

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 46

[Docket Number FV96-351]

RIN 0581-AB41

#### Amendments to the Perishable Agricultural Commodities Act (PACA)

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed Rule.

**SUMMARY:** The Department of Agriculture (USDA) invites comments on proposed revisions to the PACA Regulations that are required in order to implement legislative changes signed by President Clinton on November 15, 1995 (Pub. L. 104-48). Specifically, the legislative changes phase retailers and grocery wholesalers out of license fee payments over a 3-year period; establish a one-time administrative fee for new retailers and grocery wholesalers entering the program after the 3-year phase-out period; increase license fees from \$400 to \$550 annually for all other licensees; grant USDA authority to adjust future license fees through "notice and comment" rulemaking; eliminate the requirement of filing notice of intent to preserve trust benefits with USDA in the PACA trust; require USDA to receive a written complaint before initiating an investigation; require additional USDA investigation notification procedures; increase administrative penalties; establish civil penalties as an alternative to revocation or suspension of license; continue current filing fees for formal and informal reparation complaints; explicit address the status of collateral fees and expenses; clarify misbranding prohibitions; and amend the provisions of PACA regarding the determination of responsibly connected individuals.

**DATES:** Comments must be received by November 12, 1996.

**ADDRESSES:** Interested persons are invited to submit written comments

concerning this proposal. Comments must be sent to James R. Frazier, Chief, Fruit and Vegetable Division, PACA Branch, Room 2095-So. Bldg., P.O. Box 96456, Washington, D.C. 20090-6456. All comments should reference the docket number and the date and page number of this issue in the Federal Register and will be made available for public inspection in the PACA Branch during regular business hours.

#### FOR FURTHER INFORMATION CONTACT:

James R. Frazier, Chief, PACA Branch, Room 2095-So. Bldg., Fruit and Vegetable Division, AMS, USDA, Washington, D.C. 20250, Phone (202) 720-4180.

**SUPPLEMENTARY INFORMATION:** This proposal is issued under authority of section 15 of the PACA (7 U.S.C. 499o).

The license fee increase was signed into law by President Clinton on November 15, 1995, as part of the PACA Amendments of 1995 (Pub. L. 104-48). Public Law 104-48 mandated an immediate increase in the license fees. As a result of this mandate, license renewals and new applications received after November 15, 1995, are subject to the \$550 fee. Notice of the fee increase was published in the Federal Register on December 27, 1995.

This rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This proposed rule will 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.

#### Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been

defined by the Small Business Administration (SBA) (13 CFR 121.601) as those whose annual receipts are less than \$5,000,000. The PACA requires commission merchants, dealers, and brokers buying or selling fruits and/or vegetables in interstate or foreign commerce who meet certain threshold requirements to be licensed. There are approximately 15,300 PACA licensees. Separating licensees by the nature of business, there are approximately 6,000 wholesalers, 4,750 retailers, 2,100 brokers, 1,200 processors, 550 commission merchants, 450 food service businesses, 150 grocery wholesalers, and 50 truckers licensed under PACA. The license is effective for 1 year unless suspended or revoked by USDA for valid reasons [46.9 (a)-(h)], and must be renewed annually by the licensee. Many of the licensees may be classified as small entities.

Wholesalers, processors, food service companies, grocery wholesalers, and truckers are considered to be dealers and subject to a license when they buy or sell more than 2,000 pounds of fresh and/or frozen fruits and vegetables in any given day. Dealers whose fruit and vegetable purchases or sales do not exceed the 2,000 pound threshold are exempt from the license requirement. A retailer is considered to be a dealer and subject to license when the invoice cost of its perishable agricultural commodities exceeds \$230,000 in a calendar year. Brokers, negotiating the sale of frozen fruits and vegetables on behalf of the seller, are exempt from licensing when the invoice value of the transactions are below \$230,000 in any calendar year.

