

Outline
Issues to Address
Online/Internet Auctions

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I. Packers and Stockyard Act, 1921 (7 U.S.C. §181 et seq.)

- A. The purpose of the act is “[t]o protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.” (7 U.S.C. §181 and https://www.gipsa.usda.gov/laws/law/PS_act.pdf)
- B. The act applies to: Packers, Dealers, and Market Agencies
1. Packers: “any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.” (7 U.S.C. §191)
 2. Dealers: “any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vender or purchaser.” (7 U.S.C. §201(d))
 3. Market Agencies: “any person engaged in the business of (1) buying or selling commerce livestock on a commission basis or (2) furnishing stockyard services”. (7 U.S.C. §201(c))
- C. The act regulates the sale of livestock and poultry
1. Under the act, livestock only includes: cattle, sheep, swine, horses, mules, and goats. (7 U.S.C. §182(4))
 2. Under the act, poultry only includes: chickens, turkeys, ducks, geese, and other domestic fowl. (7 U.S.C. §182(6))
- D. The act assures fair trade practices through requirements including:
1. Registrations (7 U.S.C. §203)
 2. Bonds (7 U.S.C. §204)
 3. Prompt Payment or Waiver of Prompt Payment (7 U.S.C. §228b(a))
 4. Accurate Weighing and Scales (7 U.S.C. §213)
 5. Record keeping and allowing for inspection of records (7 U.S.C. §221)
 6. Custodial Accounts (9 C.F.R. 201.42)
- E. How Packers and Stockyards Act applies to Internet Auctions
1. It is currently unclear how the Packers and Stockyards Act applies to Internet Auctions, because no part of the statute is specific to Internet Auctions. (Victoria G. Myers, *Going, Going, Gone*, *The Progressive Farmer* (June/July 2013), *available at*: <http://dtnpf-digital.com/article/Going,+Going,+Gone+/1442193/165515/article.html>)
 2. The Livestock Marketing Association has introduced a bill “to clarify the duties relating to services furnished in connection with the buying or selling of livestock in commerce through online, video, or other electronic methods, and for other purposes.” (H.R. 5883)
 - a. The bill further defines a Market Agency to include the “buying or selling [of] livestock in commerce through online, video, or other electronic methods on a commission or other fee basis when handling or providing a means to handle receivables or proceeds from the sale of that livestock.” (H.R. 5883 Sec 2(c)(3))

- b. The bill also includes provisions to allow for more modern payment methods by changing language from only allowing wire transfers to “shall transfer funds to the account of the seller by wire, electronic fund transfer, or any other expeditious method determined appropriate by the Secretary.” (H.R. 5883 Sec 3)

II. Federal Food, Drug, and Cosmetic Act (21 U.S.C. §301 et seq.)

A. The purpose of the Food, Drug, and Cosmetic Act is to provide for safe labeling and use of food, drugs, and cosmetics, including that they not be adulterated or misbranded. (*See generally* <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214416.htm>)

B. The act applies to animals that are being offered for sale, in that animals being sold for slaughter cannot be adulterated. In part, the statute state “A food shall be deemed to be adulterated [...] [if it is] a new animal drug (or conversion product thereof) that is unsafe within the meaning of section 512 [21 U.S.C.S. §360b]...” (21 U.S.C. §342(a)(2)(C)(i-ii))

1. New animal drugs under section 512 are deemed unsafe unless: there is effective approval with respect to intended uses, there is a conditional approval with respect to intended uses, or there is an index listing with respect to its intended uses. (21 U.S.C. §360b(a)(1)(A-C).

C. How Federal Food, Drug, and Cosmetic Act applies to Internet Auctions

1. Animals offered for sale through Internet Auctions that are being slaughtered must comply with all parts of the Food, Drug, and Cosmetic Act, including that the meat not be adulterated. Therefore, there cannot be any unsafe drug residue left in the edible tissue of the animal. (*See* FDA warning letters 2012-DAL-WL-19) Also, drug use must be in conformance with its labeling, or it is considered adulterated. (*See* FDA warning letters 2012-DAL-WL-19 and 2015-NOL-07).

2. The FDA recommends auctioneers implementing a system to determine whether animals received for auction have been medicated, what drugs have been administered on an animal, and what the withdrawal period is for those particular drugs. The FDA further recommends either withholding animals who have been medicated or identifying the animal as medicated and selling it for something other than human consumption. (*See* FDA warning letter 2015-NOL-07).

