304, 307, and 312(a) of the Act for a stockyard owner or market agency to discriminate, in the furnishing of stockyard services or facilities or in establishing rules or regulations at the stockyard, because of race, religion, color, or national origin of those persons using the stockyard services or facilities. Such services and facilities include, but are not limited to, the res-

taurant, restrooms, drinking fountains, lounge accommodations, those furnished for the selling, weighing, or other handling of the livestock, and facilities for observing such services.

(g) If the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has reason to believe that any stockyard owner or market agency has so discriminated in the furnishing of stockyard services or facilities, consideration will be given to the issuance of a complaint charging the stockyard or market agency with violations of the Act.

(Sec. 407(a), 42 Stat. 159, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies secs. 304, 307, 312, 42 Stat. 161 et seq., as amended, 7 U.S.C. 205, 208, 213)

[33 FR 17621, Nov. 26, 1968]

#### § 203.13 [Reserved]

#### § 203.14 Statement with respect to advertising allowances and other merchandising payments and services.

##### The Guidelines

1. *Who is a customer?* (a) A *customer* is a person who buys for resale directly from the packer, or through the packer’s agent or broker; and in addition, a customer is any buyer of the packer’s product for resale who purchases from or through a wholesaler or other intermediate reseller.

(NOTE: In determining whether a packer has fulfilled its obligations toward its customers, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will recognize that there may be some exceptions to this general definition of “customer.” For example, the purchaser of distress merchandise would not be considered a “customer” simply on the basis of such purchase. Similarly, a retailer who purchases solely from other retailers or one who makes only sporadic purchases, or one who does not regularly sell the packer’s product or who is a type of retail outlet not usually selling such products will not be considered a “customer” of the packer unless the packer has been put on notice that such retailer is selling its product.)

(b) *Competing customers* are all businesses that compete in the resale of the packer’s products of like grade and quality at the same functional level of distribution, regardless of whether they purchase direct from the packer or through some intermediary.

*Example:* A packer sells directly to some independent retailers, sells to the headquarters of chains and of retailer-owned cooperatives, and also sells to wholesalers. The direct-buying independent retailers, the headquarters of chains and of retailer-owned cooperatives, and the wholesalers' independent retailer customers are customers of the packer. Individual retail outlets which are part of the chains or members of the retailer-owned cooperatives are not customers of the packer.

2. *Definition of services.* Services are any kind of advertising or promotion of a packer's product, including but not limited to, cooperative advertising, handbills, window and floor displays, demonstrators and demonstrations, customer coupons, and point of purchase activity.

3. *Need for a plan.* If a packer makes payments or furnishes services, it should do so under a plan that meets several requirements. If there are many competing customers to be considered, or if the plan is at all complex, the packer would be well advised to put its plan in writing. The requirements are:

(a) *Proportionally equal terms*—The payments or services under the plan should be made available to all competing customers on proportionally equal terms. This means that payments or services should be made proportionately on some basis that is fair to all customers who compete in the resale of the packer's products. No single way to achieve the proper proportion is prescribed, and any method that treats competing customers on proportionally equal terms may be used. Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified period. Other methods which are fair to all competing customers are also acceptable.

*Example 1:* A packer may properly offer to pay a specified part (say 50 percent) of the cost of local advertising up to an amount equal to a set percentage (such as 5 percent) of the dollar volume of such purchases during a specified time.

*Example 2:* A packer may properly place in reserve for each customer a specified amount of money for each unit purchased and use it to reimburse those customers for the cost of advertising and promoting the packer's product during a specified time.

*Example 3:* A packer's plan should not provide an allowance on a basis that has rates graduated with the amount of goods purchased, as for instance, 1 percent of the first \$1,000 purchases per month, 2 percent on second \$1,000 per month, and 3 percent on all over that.

(b) *Packer's duty to inform*—The packer should take reasonable action, in good faith,

to inform all its competing customers of the availability of its promotional program. Such notification should include all the relevant details of the offer in time to enable customers to make an informed judgment whether to participate. Where such one-step notification is impracticable, the packer may, in lieu thereof, maintain a continuing program of first notifying all competing customers of the types of promotions offered by the packer and a specific source for the customer to contact in order to receive full and timely notice of all relevant details of the packer's promotions. Such notice should also inform all competing customers that the packer offers advertising allowances and/or other promotional assistance that are usable in a practical business sense by all retailers regardless of size. When a customer indicates its desire to be put on the notification list, the packer should keep that customer advised of all promotions available in its area as long as the customer so desires. The packer may make the required notification by any means it chooses; but in order to show later that it gave notice to a certain customer, it is in a better position to do so if it was given in writing or a record was prepared at the time of notification showing date, person notified, and contents of notification.