Pursuant to Public Law 104-48, the base license fee for all licensees, as set forth in these proposed regulations, was raised on November 15, 1995, from \$400 to \$550 for all licensees, except for retailers and grocery wholesalers. As reflected in the proposed regulations, retailers and grocery wholesalers will no longer have to pay license fees at the end of the 3-year phase-out period which began on November 15, 1995. This change affects approximately 30 percent, or about 4,900, of the firms licensed under PACA. During the first year, after enactment of P.L. 104-48, from November 15, 1995, through November 14, 1996, retailers and grocery wholesalers will have to pay \$400 for a new license, or for the

renewal of an existing license. For the second year of the phase-out period from November 15, 1996, through November 14, 1997, they will pay 75 percent of that fee, or \$300, for a license. During the last year of the phase-out period, November 15, 1997, through November 14, 1998, retailers and grocery wholesalers will pay 50 percent of the fee, or \$200 for a PACA license. After November 14, 1998, retailers and grocery wholesalers will no longer be required to pay an annual license fee, but they will be required to maintain a PACA license. At the time of application for a new license, retailers and grocery wholesalers will pay a one-time administrative fee of \$100.

The increase of \$150 in the base annual license fee, from \$400 to \$550, for commission merchants, brokers and dealers (other than retailers and grocery wholesalers) is considered nominal when averaged over a 12-month period. The fee increase, where applicable, affects all licensees regardless of size. Again, this proposed rule is needed solely for the purpose of conforming the current regulations to P.L. 104-48; license fee changes were required by statute and implemented on November 15, 1995. Projected annual income, based on the revised license fees, will approximate \$9,028,000 in fiscal year 1996, \$8,683,000 in fiscal year 1997, and \$8,288,000 in fiscal year 1998.

Public Law 104-48 removed the previously existing statutory cap on license fees other than those of retailers and grocery wholesalers, and altered the previous legislated ceiling on operating reserves of the PACA fund. After November 14, 1998, USDA has the authority to increase fees through rulemaking, provided operating reserves fall below 25 percent of the projected annual program costs. USDA projects that the initial increase in receipts from fees collected following enactment of P.L. 104-48 will allow the PACA fund to build up operating reserves so that no fee increase will be needed until fiscal year 2001, when PACA operating reserves are expected to fall below that level.

The proposed rule, again pursuant to Public Law 104-48, increases the penalty for late renewal of a license, and the penalty for operating without a license. These penalties, which are applicable to all entities operating subject to the PACA, are necessary to deter licensees from operating in violation of the PACA. Any penalties for violations of the PACA would be applied equitably.

A compliance guide which highlights the 1995 PACA legislation, and a general compliance guide entitled

"PACA Fact Finder" which explains the rights and responsibilities of firms operating subject to the provisions of the PACA, are available to all licensees, including small businesses.

Accordingly, based on the information discussed above and in the following discussion, it is determined that the provisions of this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act

The amendments to Public Law 104-48 set forth in this proposed rule involves a change in the existing information collection and record keeping requirements which were previously approved by OMB under the provisions of 44 U.S.C. Chapter 35. In accordance with the Paperwork Reduction Act of 1995, this notice announces AMS' intention to request revisions to a currently approved information collection in support of the Reporting and Record keeping Requirements Under Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930.

*Title:* Reporting and Record keeping Requirements Under Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930.

*OMB Control Number:* 0581-0031.

*Expiration Date of Approval:* May 31, 1999.

*Type of Request:* Revision of a currently approved information collection.

*Abstract:* The PACA was enacted by Congress in 1930 to establish a code of fair trading practices covering the marketing of fresh and frozen fruits and vegetables in interstate or foreign commerce. It protects growers, shippers, and distributors dealing in those commodities by prohibiting unfair and fraudulent practices.

The law provides for the enforcement of contracts by providing a forum for resolving contract disputes, and for the collection of damages from anyone who fails to meet contractual obligations. In addition, the PACA impresses a statutory trust on licensees for perishable agricultural commodities received, products derived from them, and any receivables or proceeds due from the sale of the commodities for the benefit of suppliers, sellers, or agents that have not been paid. An amendment to the PACA, enacted into law on November 15, 1995, reduced the record keeping and reporting burden imposed under the trust provision by removing the requirement that trust claimants file

notices of intent to preserve trust benefits with the Department of Agriculture. The burden is, therefore, being revised to remove the record keeping and time requirements that were necessary for the filing of trust claims. This action will decrease the time requirement by 43,091 total hours and the paperwork burden by 124,445 total annual responses.

The PACA is enforced through a licensing system and is user-fee financed through a license fee. All commission merchant, dealers, and brokers engaged in business subject to the PACA must be licensed. The license is effective for one (1) year unless withdrawn by USDA for valid reasons, and must be renewed annually. Those who engage in practices prohibited by the PACA may have their licenses suspended or revoked.

