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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AA45

Regulations Issued Under the Packers and Stockyards Act

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA), USDA.

ACTION: Final rule.

SUMMARY: As part of GIPSA's efforts to review and streamline its regulations, proposed amendments to rules issued under the Packers and Stockyards (P&S) Act were published in the Federal Register on August 21, 1995, and identified as Group III. This document adopts proposed changes which modify two regulations, to provide uniform termination procedures for all bonds and bond equivalents and to change the requirement that funds pledged to secure bond equivalents be maintained in FDIC-insured accounts to permit their deposit in any Federally-insured account, and retains seven regulations in their present form.

EFFECTIVE DATE: August 9, 1996.

FOR FURTHER INFORMATION CONTACT: Dan Van Ackeren, Director, Livestock Marketing Division, 202–720–6951, or Tommy Morris, Director, Packer and Poultry Division, 202–720–7363.

SUPPLEMENTARY INFORMATION: In response to the proposed rule published in the Federal Register (60 FR 43411), the Agency received comments from two marketing associations, one livestock selling agency, a State department of agriculture, and a law firm representing livestock marketing interests.

Two comments were received regarding the modification of § 201.27. This regulation provides for approved sureties, authorizes bond equivalents, and requires bond or bond equivalents to be on forms approved by the Administrator. Both comments generally supported the proposed modification of § 201.27(b)(1) and (b)(2), but urged the Agency to assure that funds pledged under bond equivalents be provided the same degree of protection as those insured by the Federal Deposit Insurance Corporation (FDIC). As long as funds are actually deposited or invested in fully negotiable obligations of the United States, deposited in Federally-insured accounts, or letters of credit are issued by Federally-insured institutions, then bond equivalents will continue to have the same degree of protection as those insured by the FDIC.

As proposed, § 201.27(b)(1) and (b)(2) will be modified to broaden these subsections to permit funds pledged under bond equivalents to be on deposit or in accounts that are Federally-insured and not limited to only deposits or accounts insured by the FDIC. This modification would also permit all Federally-insured banks or other institutions to issue letters of credit, not just those banks or institutions insured by FDIC. The primary benefit accrues to persons choosing to meet bonding requirements with bond equivalents by permitting all Federally-insured deposits and letters of credit (not just FDIC) and would expand the number of banks or other institutions available to those seeking bond equivalents without increasing the risk to livestock sellers.

No comments were received concerning § 201.34. This regulation sets forth procedures for termination of market agency, dealer, and packer bonds and trust fund agreements. As proposed, the Agency will amend § 201.34(c) to include termination procedures for trust agreements. This will provide uniform termination for all bonds and bond equivalents.

As proposed, each of the following regulations will be retained in its present form:

§ 201.10 Requirements and procedures for registration.

§ 201.28 Duplicates of bonds or equivalents to be filed with regional supervisor.

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

§ 201.30 Amount of market agency, dealer and packer bonds.

§ 201.31 Conditions in market agency, dealer and packer bonds.

§ 201.32 Trustee in market agency, dealer and packer bonds.

§ 201.33 Persons damaged may maintain suit; filing and notification of claims; time limitation; legal expenses.

In the process of reviewing these regulations, it was determined that they were necessary to the efficient and effective enforcement of the P&S Act and to the orderly conduct of the marketing system. The absence of any of the regulations would result in increased litigation.

Three comments were received concerning § 201.10, which specifies the requirements and procedures for registration for those persons desiring to operate as market agencies or dealers as defined in § 301 of the P&S Act. One comment suggested modifying § 201.10 by prohibiting market agencies, dealers, and packers from operating subject to the P&S Act, under their bond or anyone else's bond, until all debts owed approved livestock auction markets had been paid, regardless of whether such debt had been dismissed in bankruptcy. The Agency believes that such a modification would not be in the best interest of all livestock sellers since the comment referred to only debts owed to approved livestock auction markets. The Agency could also be in conflict with Federal bankruptcy statutes if a registration was denied based on a debt dismissed in bankruptcy. Under the provisions of the P&S Act, all market agencies and dealers are required, as a condition for registration, to be solvent. That is, current assets must be equal to or exceed current liabilities.