If more direct methods of notification are impracticable, a packer may employ one or more of the following methods, the sufficiency of which will depend upon the complexity of its own distribution system. Different packers may find that different notification methods are most effective for them:

(1) The packer may enter into contracts with its wholesaler, distributors or other third parties which conform to the requirements of item 5, *infra*.

(2) The packer may place appropriate announcements on product containers or inside thereof with conspicuous notice of such enclosure on the outside.

(3) The packer may publish notice of the availability and essential features of a promotional plan in a publication of general distribution in the trade.

*Example 1:* A packer has a wholesaler-oriented plan directed to wholesalers distributing its products to retailing customers. It should notify all the competing wholesalers distributing its products of the availability of this plan, but the packer is not required to notify retailing customers.

*Example 2:* A packer who sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its products at the retail level. If the packer directly notifies not only all competing direct purchasing retailers but also all competing retailers purchasing through the wholesalers as to the availability, terms and conditions

of the plan, the packer is not required to notify its wholesalers.

*Example 3:* A packer regularly engages in promotional programs and the competing customers include large direct purchasing retailers and smaller customers who purchase through wholesalers. The packer may encourage, but not coerce, the retailer purchasing through a wholesaler to designate a wholesaler as its agent for receiving notice of, collecting, and using promotional allowances for the customer. If a wholesaler or other intermediary by written agreement with a retailer is actually authorized to collect promotional payments from suppliers, the packer may assume that notice of and payment under a promotional plan to such wholesaler or intermediary constitutes notice and payment to the retailer.

(A packer should not rely on a written agreement authorizing an intermediary to receive notice of and/or payment under a promotional plan for a retailer if the packer knows, or should know, that the retailer was coerced into signing the agreement. In addition, a packer should assume that an intermediary is not authorized to receive notice of and/or payment under a promotional plan for a retailer unless there is a written authorization signed by such retailer.)

(c) Availability to all competing customers—The plan should be such that all types of competing customers may participate. It should not be tailored to favor or discriminate against a particular customer or class of customers but should, in its terms, be usable in a practical business sense by all competing customers. This may require offering all such customers more than one way to participate in the plan or offering alternative terms and conditions to customers for whom the basic plan is not usable and suitable. The packer should not, either expressly or by the way the plan operates, eliminate some competing customers, although it may offer alternative plans designed for different customer classes. If it offers alternative plans, all of the plans offered should provide the same proportionate equality and the packer should inform competing customers of the various alternative plans.

When a packer, in good faith, offers a basic plan, including alternatives, which is reasonably fair and nondiscriminatory and refrains from taking any steps which would prevent any customer, or class of customers, from participating in its program, it shall be deemed to have satisfied its obligation to make its plan functionally available to all customers, and the failure of any customer or customers to participate in the program shall not be deemed to place the packer in violation of the provisions of the Packers and Stockyards Act.

*Example 1:* A packer offers a plan of short term store displays of varying sizes, includ-

ing some which are suitable for each of its competing customers and at the same time are small enough so that each customer may make use of the promotion in a practical business sense. The plan also calls for uniform, reasonable certification of performance by the retailer. Because they are reluctant to process a reasonable amount of paperwork, some small retailers do not participate. This fact is not deemed to place a packer in violation of Item 3(c) and it is under no obligation to provide additional alternatives.

*Example 2:* A packer offers a plan for cooperative advertising on radio, television, or in newspapers of general circulation.<sup>1</sup> Because the purchases of some of its customers are too small, this offer is not “functionally available” to them. The packer should offer them alternative(s) on proportionally equal terms that are usable by them and suitable for their business.

(d) Need to understand terms—In informing customers of the details of a plan, the packer should provide them sufficient information to give a clear understanding of the exact terms of the offer, including all alternatives, and the conditions upon which payment will be made or services furnished.

(e) Checking customer’s use of payments—The packer should take reasonable precautions to see that services it is paying for are furnished and also that it is not overpaying for them. Moreover, the customer should expend the allowance solely for the purpose for which it was given. If the packer knows or should know that what it pays or furnishes is not being properly used by some customers, the improper payments or services should be discontinued.<sup>2</sup>

A packer who, in good faith, takes reasonable and prudent measures to verify the performance of its competing customers will be deemed to have satisfied its obligations under the Act. Also, a packer who, in good faith, concludes a promotional agreement with wholesalers or other intermediaries and who otherwise conforms to the standards of Item 5 shall be deemed to have satisfied this obligation. If a packer has taken such steps,

<sup>1</sup>In order to avoid the tailoring of promotional programs that discriminate against particular customers or class of customers, the packer in offering to pay allowances for newspaper advertising should offer to pay the same percentage of the cost of newspaper advertising for all competing customers in a newspaper of the customer’s choice, or at least in those newspapers that meet the requirements for second class mail privileges.