The information collected from respondents is used to administer licensing provisions under the PACA. The records maintained are used to adjudicate reparation and administrative complaints filed against licensees to determine the imposition of sanctions on firms and responsibly connected individuals who have engaged in unfair trading practices. We estimate the paperwork and time burden as follows:

*Form FV-211, Application for License:* average of 15 minutes per application per response.

*Form FV-231, Application for Renewal of License:* Average of 5 minutes per application per response.

*Regulations Section 46.13—Letters to Notify USDA of Changes in Business Operations:* Average of 5 minutes per notice per response.

*Regulations Section 46.20—Records Reflecting Lot Numbers:* Average of 8.25 hours with approximately 1,000 record keepers.

*Regulations Section 46.46(d)(2)—Waiver of Rights to Trust Protection:* Average of 15 minutes per notice with approximately 100 principals.

*Regulations Sections 46.46(f) and 46.2(aa)(11)—Copy of Written Agreement Reflecting Times for Payment:* Average of 20 hours with approximately 2,000 record keepers.

*Estimate of Burden:* The total public reporting burden for this collection of information is estimated to average 8 hours per response.

*Respondents:* Commission merchants, dealers, and brokers engaged in the business of buying, selling, or negotiating the purchase or sale of fresh and/or frozen fruits and vegetables in interstate or foreign commerce are required to be licensed under the PACA (7 U.S.C. 499(c)(a)).

*Estimated Number of Respondents:* 15,550.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 118,476 hours.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michael A. Clancy, Head, License and Program Review Section, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Room 2715-South Building, P.O. Box 96456, Washington, D.C. 20090-6456.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

OMB is required to make a decision concerning the collection(s) of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

#### Background

The PACA, enacted in 1930, establishes a code of fair trading practices covering the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. The PACA protects growers, shippers, distributors, and retailers dealing in those commodities by prohibiting unfair and fraudulent practices. The law provides a forum to adjudicate private disputes alleging violations of the PACA and awards damages against anyone who fails to meet contractual obligations subject to the PACA. The law also imposes a statutory trust on perishable agricultural commodities received but not yet paid for, products derived from those commodities, and any receivables

or proceeds due from the sale of those commodities for the benefit of unpaid suppliers or sellers.

Under the PACA, anyone buying and selling commercial quantities of fruits and vegetables in interstate or foreign commerce must be licensed. The cost of administering the PACA is defrayed primarily through the license fees paid by those engaging in business subject to the law. The law also imposes complaint filing fees which help finance the program. Amendments to the PACA in 1988 permitted the Secretary to assess a base annual license fee of \$400, plus \$200 for each branch operation in excess of nine. The maximum aggregate annual license fee for any firm could not exceed \$4,000. Public Law 104-48 increased the base license fee to \$550 while retaining the branch fee and the maximum aggregate for all applicants except retailers and grocery wholesalers who are phased out of paying a fee over a 3-year period.

Public Law 104-48 added two new definitions to the law for types of dealers: "retailer" and "grocery wholesaler". Accordingly, a change would be made in section 46.2 in the definition of "retailer" as it appears in the current regulations, and a new definition would be added to the regulations for the term "grocery wholesaler". The definition of "retailer" in the proposed regulations would be the same as that adopted in Public Law 104-48, but would include a provision to make it clear that occasional wholesale sales, defined as not more than 5 percent of the gross annual sales, would not remove a dealer from the category of "retailer". The intent was that occasional wholesale transactions should not remove an entity from the category of "retailer". The definition of "grocery wholesaler" would be the same as that adopted by Public Law 104-48, but would include objective criteria for determining the meaning of "primarily engaged" as that term is used in the definition. This will enable an entity to more readily determine whether it falls within the "grocery wholesaler" category.

The proposed definition of "good faith" would also be added to the regulations since that term is used in Section 2 of Public Law 104-48 in reference to collateral fees. The proposed definition is taken from the Uniform Commercial Code article on Sales, section 2-103(b). Public Law 104-48 provides that the good faith offer, solicitation, payment or receipt of collateral fees is not, in and of itself, a violation of the PACA. The proposed regulation points out that where collateral fees would affect a material

term of the agreement, disclosure of the fees is required by the principle good faith.