Two other comments received regarding § 201.10 suggested the regulation lacks specificity as to what circumstances or past activities are deemed actionable in denying the registration of an applicant. They also suggested serious violations of the Act, such as fraud, theft, and embezzlement, should warrant denial of registration unless the applicant can show just cause why registration should not be denied. The Agency believes this concern is sufficiently addressed in § 201.10(b) which specifies that if the Administrator has reason to believe the applicant is unfit to engage in the activity for which application has been made, the applicant will be afforded an opportunity for a full hearing for the

purpose of showing cause why the application should not be denied. This paragraph gives the Agency authority to review each application and to deny registration to those believed unfit to engage in the business of a market agency or dealer. It is believed § 201.10(b) can be enforced more effectively if this regulation is not narrowed to specified violations of the P&S Act. After considering the comments, the Agency has concluded this regulation should be retained in its present form.

One comment was received regarding § 201.29, which requires market agencies, packers and dealers to file and maintain bonds. The comment indicated no particular concern regarding the language in § 201.29, but suggested the P&S Act should be changed to insure that all major buyers of livestock, including feedlots, be required to maintain a reasonable bond. Those feedlots operating as dealers or market agencies as defined under the P&S Act, are subject to the registration and bonding provisions. Broader coverage to all major buyers would require a change in the statute. Therefore, the Agency has concluded this regulation should be retained in its present form.

All five comments to the proposal addressed § 201.30. This regulation sets forth the formulae for computing bonds for market agencies, dealers, and packers. It also provides the Administrator the authority to adjust the level of bond required whenever he/she determines a bond is not adequate to secure the obligations of the person or firm.

Two comments generally supported the Agency's proposal to retain § 201.30 in its present form and believed that even a modest increase in bond levels would not appreciably improve the financial protection afforded livestock sellers and may exclude smaller reputable businesses from operating altogether. The Agency was also urged to give serious consideration to establishing alternatives to the current bonds and bond equivalents such as the financial security funds used in several Canadian provinces.

One comment suggested changing the formulae for determining bond size for market agencies buying on commission and dealers (Clause 2 bond) to one half of an average week's gross purchases from the prior year (52 weeks). Another comment suggested the Agency eliminate the 10 percent threshold on dealer bonds over $75,000 because the threshold is unfair to smaller dealers and the default of a larger dealer could have a greater impact on the livestock industry than a smaller dealer. One comment recommended increasing the minimum requirement for dealers and market agencies buying on commission from the current $10,000 to $25,000. The comment also stated that an increase in the minimum bond from $10,000 to $25,000 may discourage potential dealers, who may not be financially secure or responsible, from becoming a livestock dealer.

After considering these comments, the Agency has concluded § 201.30 will be retained in its present form. The Agency does not believe it is necessary to increase the minimum bond level of Clause 2 bonds or to remove the threshold on bonds over $75,000 at this time. The cost to the industry of increasing minimum bond levels would far outweigh the increased protection that would be gained by such an increase. Small dealers and market agencies buying on commission, which include 48 percent of all dealers or market agencies, would be hardest hit by an increase in bond levels and may find it difficult to remain in business. The Agency also believes that the cost to the industry of removing the 10 percent threshold on Clause 2 bonds over $75,000 would far outweigh the benefit to livestock sellers and cause an undue hardship on larger dealers and market agencies buying on commission since many would likely be unable to obtain the required bond coverage. However, the Agency will continue to review the levels of bonds and to study alternative methods of providing financial protection to livestock sellers. In addition, the Department is supporting proposed legislation to amend the P&S Act to establish a dealer trust for the benefit of sellers of livestock to dealers and market agencies buying on commission. If the proposed legislation is passed, livestock sellers will benefit from additional protection under the Act.