<sup>2</sup>The granting of allowances or payments that have little or no relationship to cost or approximate cost of the service provided by the retailer may be considered a violation of section 202 of the Act.

the fact that a particular customer has retained an allowance in excess of the cost, or approximate cost if the actual cost is not known, of services performed by the customer shall not alone be deemed to place a packer in violation of the Act.

(When customers may have different but closely related costs in furnishing services that are difficult to determine such as the cost for distributing coupons from a bulletin board or using a window banner, the packer may furnish to each customer the same payment if it has a reasonable relationship to the cost of providing the service or is not grossly in excess thereof.)

4. *Competing customers.* The packer is required to provide in its plan only for those customers who compete with each other in the resale of the packer's products of like grade and quality. Therefore a packer should make available to all competing wholesalers any plan providing promotional payments or services to wholesalers, and similarly should make available to all competing retailers any plan providing promotional payments or services to retailers. With these requirements met, a packer can limit the area of its promotion. However, this section is not intended to deal with the question of a packer's liability for use of an area promotion where the effect may be to injure the packer's competition.

5. *Wholesaler or third party performance of packer's obligations.* A packer may, in good faith, enter into written agreements with intermediaries, such as wholesalers, distributors or other third parties, including promoters of tripartite promotional plans, which provide that such intermediaries will perform all or part of the packer's obligations under this part. However, the interposition of intermediaries between the packer and its customers does not relieve the packer of its ultimate responsibility of compliance with the provisions of the Packers and Stockyards Act. The packer, in order to demonstrate its good faith effort to discharge its obligations under this part, should include in any such agreement provisions that the intermediary will:

- (1) Give notice to the packer's customers in conformity with the standards set forth in items 3(b) and (d), supra;
- (2) Check customer performance in conformity with the standards set forth in item 3(e), supra;
- (3) Implement the plan in a manner which will insure its functional availability to the packer's customers in conformity with the standards set forth in item 3(c), supra (This must be done whether the plan is one devised by the packer itself or by the intermediary for use by the packer's customers.); and
- (4) Provide certification in writing and at reasonable intervals that the packer's customers have been and are being treated in conformity with the agreement.

A packer who negotiates such agreements with its wholesalers, distributors or third party promoters will be considered by the Administration to have justified its "good faith" obligations under this section only if it accompanies such agreements with the following supplementary measures: At regular intervals the packer takes affirmative steps to verify that its customers are receiving the proportionally equal treatment to which they are entitled by making spot checks designed to reach a representative cross section of its customers. Whenever such spot checks indicate that the agreements are not being implemented in such a way that its customers are receiving such proportionally equal treatment, the packer takes immediate steps to expand or to supplement such agreements in a manner reasonably designed to eliminate the repetition or continuation of any such discriminations in the future.

Intermediaries, subject to the Packers and Stockyards Act, administering promotional assistance programs on behalf of a packer may be in violation of the provisions of the Packers and Stockyards Act, if they have agreed to perform the packer's obligations under the Act with respect to a program which they have represented to be usable and suitable for all the packer's competing customers if it should later develop that the program was not offered to all or, if offered, was not usable or suitable, or was otherwise administered in a discriminatory manner.

6. *Customer's liability.* A customer, subject to the Packers and Stockyards Act, who knows, or should know, that it is receiving payments or services which are not available on proportionally equal terms to its competitors engaged in the resale of the same packer's products may be in violation of the provisions of the Act. Also, customers (subject to the Packers and Stockyards Act) that make unauthorized deductions from purchase invoices for alleged advertising or other promotional allowances may be proceeded against under the provisions of the Act.

*Example:* A customer subject to the Act should not induce or receive an allowance in excess of that offered in the packer's advertising plan by billing the packer at "vendor rates" or for any other amount in excess of that authorized in the packer's promotion program.

7. *Meeting competition.* A packer charged with discrimination under the provisions of the Packers and Stockyards Act may defend its actions by showing that the payments were made or the services were furnished in good faith to meet equally high payments made by a competing packer to the particular customer, or to meet equivalent services furnished by a competing packer to the particular customer. This defense, however,

is subject to important limitations. For instance, it is insufficient to defend solely on the basis that competition in a particular market is very keen, requiring that special allowances be given to some customers if a packer is "to be competitive."