Section 46.6 would be revised to conform with the fee structure mandated by Public Law 104-48. Under the new fee structure, retailers and grocery wholesalers, described earlier, are phased out of the responsibility for annual license fee payments over a 3-year period. A one-time administrative fee was established by Public Law 104-48 for new retailers and grocery wholesalers entering the program after the 3-year phase-out period. License fees for all other licensees are increased from \$400 to \$550 annually. After the expiration of the 3-year period, USDA is authorized to adjust future license fees through notice and comment rulemaking.

Conforming changes are proposed for sections 46.9 and 46.10 as a result of the increased penalties for late license renewals provided Public Law 104-48. Sections 46.9 and 46.10 would also be revised to make these sections applicable to entities subject to license which no longer have to pay an annual license fee. As mandated by Public Law 104-48, the payment of renewal fees or accrued license fees is not required of such entities after the phase-out period, but they are subject to the \$50 late application fee, and when they have violated the PACA by operating without a license, they will have to submit the required license application and pay the applicable fine. The proposed regulation would implement these changes.

The House Agriculture Committee, in its Report (House Reports No. 104-207), directed USDA to review and revise the PACA regulations relating to brokers in order to "accurately reflect an increased role as a purchasers agent". The role of brokers has changed over the years and increasingly the broker is engaged by the buyer. To address this issue, we propose to revise sections 46.27 and 46.28, which describe and establish the duties of a broker, to more accurately describe the relationship of a broker to buyers and sellers, and to require that the broker disclose on its confirmation or memorandum of sale the party that engaged the broker to act in the negotiations. A broker is "engaged" by, and thus may have a closer relationship with, one of the parties to the contract than with the other. The changes in these sections are intended to recognize that the broker may not be a neutral party and would make the broker's position relative to the parties clear.

Section 46.45 is being modified to reflect the amendment to the misbranding provisions requiring that only the first licensed handler be held

responsible for the violation unless subsequent handlers had knowledge of the misbranding and failed to correct it.

The Amendments also eliminate from the law the need for unpaid produce suppliers to file trust notices with USDA in order to preserve their rights to trust protection under the statutory trust provision of the PACA. Therefore, paragraphs (d) and (e) of § 46.46 of the regulations would be revised to eliminate references to filing with USDA. Paragraph (a) would be removed since it is unnecessary. Accordingly, paragraphs (b) through (g) would be redesignated paragraphs (a) through (f).

Redesignated paragraph (f) of section 46.46 has been reworded to remove the referenced requirement for the filing of the notice with USDA and to clarify the two methods available to preserve trust rights and their filing requirements.

Redesignated paragraphs (f)(1)(ii) and (3)(ii) conform with the statutory requirement that the notice of preservation of trust benefits contain the terms of payment when the parties have agreed to terms different from those established by the Secretary.

Redesignated paragraph (c)(2) would be reworded to make it clear that there is no general duty resting upon all brokers to preserve the trust benefits of their principals by filing trust notices. Rather the duty attaches only to brokers, or others operating in a fiduciary capacity, who have undertaken an obligation to "collect and remit". The paragraph also reminds those who employ collect and remit agents that they must preserve their right to trust benefits against such agents by filing appropriate notices with such agents. The citation in paragraph (e)(2) to paragraph (b)(1) would be conformed to the new paragraph designation for this section.

The Amendments outline new requirements for USDA when pursuing a disciplinary investigation of an alleged violation. USDA must have a written notification of the alleged violation before initiating an investigation. After receiving such a complaint, USDA would initiate an investigation if warranted. The subject of the investigation would be notified of the existence of the investigation and the nature of the alleged violations. Section 46.17, which establishes the requirements for inspection of records, would be revised to clarify that PACA representatives are permitted access to licensee's records to investigate petitions or complaints under section 6(a) of the PACA, and written notifications under section 6(b) of the PACA.

New section 46.49 would be added to the proposed regulations to describe what constitutes a written notification. In conformity with the text of amended section 6(b) of the PACA, official USDA certificates and trust notices are deemed written notifications, as are written statements reporting or complaining of a PACA violation filed by any officer or agency of any State or Territory having jurisdiction over licensees or persons subject to license or any other interested person who has knowledge of or information regarding a possible violation other than an employee of an agency of USDA administering the PACA. In conformity with the language used by Report 104-207 of the House Committee on Agriculture, written notifications are equated with complaints as that term is used in the PACA. The proposed regulation also outlines investigative procedures relating to such complaints.