Two comments were received regarding § 201.32 which refers to trustees named in market agency, dealer, and packer bonds. Both comments suggested § 201.32 be amended to show that whenever multiple trustees are listed on a bond, the Agency should designate a ''lead'' trustee to represent those who filed claims against the bond. Both comments further suggested that whenever trust agreements or trust fund agreements (bond equivalents) are used in lieu of a bond, the bank issuing collateral for a trust fund agreement or an irrevocable letter of credit should not be permitted to act as trustee. They believe an inherent conflict of interest exists whenever the bank holding the collateral for a bond equivalent (or issued a letter of credit) is also named as trustee.

After reviewing these comments, the Agency has decided to retain § 201.32 in its present form. The Agency does not accept bonds or bond equivalents with multiple trustees listed, therefore, does not believe it is necessary to amend the regulation to designate a ''lead'' trustee. Trustees on bond equivalents have a fiduciary responsibility to carry out their duty as trustee when bond claims are filed. Whenever a trustee fails to carry out their fiduciary responsibility on behalf of the claimants, the Agency has the authority to appoint a new trustee to carry out the trustee's responsibility.

Three comments were received concerning § 201.33, which pertains to filing and notification of bond claims, time limitations, and the filing of civil suit to recover on the bond or bond equivalent.

One comment suggested the number of days to file a claim stay at 60 days, but to pay only those claims that are filed within 21 days of the first unpaid debt. The comment further stated that this is sufficient time for those following the prompt pay laws and they should not be penalized by dividing bond proceeds with those who have given buyers credit. The Agency believes this suggestion would give livestock sellers insufficient time to file the bond claims. Some sellers of livestock may not have specifically extended credit to the buyer, yet may be classified as a credit seller if a bond claim is not filed within 21 days of the date of the transaction and therefore, not included in the payout of bond proceeds. We believe there is insufficient basis to warrant this change in the bond requirements at this time.

Two other comments suggested two changes to this regulation. They suggested that the Agency clarify the term ''date of transaction.'' They state that it has been assumed for years that the term ''date of transaction'' meant the date of the sale or, at most, the date payment was due after the sale. The comment also accurately states that § 201.33(d) requires that a claim must be filed within 60 days from the date of the transaction on which the claim is based and, if for some reason the claim is not paid or acknowledged as a valid claim, the claimant can then file suit on that claim alleging as a cause of action that the claimant has a valid claim but the surety has denied liability or failed to pay the claim. In other words, filing a claim within 60 days from the date of the transaction is a condition precedent which must be met in order to file suit. They believe this paragraph should be

clarified to avoid confusion and keep persons from filing suit against a surety company 15 or 18 months after a transaction when no claim was ever filed against the bond.

The Agency believes that the language in § 201.33 is sufficiently clear and does not believe it is necessary to define ''date of transaction'' or to modify paragraph (d). In addition, § 409 of the P&S Act provides a basis for when payment is due in subject transactions. Under § 409, payment must be made by the close of the next business day following the purchase of livestock and transfer of possession thereof. After considering these comments, the Agency has decided to retain § 201.33 in its present form.

The proposed changes in § 201.27(b)(1) and (b)(2) and in § 201.34(c) do not impose or change any recordkeeping or information collection requirements. Existing requirements in these regulations have been previously approved by OMB under control No. 0590–0001.

As provided by the Regulatory Flexibility Act, it is hereby certified that these amended rules will not have significant economic impact on a substantial number of small entities and a statement explaining the reasons for the certification is set forth in the following paragraph and is being provided to the Chief Counsel for Advocacy of the Small Business Administration.

While these proposed amended rules impact small entities, they will not have a significant economic impact on any entity, large or small. The primary effect of the changes in rules § 201.27(b)(1) and (b)(2) is to permit funds pledged under bond equivalents to be on deposit or in accounts that are Federally insured and to permit Federally-insured banks and other institutions to issue letters of credit. Eligible institutions would no longer be restricted to those banks or institutions insured by FDIC. The primary effect of the rule change in § 201.34(c) is to include the termination of trust agreements.