8. *Cost justification.* It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a packer to show that such payment or service could be justified through savings in the cost of manufacture, sale, or delivery.

(Approved by the Office of Management and Budget under control number 0580-0015)

[58 FR 52886, Oct. 13, 1993; 58 FR 58902, Nov. 4, 1993, as amended at 68 FR 75388, Dec. 31, 2003]

**§ 203.15 Trust benefits under sections 206 and 207 of the Act.**

(a) Within the times specified under sections 206(b) and 207(d) of the Act, any livestock seller, live poultry seller or grower, to preserve his interest in the statutory trust, must give written notice to the appropriate packer or live poultry dealer and file such notice with the Secretary. One of the ways to satisfy the notification requirement under these provisions is to make certain that notice is given to the packer or live poultry dealer within the prescribed time by letter, mailgram, or telegram stating:

(1) Notification to preserve trust benefits;

(2) Identification of packer or live poultry dealer;

(3) Identification of seller or poultry grower;

(4) Date of the transaction;

(5) Date of seller's or poultry grower's receipt of notice that payment instrument has been dishonored (if applicable); and

(6) Amount of money due; and to make certain that a copy of such letter, mailgram, or telegram is filed with a GIPSA Regional Office or with GIPSA, USDA, Washington, DC 20250, within the prescribed time.

(b) While the above information is desirable, any written notice which informs the packer or live poultry dealer and the Secretary that the packer or live poultry dealer has failed to pay is sufficient to meet the above-mentioned

statutory requirement if it is given within the prescribed time.

(Approved by the Office of Management and Budget under control number 0580-0015)

[54 FR 16357, Apr. 24, 1989, as amended at 68 FR 75388, Dec. 31, 2003]

**§ 203.16 Mailing of checks in payment for livestock purchased for slaughter, for cash and not on credit.**

(a) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) recognizes that one who sells livestock to a packer, market agency, or dealer, who is purchasing for slaughter, may not intend to be present at the point of transfer of possession of the livestock, to receive payment, at the time a check in payment for such livestock may be delivered by the purchaser, and may not wish to authorize a representative to receive such a check; or for other reasons such a seller may prefer that such a purchaser make payment by mailing a check within the time limit as prescribed in section 409(a) of the Act. In cases when the seller does not intend to be present, he may use the following form of notification to the purchaser:

I do not intend to be present at the point of transfer of possession of livestock sold by me to (name of packer, market agency, or dealer) for the purpose of receiving a check in payment for such livestock.

I hereby direct (name of packer, market agency, or dealer) to make payment for livestock purchased from me, by mailing a check for the full amount of the purchase price before the close of the next business day following the purchase of livestock and transfer of possession thereof or, in the case of a purchase on a "carcass" or "grade and yield" basis, not later than the close of the first business day following determination of the purchase price.

This does not constitute an extension of credit to (name of packer, market agency or dealer). This is subject to cancellation by me at any time, and if not cancelled by (date), it shall terminate on that date.

If the seller, for reasons other than not being present to receive payment, prefers to have the packer, market agency, or dealer make payment by mailing a check within the time limit as provided in section 409(a), he may use the above form but should not include the

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statement in the first sentence that he does not intend to be present.

(b) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) believes that such an agreement would not constitute an extension of credit within the meaning of section 206 of the Act because it would not give the purchaser any more time to issue a check than is provided in section 409(a).

(Approved by the Office of Management and Budget under control number 0580-0015)

(Sec. 401, 42 Stat. 168 (7 U.S.C. 221); sec. 407, 42 Stat. 169 (7 U.S.C. 228); sec. 409, as added by sec. 7, 90 Stat. 1250 (7 U.S.C. 228b); 7 CFR 2.17, 2.54; 42 FR 35625; Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.); 7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[42 FR 49929, Sept. 28, 1977, as amended at 49 FR 39516, Oct. 9, 1984; 68 FR 75388, Dec. 31, 2003]

### **§ 203.17 Statement of general policy with respect to rates and charges at posted stockyards.**

(a) Requests have been received from stockyard operators, market agencies, and livestock producers urging a reduction of rate regulation at posted stockyards. Their requests are based on the belief that competition among markets will set a level of rates and charges fair to both the market operator and to the livestock producer. Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will accept for filing tariffs containing any level of charges after 10 days' notice to the public and to the Secretary as required by the Act.