#### List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and record keeping requirements.

For the reasons set forth in the preamble, 7 CFR part 46 is amended as follows:

#### PART 46—[AMENDED]

1. The authority citation for part 46 continues to read as follows:

Authority: Sec. 15, 46 Stat. 537; 7 U.S.C. 499o

2. In § 46.2, paragraph (j) is revised and two new paragraphs (hh) and (ii) are added to read as follows:

#### § 46.2 Definitions

\* \* \* \* \*

(j) *Retailer* means a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail; *Provided*, That occasional sales at wholesale shall not be deemed to remove a dealer from the category of retailer if less than 5 percent of annual gross sales is derived from wholesale transactions.

\* \* \* \* \*

(hh) *Good faith* means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. The principle of good faith requires that a party to a transaction disclose the existence of any collateral fees and expenses to all other parties to the transaction where the collateral fees and expenses affect a material term of the agreement.

(ii) The term *grocery wholesaler* means a person that is a dealer primarily engaged in the full-line wholesale distribution and resale of

grocery and related nonfood items (such as perishable agricultural commodities, dry groceries, general merchandise, meat, poultry, and seafood, and health and beauty care items) to retailers. However, such term does not include a person described in the preceding sentence if the person is primarily engaged in the wholesale distribution and resale of perishable agricultural commodities rather than other grocery and related nonfood items. This definition states two criteria in order for an entity to be considered a grocery wholesaler:

- (1) The entity must be primarily engaged, that is, have 50 percent or greater of its annual gross sales, in the full-line distribution and resale of grocery and related nonfood items. "Full-line" means that the entity must be supplying the retailer with a wide range of products such as the items specified. If the entity meets this condition, then the entity will be considered a grocery wholesaler unless;
- (2) The entity has more than 50 percent of its annual gross sales in perishable agricultural commodities.

3. § 46.6 is revised to read as follows:

#### § 46.6 License fees.

(a) For retailers and grocery wholesalers making an initial or a renewal application for license, the annual license fee is as follows:

(1) During the period November 15, 1995 through November 14, 1996, the license fee is \$400 plus \$200 dollars for each branch or additional business facility operated by the applicant in excess of nine. In no case shall the aggregate annual fees paid by any retailer or grocery wholesaler during such period exceed \$4,000.

(2) The annual license fee during the period November 15, 1996 through November 14, 1997, is \$300 plus \$150 for each branch or additional business facility operated by the retailer or grocery wholesaler in excess of nine. In no case shall the aggregate annual fees paid by any retailer or grocery wholesaler during such period exceed \$3,000.

(3) The annual license fee during the period November 15, 1997 through November 14, 1998, is \$200 plus \$100 for each branch or additional business facility operated by any retailer or grocery wholesaler in excess of nine. In no case shall the aggregate annual fees paid by any retailer or grocery wholesaler during such period exceed \$2,000.

(4) No annual license fee will be required after November 14, 1998 for renewal of a license. However, a retailer or grocery wholesaler making an initial

application for a license after November 14, 1998, shall pay a \$100 administrative processing fee.

(b) For commission merchants, brokers, and dealers (other than grocery wholesalers and retailers) the annual license fee is \$550 plus \$200 dollars for each branch or additional business facility in excess of nine. In no case shall the aggregate annual fees paid by any such applicant exceed \$4,000.

(c) The Director may require that fees be paid in the form of a money order, bank draft, cashier's check, or certified check made payable to "USDA-AMS". Authorized representatives of the Division may accept fees and issue receipts.

4. In § 46.9, paragraph (i) is revised to read as follows:

**§ 46.9 Termination, suspension, revocation, cancellation of licenses; notices; renewal.**

\* \* \* \* \*

(i) Under section 4(a) of the Act, at least 30 days prior to the anniversary date of a valid and effective license, the Director shall mail a notice to the licensee at the last known address advising that the license will automatically terminate on its anniversary date unless an application for renewal is filed supplying all information requested on a form to be supplied by the Division, and unless the renewal fee (if any is applicable) is paid on or before such date. If the renewal application is not filed and/or the renewal fee (if required) is not paid by the anniversary date, the licensee may obtain a renewal of that license at any time within 30 days by submitting the required renewal application and/or paying the renewal fee (if required), plus \$50. Within 60 days after the termination date of a valid and effective license, the former licensee shall be notified of such termination, unless a new license has been obtained in the meantime.