These rules have been determined to be not significant for purposes of Executive Order 12866 and, therefore, have not been reviewed by OMB. These amendments do not impose any new paperwork requirements and do not have implications for Federalism under the criteria for E.O. 12612.

This final rule has been reviewed under E.O. 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This rule does not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

List of Subjects in 9 CFR Part 201

Bonding, Dealer, Market Agency, Packer, Registration.

Done at Washington, D.C., on this 1st day of July 1996.

James R. Baker,

Administrator, Grain Inspection, Packers and Stockyards Administration.

For the reasons set forth in the preamble, the Grain Inspection, Packers and Stockyards Administration will amend 9 CFR part 201 as follows:

PART 201—[AMENDED]

1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 204, 228: 7 CFR 2.17(e), 2.56.

2. Revise § 201.27(b) to read as follows:

§ 201.27 Underwriter: equivalent in lieu of bonds; standard forms.

* * * * *

(b) Any packer, market agency, or dealer required to maintain a surety bond under these regulations may elect to maintain, in whole or partial substitution for such surety bond, a bond equivalent, or combination thereof, must be the total amount of the surety bond otherwise required under these regulations. Any such bond equivalent must be in the form of:

(1) A trust fund agreement governing funds actually deposited or invested in fully negotiable obligations of the United States or Federally-insured deposits or accounts in the name of and readily convertible to currency by a trustee as provided in § 201.32, or

(2) A trust agreement governing funds which may be drawn by a trustee as provided in § 201.32, under one or more irrevocable, transferrable, standby letters of credit, issued by a Federally-insured bank or institution and physically received and retained by such trustee.

* * * * *

3. Revise § 201.34(c) as follows:

§ 201.34 Termination of market agency, dealer and packer bonds.

* * * * *

(c) Each trust fund agreement and trust agreement shall contain a provision requiring that, prior to terminating such agreement, at least 30 days notice in writing shall be given to the Administrator, Grain Inspection, Packers and Stockyards Administration, U.S. Department of Agriculture, Washington, D.C. 20250, by the party terminating the agreement. Such provision shall state that in the event the principal named therein files an acceptable bond or bond equivalent to replace the agreement, the 30-day notice requirement may be waived and the agreement will be terminated as of the effective date of the replacement bond or bond equivalent.

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9 CFR Part 201

RIN 0580–AA44

Regulations and Statements of General Policy Issued Under the Packers and Stockyards Act

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA), USDA.

ACTION: Final rule.

SUMMARY: As part of GIPSA's efforts to review and streamline its regulations, proposed amendments to rules issued under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) were published in the Federal Register (60 FR 29506) on June 5, 1995, and identified as Group II. This document adopts proposed changes which modify six trade practice regulations and retains seven regulations and seven statements of general policy in their present form.

EFFECTIVE DATE: August 9, 1996.

FOR FURTHER INFORMATION CONTACT: Daniel Van Ackeren, Director, Livestock Marketing Division, 202–720–6951, or Tommy Morris, Director, Packer and Poultry Division, 202–720–7363.

SUPPLEMENTARY INFORMATION: In response to the proposed rule published in the Federal Register (60 FR 29506), the Agency received comments from four organizations and two companies.

Although the Agency did not propose any changes to § 201.43, a poultry growers association suggested that a new paragraph be added to § 201.43 to require live poultry dealers to maintain certain records for flock placements. After considering the comment, the Agency has concluded that this regulation will be retained in its present form. The Agency believes that § 401 of the P&S Act adequately addresses the issue of record maintenance.

The Agency received three comments regarding § 201.49. A livestock trade association agrees with the proposed amendment. A major hog slaughterer suggests that records be retained for lot summaries instead of individual