(b) Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will not investigate the level of rates and charges established by stockyard owners and market agencies for reasonableness except upon receipt of a valid complaint or under compelling circumstances warranting such an investigation. Stockyard owners and market agencies will have substantial flexibility in setting their own rates and charges.

(c) Complaints filed about the reasonableness of rates and charges will be investigated to determine the validity of such complaints and appropriate action taken if warranted.

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(d) Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will continue to insure that the schedules of rates and charges filed with the Department are applied uniformly and in a nondiscriminatory manner.

(Approved by the Office of Management and Budget under control number 0580-0015)

(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33004, Aug. 20, 1984, as amended at 68 FR 75388, Dec. 31, 2003]

### **§ 203.18 Statement with respect to packers engaging in the business of custom feeding livestock.**

(a) In its administration of the Packers and Stockyards Act, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has sought to promote and maintain open and fair competition in the livestock and packing industries, and to prevent unfair or anticompetitive practices when they are found to exist. It is the opinion of the Administration that the ownership or operation of custom feedlots by packers presents problems which may, under some circumstances, result in violations of the Packers and Stockyards Act.

(b) Packers contemplating entering into such arrangements with custom feedlots are encouraged to consult with the Administration prior to the commencement of such activities. Custom feedlots are not only places of production, but are also important marketing centers, and in connection with the operation of a custom feedlot, it is customary for the feedlot operator to assume responsibility for marketing fed livestock for the accounts of feedlot customers. When a custom feedlot is owned or operated by a packer, and when such packer purchases fed livestock from the feedlot, this method of operation potentially gives rise to a conflict of interest. In such situations, the packer's interest in the fed livestock as a buyer is in conflict with its obligations to feedlot customers to market their livestock to the customer's best advantage. Under these circumstances, the packer should take appropriate measures to eliminate any

conflict of interest. At a minimum, such measures should insure:

(1) That feedlot customers are fully advised of the common ties between the feedlot and the packer, and of their rights and options with respect to the marketing of their livestock;

(2) That all feedlot customers are treated equally by the packer/custom feedlot in connection with the marketing of fed livestock; and

(3) That marketing decisions rest solely with the feedlot customer unless otherwise expressly agreed.

(c) Packer ownership or operation of custom feedlots may also give rise to competitive problems in some situations. Packers contemplating or engaging in the business of operating a custom feedlot should carefully review their operations to assure that no restriction of competition exists or is likely to occur.

(d) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) does not consider the existence of packer/custom feedlot relationships, by itself, to constitute a violation of the Act. In the event it appears that a packer/custom feedlot arrangement gives rise to a violation of the Act, an investigation will be made on a case-by-case basis, and, where warranted, appropriate action will be taken.

(Approved by the Office of Management and Budget under control number 0580-0015)

(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33004, Aug. 20, 1984, as amended at 68 FR 75388, Dec. 31, 2003]

**§ 203.19 Statement with respect to packers engaging in the business of livestock dealers or buying agencies.**

(a) In its administration of the Packers and Stockyards Act, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has sought to prevent conflicts of interest and to maintain open and fair competition in the livestock and meat packing industries. The ownership or operation of livestock dealers or buying agencies by packers, under some circumstances, may result in violations of the Packers and Stockyards Act.

(b) Traditionally, livestock dealers and buying agencies purchase livestock for resale or to fill orders for farmers, ranchers, producers, other livestock firms and packers. When a livestock dealer or buying agency is owned or operated by a packer, and when such packer is also buying livestock for its own operational requirements, there is a potential conflict of interest. Furthermore, the purchase and sale of livestock by meat packers may result in control of markets and prices which could adversely affect both livestock producers, competing packers, and consumers.

(c) Arrangements between packers and dealers or buying agencies which do not normally create a conflict of interest or result in a restraint of competition include:

(1) Operations utilizing different species or classes of livestock; (2) operations where the business activities are widely separated geographically; and (3) operations where tie-in purchases or sales are not involved. Packers contemplating engaging in the business of a livestock dealer or a buying agency are encouraged to consult with the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) prior to the commencement of such activities.

(d) In the event a packer/dealer or a packer/buying agency arrangement appears to give rise to a violation of the Act, an investigation will be made on a case-by-case basis and, where warranted, appropriate action will be taken.

(Approved by the Office of Management and Budget under control number 0580-0015)

(7 U.S.C. 228, 228b, 222, 15 U.S.C. 46)

[49 FR 32845, Aug. 17, 1984; 54 FR 26349, June 23, 1989, as amended at 68 FR 75388, Dec. 31, 2003]

**PART 204—ORGANIZATION AND FUNCTIONS**

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