5. § 46.10 is revised to read as follows:

**§ 46.10 Nonlicensed person; liability; penalty.**

Any commission merchant, dealer, or broker who violates the Act by engaging in business subject to the Act without a license may settle its liability, if such violation is found by the Director not to have been willful but due to inadvertence, by submitting the required application and paying the amount of fees that it would have paid had it obtained and maintained a license during the period that it engaged in business subject to the Act, plus an additional sum not in excess of two hundred and fifty dollars (\$250) as may be determined by the Director.

6. § 46.17 is revised to read as follows:

**§ 46.17 Inspection of records.**

(a) Each licensee shall, during ordinary business hours, promptly upon request, permit any duly authorized representative of USDA to enter its place of business and inspect such accounts, records, and memoranda as may be material:

(1) in the investigation of complaints under the Act including any petition, written notification, or complaint under section 6 of the Act,

(2) to the determination of ownership, control, packer, or State, country, or region of origin in connection with commodity inspections,

(3) to ascertain whether there is compliance with section 9 of the Act,

(4) in administering the licensing and bonding provisions of the Act,

(5) if the licensee has been determined in a formal disciplinary proceeding to have violated the prompt payment provision of section 2(4) of the Act, to determine whether, at the time of the inspection, there is compliance with that section.

(b) Any necessary facilities for such inspection shall be extended to such representative by the licensee, its agents, and employees.

7. In § 46.27, paragraph (a) is revised to read as follows:

**§ 46.27 Types of broker operations.**

(a) Brokers carry on their business operations in several different ways and are generally classified by their method of operation. The following are some of the broad groupings by method of operation. The usual operation of brokers consists of the negotiation of the purchase and sale of produce either of one commodity or of several commodities. A broker is usually engaged by only one of the parties, but in negotiating a contract the broker acts as a special agent of first one and then the other party in conveying offers, counter offers, and acceptances between the parties. Once the contract is formed, and the confirmation issued, the broker's duties are usually ended, and the broker is not the proper party to whom notice of breach or of rejection should be directed. However, a broker receiving notice has a duty to promptly convey the notice to the proper party. Frequently, brokers never see the produce they are quoting for sale or negotiating for purchase by the buyer, and they carry out their duties by conveying information received from the parties between the buyer and seller until a contract is effected. Generally, the seller of the produce invoices the buyer, however, when there is a specific

agreement between the broker and its principal, the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller. Under other types of agreements, the seller ships the produce to pool buyers, and the broker as an accommodation to the seller invoices the buyers, collects, and remits to the seller. Also, there are times when the broker is authorized by the seller to act much like a commission merchant, being given blanket authority to dispose of the produce for the seller's account either by negotiation of sales to buyers not known to the seller or by placing the produce for sale on consignment with receivers in the terminal markets.

\* \* \* \* \*

8. In section 46.28, paragraph (a) is revised to read as follows:

**§ 46.28 Duties of brokers.**

(a) General. The function of a broker is to facilitate good faith negotiations between parties which lead to valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act, is subject to the penalties specified in the Act, and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all proposed terms and conditions of the proposed contract. After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The confirmation or memorandum of sale shall also identify the party who engaged the broker to act in the negotiations. If the confirmation or memorandum of sale does not contain such information, the broker shall be presumed to have been engaged by the buyer. Brokers do not normally act as general agents of either party, and will not be presumed to have so acted. Unless otherwise agreed and confirmed, the broker will be entitled to payment of brokerage fees from the party by whom it was engaged to act as broker. The broker shall retain a copy of such confirmations or memoranda as part of its accounts and records. The broker who does not prepare these documents and retain copies in its files is failing to prepare and maintain complete and correct records as required by the Act. The broker who does not deliver copies of these documents to all parties

involved in the transaction is failing to perform its duties as a broker. A broker who issues a confirmation or memorandum of sale containing false or misleading statements shall be deemed to have committed a violation of section 2 of the Act. If the broker's records do not support its contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the Act for failing to perform its express or implied duties. The broker shall take into consideration the time of delivery of the shipment involved in the contract, and all other circumstances of the transaction, in selecting the proper method for transmitting the written confirmation or memorandum of sale to the parties. A buying broker is required to truly and correctly account to its principal in accordance with section 46.2(y)(3). The broker should advise the appropriate party promptly when any notice of rejection or breach is received, or of any other unforeseen development of which it is informed.

