

Proposed Rules

Federal Register

Vol. 62, No. 119

Friday, June 20, 1997

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 FV97-355]

Proposed Revision to Part 46, Regulations Under 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 to establish that electronic transmissions will be considered "ordinary and usual billing or invoice statements" within the meaning of the PACA.

DATES: Comments must be received by July 21, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to Charles W. Parrott, Assistant Chief, PACA Branch, Fruit and Vegetable Division, AMS, USDA, Room 2095-So. Bldg., P.O. Box 96456, Washington, DC 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: Charles W. Parrott, Assistant 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).

Background

The Perishable Agricultural Commodities Act (PACA or Act) 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 trade practices. With this regulatory scheme, the law fosters an efficient nationwide distribution system for fresh and frozen fruits and vegetables, benefitting the whole marketing chain from farmer to consumer. The Act provides for a forum to adjudicate private disputes, which awards damages against a licensee who fails to meet contractual obligations in violation of the PACA. The Act 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 or products thereof for the benefit of unpaid suppliers or sellers. USDA's Agricultural Marketing Service (AMS) administers and enforces the PACA.

The 1995 PACA amendments, among other things, eliminated the requirement for unpaid produce suppliers to file trust notices with USDA in order to preserve their trust rights under the statutory trust provision of the Act. Additionally, the amendments to the PACA allow unpaid sellers of fresh and frozen fruits and vegetables to preserve trust benefits by augmenting existing invoice and billing documentation to advise the buyer of the creditor's intention to preserve trust benefits. This addition to billing or invoicing eliminates the need for a trust creditor to provide any additional notice to the debtor of the creditor's intention to preserve trust benefits. However, the PACA does not indicate that information transmitted in the course of electronic transactions constitute "ordinary and usual billing or invoice statements" that could fulfill the Act's requirements for creditors to provide prior notice that a sale may be subject to the trust provisions.

Electronic commerce is becoming increasingly common as companies communicate with each other via remote computers over ordinary telephone lines. The data exchanged in an electronic transaction may include the buyer's purchase order, followed by a shipping order and an invoice from the seller, and a remittance advice and payment from the buyer. Prior to

engaging in an electronic transaction, both parties to a transaction must agree to the format of the information to be transmitted and received to assure that all necessary and appropriate terms of sale are included and are readily understandable.

The purchase and sale of goods by electronic means has grown steadily in the United States over the past decade. Nearly one quarter of businesses surveyed in 1993 anticipated the use of electronic transactions within 2 years and 20 percent were already conducting business electronically. By 1993, electronic transmission was the second most common means of exchanging business documents in the United States. The use of paper remains number one, but has fallen by 50 percent since 1988.¹

The federal government and many state governments have recognized and accepted the reliability and usefulness of Electronic Data Interchange (EDI). Some jurisdictions currently use EDI for tax and Uniform Commercial Code filing systems. President Clinton, by Executive Order, has mandated the use of EDI systems in federal procurement.²

Representatives of the fruit and vegetable industry have requested that USDA clarify whether the exchange of commercial data in electronic transactions will be considered "ordinary and usual billing or invoice statements" within the meaning of the 1995 PACA legislation.

On January 15, 1997, the United Fresh Fruit and Vegetable Association (UFFVA), a produce industry trade association based in Alexandria, Virginia, petitioned AMS to promulgate regulations under PACA to recognize the use of EDI. Ten other produce industry organizations joined the UFFVA on the petition. The petitioners sought clarification as to whether EDI transactions are considered by AMS to be "ordinary and usual billing or invoice statements" within the meaning of the 1995 PACA amendments.

USDA agrees with petitioners that a revision to the regulations would eliminate any uncertainty in this regard and ensure that licensees can use reasonable technological advances

¹ This data was included in the January 15, 1997 petition for rulemaking submitted by the United Fresh Fruit and Vegetable Association.

² Executive Order 12873, 58 Fed.Reg. 54,911 (October 22, 1993).

while still receiving appropriate trust protection under the PACA. To achieve this effect, a definition for the term "ordinary and usual billing or invoice statements" would be added in section 46.46(b), as follows:

"Ordinary and usual billing or invoice statements" as used in section 5(c)(4) of the Act and "invoice or other billing statement" as used in section 46.46(f)(3) mean communications customarily used between parties to a transaction in perishable agricultural commodities in whatever form, documentary or electronic, for billing or invoicing purposes.

This definition would specify that "ordinary and usual billing or invoice statements" as used in the PACA and "invoice or other billing statement" as used in section 46.46(f)(3) include both paper documentation and electronic transmissions customarily used between a seller and a buyer for billing or invoicing purposes. This proposed change to the regulations is similar to the change suggested in the UFFVA petition. The petitioners also suggested a change to section 46.46(f)(3) of the regulations. However, the Department has determined that the proposed definition set out above makes the suggested change unnecessary.

Executive Orders 12866 and 12988

This rule, issued under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*), as amended, has been determined to be not significant for the purposes of Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule 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.*), USDA 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 (13 CFR 121.601) as those whose annual receipts are less than \$5,000,000. The PACA requires all businesses that operate subject to its

provisions maintain a license issued by USDA. There are approximately 15,700 PACA licensees, many of which may be classified as small entities.

The proposed regulations would establish that the electronic transmissions used in perishable agricultural commodity transactions are, in fact, "ordinary and usual billing or invoice statements." The use of electronic transactions would be voluntary, and would specifically provide companies an electronic alternative to paper documentation to give notice of intent to preserve trust rights.

Accordingly, based on the information in the above discussion, AMS has determined that the provisions of this rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104-13), the information collection and recordkeeping requirements covered by this proposed rule were approved by OMB on October 31, 1996, and expire on October 31, 1999.

List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 46 is proposed to be 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 § 46.46, paragraph (b)(5) would be added, as follows:

§ 46.46 Statutory trust.

* * * * *

(b) * * *

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(5) *Ordinary and usual billing or invoice statements* as used in section 5(c)(4) of the Act, and *invoice or other billing statement* as used in § 46.46(f)(3), mean communications customarily used between parties to a transaction in perishable agricultural commodities in whatever form, documentary or electronic, for billing or invoicing purposes.

Dated: June 17, 1997

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 97-16196 Filed 6-19-97; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 400

RIN 0563-AB07

General Administrative Regulations; Insurance Coverage by Written Agreement

AGENCY: Federal Crop Insurance Corporation.

ACTION: Proposed rule.

SUMMARY: The regulations contained in this subpart are issued pursuant to the Federal Crop Insurance Act, as amended, to prescribe the procedures for offering insurance coverage by written agreement and are applicable to limited and additional coverage policies insured or reinsured by the Federal Crop Insurance Corporation (FCIC).

DATES: Written comments and opinions on this proposed rule will be accepted until close of business August 19, 1997 and will be considered when the rule is to be made final.

ADDRESSES: Written comments on this proposed rule should be sent to the Chief, Product Development Branch, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131.

FOR FURTHER INFORMATION CONTACT: For further information, contact Bill Smith, Supervisory Program Analyst, Research and Development Division, Product Development Branch, FCIC, at the Kansas City, MO address listed above, telephone (816) 926-7743.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has determined this rule to be significant for the purposes of Executive Order 12866 and, therefore, this rule has been reviewed by OMB.

Cost-Benefit Analysis

A Cost-Benefit Analysis has been completed and is available to interested persons at the address listed above. In summary, the analysis finds that producers will benefit from this regulation because a greater number of producers will be able to obtain insurance coverage to meet their risk