III. Federal Trade Commission –Consumer Protection

A. Federal Trade Commission Act (15 U.S.C. §41 et seq.)

1. The purpose of the Federal Trade Commission Act is to empower to the Commission to: prevent unfair methods of competition, seek monetary redress for injured consumers, define unfair or deceptive practices, conduct investigations, and make legislative recommendations. (<https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act>)

2. The Federal Trade Commission Act ensures that advertising is non-deceptive and is not likely to cause substantial injury to the average consumer through unfair methods of competition. (*see* 15 U.S.C. §45)

3. How the Federal Trade Commission Act applies to Internet Auctions

- a. The Commission has jurisdiction to direct individuals and companies from using “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” However, excluded from their jurisdiction is bank, credit unions, common carries, and individuals and companies subject to the Packers and Stockyards Act except as provided in section 406(b). (15 U.S.C. §45)

b. Because the Packers and Stockyard Act also protects against unfair trade practices there is a jurisdictional overlap between The Federal Trade Commission and the Secretary of Agriculture in regards to advertising and marketing livestock and meat products, likely, including through Internet Auctions. (*see* 7 U.S.C. §227)

(1) The Packers and Stockyard Act limits this overlap by giving the Commission jurisdiction over the retail sale of “meat, meat food products, and livestock products in unmanufactured form, or poultry products” (7 U.S.C. §227(b) and <https://www.ftc.gov/enforcement/statutes/packers-and-stockyards-act>)

(2) The Commission also has jurisdiction over manufactured products and non-retail activities only “[w]hen the Secretary in the exercise of his duties requests of the Commission that it make investigations...” and when “the Commission determines that effective exercise of its power or jurisdiction [...] will be impaired by the absence of power or jurisdiction over all acts of transactions involving such commodities in such investigation or proceeding.” (7 U.S.C. §227(b) and <https://www.ftc.gov/enforcement/statutes/packers-and-stockyards-act>)

B. Mail, Internet, or Telephone Order Merchandise Rule (16 C.F.R. Part 435)

1. The purpose of the Mail, Internet, or Telephone Order Merchandise Rule is to require sellers, at the time of solicitation, to provide buyers with a reasonable shipping time “clearly and conspicuously states in any such solicitation; or if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer.” (16 C.F.R. Part 435.2(a)(1))

2. The Mail, Internet or Telephone Merchandise Rule likely applies to online livestock auctions the same way it applies to any other Internet Auction. Sellers of livestock also have to give a reasonable shipping period, and if none is given, within 30 days of receipt. (*see* 16 C.F.R. Part 435.2(a)(1))

IV. Other Potential Issues Relating to Internet Auctions

A. State Requirements

1. Whether livestock internet auctions require a license, license requirements, and licensing exceptions are determined by the individual states, Examples:

2. Ohio: O.R.C. §4707.01- the statutory definition of auction includes the sale of personal property, goods, or chattels via verbal exchange, regular mail, telecommunications, the internet, an electronic transmission, or a physical gesture. Because Ohio law includes internet auctions in the definition of “auction” internet auctioneers in Ohio therefore must also be licensed. In addition to being licensed, Ohio also requires auctioneers to apprentice before obtaining their license.

a. However, licensed livestock dealers under Chapter 943 of the Revised Code are exempt from the licensing requirement as long as they exclusively sell livestock and as long as they use a licensed auctioneer to conduct the auction. (O.R.C. §4707.02(B)(6))

b. “Sales of real or personal property conducted by means of the internet [do not require an auctioneer license] provided that they are not conducted in conjunction with a live auction” (O.R.C. §4707.02(B)(8))

3. Texas: T.O.C. §1802.001- the statutory definition of auctioneer specifically limits auctioneers as only being people who “...offer to sell property of another person by live bid at auction.” However, live auctioneers in the state are required to be licensed. (T.O.C. §1802.051(a)).

a. The code specifically excludes Internet Auctions (T.O.C. §1802.002(a)(14))

b. Texas code also removes from the statute “auction[s] of livestock conducted by a posted stockyard or market agency as defined by the Federal Packers and Stockyard Act” and “auctions of livestock conducted by a nonprofit livestock trade association chartered in this state, if the auction involves only the sale of livestock owned by members of the trade association” (T.O.C. §1802.002(a)(8-9))

4. Nevada: N.R.S. §573.020- Nevada has a specific sale of livestock statute, that requires individuals holding a public livestock auction to be licensed. However, it is likely that this only applies to live auctions because of the definition of Public livestock auction. “[A]ny sale or exchange of livestock held by any person at an established place of business or premises where the livestock is assembled for sale or exchange.” (N.R.S. §573.010(6)).