\* \* \* \* \*

9. In § 46.45, the introductory text is revised to read as follows:

**§ 46.45 Procedures in administering section 2(5) of the Act.**

It is a violation of section 2(5) for a commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree, or maturity, or State, country, region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of the Act by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

\* \* \* \* \*

10. In § 46.46, paragraph (a) is removed, paragraphs (b) through (g) are redesignated as paragraphs (a) through (f), and newly redesignated paragraphs (c), (e)(2), and (f) are revised to read as follows:

**§ 46.46 Statutory trust.**

\* \* \* \* \*

(c) *Trust benefits.* (1) When a seller, supplier or agent who has met the eligibility requirements of paragraphs (e) (1) and (2) of this section, transfers ownership, possession, or control of

goods to a commission merchant, dealer, or broker, it automatically becomes eligible to participate in the trust. Participants who preserve their rights to benefits in accordance with paragraph (f) of this section, remain beneficiaries until they are paid in full.

(2) Any licensee, or person subject to license, who has a fiduciary duty to collect funds resulting from the sale or consignment of produce, and remit such funds to its principal, also has the duty to preserve its principal's rights to trust benefits in accordance with paragraph (f) of this section. The responsibility for filing the notice to preserve the principal's rights is obligatory and cannot be avoided by the agent by means of a contract provision. Persons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: Provided, That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by the principal prior to the time affected transactions occur, must clearly state the principal's intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent's authority to act on the principal's behalf expires. In the event an agent having a fiduciary duty to collect funds resulting from the sale or consignment of produce and remit such funds to its principal, fails to perform the duty of preserving its principal's rights to trust benefits, it may be held liable to the principal for damages. A principal employing a collect and remit agent must preserve its rights to trust benefits against such agent by filing appropriate notices with the agent.

(e) *Prompt payment and eligibility for trust benefits.*

\* \* \* \* \*

(2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (a)(1) of this section.

\* \* \* \* \*

(f) *Filing notice of intent to preserve trust benefits.* (1) Notice of intent to preserve benefits under the trust must be in writing, must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment:

(i) The names and addresses of the trust beneficiary, seller-supplier,

commission merchant, or agent and the debtor, as applicable.

(ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),

(iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and

(iv) The amount past due and unpaid.

(2) Timely filing of a notice of intent to preserve benefits under the trust will be considered to have been made if written notice is given to the debtor within 30 calendar days:

(i) After expiration of the time prescribed by which payment must be made pursuant to regulation,

(ii) After expiration of such other time by which payment must be made as the parties have expressly agreed to in writing before entering into the transaction, but not longer than the time prescribed in paragraph (e)(2) of this section, or

(iii) After the time the supplier, seller or agent has received notice that a payment instrument promptly presented for payment has been dishonored. Failures to pay within the time periods set forth in paragraphs (f)(2)(i) and (ii) of this section constitute defaults.

(3) Licensees may choose an alternate method of preserving trust benefits from the requirements described in paragraphs (f)(1) and (2) of this section. Licensees may use their invoice or other billing statement to preserve trust benefits. The alternative method requires that the licensee's invoice or other billing statement, given to the debtor, contain:

(i) The statement: "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."; and

(ii) The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.

\* \* \* \* \*

11. A new § 46.49 is added to read as follows:

**§ 46.49 Written notifications and complaints**

(a) The term *written notification*, as used in section 6(b) of the Act, means:

(1) any written statement reporting or complaining of a PACA violation(s) filed by any officer or agency of any State or Territory having jurisdiction over licensees or persons subject to license, or any other interested person who has knowledge of or information regarding a possible violation, other than an employee of an agency of USDA administering this Act or a person filing a complaint under Section 6(c);

(2) any written notice of intent to preserve the benefits of the trust established under section 5 of this Act; or

(3) any official certificate(s) of the United States Government or States or Territories of the United States.