B. Federal and State Checkoff Programs

1. The federal checkoff program is a marketing program that is assessed and charged on a per unit basis of specific commodities authorized through federal statute. (<http://nationalaglawcenter.org/overview/checkoff/> and 7 U.S.C. §7411-7425)

a. Federal checkoff programs include:

- (1) American Lamb Board
- (2) Cattlemen’s Beef Board
- (3) National Dairy Promotion & Research Board
- (4) National Pork Board
- (5) Full list available at <https://www.ams.usda.gov/rules-regulations/research-promotions>

2. States may also have checkoff programs. The individual states can determine the amount of the checkoff, what animals the checkoff applies to, and what individuals are subject to the states checkoff. State and Federal Checkoffs do apply to livestock sold over the internet.

a. For example: The Ohio Beef Council checkoff is an additional \$1 per head required to be paid by all buyers “for any reason and regardless of age or sex [of the cattle]”. The Ohio Beef Council also requires Ohio cattle that are marketed over the internet by individuals located outside of the state to remit the extra one dollar state checkoff. Finally, Ohio requires out of state cattle that are sold within the state to split the extra one dollar check off between Ohio and the state the cattle are from. (<http://www.ohiobeef.org/farmers/faqs>)

b. Compared to the dairy checkoff in Ohio (and shared with West Virginia) where all dairy farmers pay 15 cents per 100 gallons of milk, and the fee is distributed between ADA Midwest, who receives 10 cents and the remaining 5 cents goes to the Nation Dairy Board. (<https://www.drink-milk.com/for-dairy-farmers> and <http://www.dairy.org/about-dmi>)

C. UCC Issues with Clear Title and Warranty Disclaimers

1. Warranty Disclaimers

a. UCC §2-316 allows for sellers to limit warranties through conspicuous language such as “as is” or “with all faults” as long as the buyer has an opportunity to inspect. Implied warranties can also be modified through “course of dealing or course of performance or usage of trade.” The UCC applies to the sale of goods whether or not the sale was over the internet.

b. ORC §1302.29 Exclusion or modification of warranties is similar to UCC §2-316 except Ohio added an additional provision to further protect sellers of livestock. “[W]ith respect to the sale of livestock between merchants, except sales of livestock for immediate slaughter, both of the following apply: there is no implied warranty that the animal is free from disease[;] there is an implied warranty that the seller has no knowledge or reason to know that the animal is not free from disease at the time of the sale and that he has complied with all state and federal health rules applicable to the animal.”

2. Clear Title

a. 7 U.S.C. §1631 was created to protect individuals who buy farm products with an existing security interest on it, from secured lenders who under certain State laws could enforce the security interest against the buyer. Without this protection purchasers would be responsible for paying for the farm product when they buy it from a seller and for paying off the secured lender.

(1) Under the statute, a buyer, in the ordinary course of business, who buys a farm product—including livestock—from a merchant farmer “take[s] free of [any] security interest created by the seller, even though the security interest is perfected; and the buyer know of the existence of such interest.” (7 U.S.C. §1631(d))

(2) A purchaser or commission merchant only takes subject to the security interest if: the buyer or commission merchant received notice of the security interest from the secured party or the seller within one year before the sale; the buyer or commission merchant failed to pay for the products; or the buyer or commission merchant failed to register with the Secretary of State prior to purchasing farm products produced in a central filing state and the secured party filed an effective financing statement. (7 U.S.C. §1631(e and g))

(a) A commission merchant is “any person engaged in the business of receiving any farm product for sale, on commission, or for or on behalf of another person.” (7 U.S.C. §1631(c)(3)). Auction houses are commission merchants.

(b) In central filing system states (there are 19, a full list of which is available at <https://www.gipsa.usda.gov/laws/cleartitle.aspx>) “the Secretary of State maintains a list of all buyers of farm products, commission merchants, and selling agents who register with the Secretary of State” which is then distributed among all of the registrants. This list is then used to provide notice to buyers and commission merchants of existing security interests. (7 U.S.C. §1631(c)(2)(D-E)). Therefore, auction firms selling farm products produced in a central filing state should register with that state’s Secretary of State prior to conducting any sales.