(b) Any written notification may be filed by delivering it to any office of USDA or any official thereof responsible for administering the Act. A written notification which is so filed, or any expansion of an investigation resulting from any indication of additional further violations of the Act found as a consequence of an investigation based on written notification or complaint, shall also be deemed to constitute a complaint under section 13(a) of this Act.

(c) Upon becoming aware of a complaint under Section 6(a) or 6(b) of this Act, the Secretary will determine if reasonable grounds exist for an investigation of such complaint for disciplinary action. If the investigation substantiates the existence of violations, a formal disciplinary complaint may be filed by the Secretary as described under Section 6(c)(2) of the Act.

(d) Whenever an investigation, initiated as a result of a written notification or complaint under Section 6(b) of the Act, is commenced, or expanded to include new violations, notice shall be given by the Secretary to the subject of the investigation within thirty (30) days of the commencement or expansion of the investigation. Within one hundred and eighty (180) days after giving initial notice, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under Section 6(c)(2) of this Act, terminate the investigation, or continue or expand the investigation. Thereafter, the subject of the investigation may request in writing, no more frequently than every ninety (90) days, a status report from the Chief of the PACA Branch who shall respond thereto within fourteen (14) days of receiving the request. When an investigation is terminated, the Secretary shall, within fourteen (14) days, notify the subject of the investigation of the termination. In

every case in which notice or response is required under this subsection such notice or response shall be accomplished by personal service or by posting the notice or response by certified mail to the last known address of the subject of the investigation.

Dated: September 4, 1996.

Eric M. Forman,

*Acting Director, Fruit and Vegetable Division.*

[FR Doc. 96-23020 Filed 9-9-96; 8:45 am]

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## Food and Consumer Service

### 7 CFR Parts 271 and 275

[Amdt No. 373]

RIN 0584-AB38

#### Food Stamp Program: 1995 Quality Control Technical Amendments

**AGENCY:** Food and Consumer Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Consumer Service is proposing technical changes to the Food Stamp Program's Quality Control System which will reduce the workload on State agencies and improve the efficiency of the quality control system.

**DATES:** Comments must be received by November 12, 1996, in order to be assured of consideration.

**ADDRESSES:** Please address all comments to John H. Knaus, Branch Chief, Quality Control Branch, Program Accountability Division, Food Stamp Program, Food and Consumer Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302. All written comments will be open to public inspection during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at Room 904, 3101 Park Center Drive, Alexandria, Virginia.

**FOR FURTHER INFORMATION CONTACT:** John H. Knaus, at the above address, or by telephone at (703) 305-2472.

#### SUPPLEMENTARY INFORMATION:

Executive Order 12866.

This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866. It has been determined that the following cost-benefits would result from adoption of the provisions of this rule:

1. *State agency sample size.* The provision reducing the minimum sample size for active and negative case reviews will benefit those State agencies

who will be required to review fewer cases. These are States choosing the "smaller range" in their sample plans with current minimum active or negative case sample sizes above the minimum sample size. In Fiscal Year 1992, before the waiver was available, States reviewed nearly 52,000 active and over 30,000 negative cases. Assuming a 15 percent reduction in cases, under this provision, States will be required to review nearly 8,000 fewer active cases and about 4,500 fewer negative cases. Assuming that each active case review costs \$180 and each negative case review costs \$40 (taken from studies of active and negative case reviews and adjusted to account for wage inflation), total potential savings for States and FCS combined is an estimated \$1.6 million. Savings for States are estimated at \$800,000.

2. *Home visits.* It is estimated that minimal savings in quality control expenditures will result from this provision as it is expected that State agencies will channel the resources into other aspects of quality control operations.

3. *Error dollar tolerance level.* The provision to modify the tolerance level from \$5.00 to \$10.00 for excluding small errors will benefit those State agencies which qualify for enhanced funding. Based on Fiscal Year 1995 data, State agencies would qualify for an additional \$562,811.

The Department has examined the impact on potential State agency liability calculations from the combined effect of changing the error dollar tolerance level and the case completion standard. Data from two fiscal years has been analyzed to determine how these changes would effect liability amounts. The data shows that in one year the potential liability would have been higher, and in another year it would have been lower. In both situations the amount of the change was under one million dollars.

It is not anticipated that any other provisions of this rule will have any significant impact on the costs or benefits to either the State agencies or FCS.

Executive Order 12372.

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule at 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.