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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Doc. #AMS-FV-08-0013; FV08-379]

Regulations Under the Perishable Agricultural Commodities Act, 1930; Section 610 Review

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Confirmation of regulations.

SUMMARY: This notice summarizes the results of an Agricultural Marketing Service (AMS) review of the Regulations (Other than Rules of Practice) under the Perishable Agricultural Commodities Act, 1930, as amended, under the criteria contained in section 610 of the Regulatory Flexibility Act (RFA). Based upon its review, AMS has determined that the Regulations (Other than Rules of Practice) under the Perishable Agricultural Commodities Act, 1930, as amended, should be continued without change.

FOR FURTHER INFORMATION CONTACT:

Interested persons may obtain a copy of the review. Requests for copies should be sent to Michiko Shaw, Assistant to the Chief, AMS, F&V Programs, PACA Branch, 1400 Independence Avenue, SW., Room 2095-S, Stop 0242, Washington DC 20250-0242, (202) 205-4887, e-mail:

Michiko.Shaw@ams.usda.gov or by accessing our Web site at <http://www.ams.usda.gov/paca>.

SUPPLEMENTARY INFORMATION: USDA's Agricultural Marketing Service (AMS) administers and enforces The Perishable Agricultural Commodities Act (PACA). The PACA establishes a code of fair trade practices in 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. The law also provides a forum to adjudicate or mediate commercial disputes. Licensees who violate the PACA may have their license suspended or revoked, and principals of such a licensee are restricted from employment or operating in the produce industry for a period of time.

The PACA also imposes a statutory trust for the benefit of unpaid suppliers or sellers on perishable agricultural commodities received and accepted but not yet paid for, and may encumber products derived from those commodities, and any receivables or proceeds due from the sale of those commodities or products.

In the case of a business failure or bankruptcy of an entity subject to PACA, the debtor's inventory and receivables (PACA trust assets) are not property of the estate and are not available for general distribution until the claims of PACA creditors who have preserved their trust rights have been satisfied. Because of the statutory trust provision, PACA trust creditors who have preserved their trust rights with the appropriate written notices, including sellers outside of the United States, have a far greater chance of recovering the money owed to them should an entity subject to PACA go out of business. The PACA trust provisions protect producers and the majority of firms trading in fruits and vegetables as each buyer of perishable agricultural commodities in the marketing chain becomes a seller in its own turn.

There are approximately 14,500 firms that are licensed under the PACA to operate in the produce industry. PACA licensees are located nationwide and include dealers, brokers and commission merchants who buy, sell, or negotiate the purchase or sale of fresh and frozen fruits and vegetables in interstate and/or foreign commerce.

AMS published in the **Federal Register** (68 FR 48574, August 14, 2003) its plan to review certain regulations, including regulations (7 CFR Part 46) under the PACA, under criteria contained in section 610 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612). An updated plan was published in the **Federal Register** on March 24, 2006 (71 FR 14827). Because many of AMS' regulations impact small entities, AMS decided, as a matter of

policy, to review certain regulations which, although they may not have a significant economic impact on a substantial number of small entities as required in section 610 of the RFA (5 U.S.C. 610), merit review.

The review was undertaken to determine whether the PACA Regulations (Other than Rules of Practice) should be continued without change, or should be amended or rescinded (consistent with the objectives of the Act) to minimize any significant economic impact of the regulations upon a substantial number of small businesses. In conducting this review, AMS considered the following factors: (1) The continued need for the PACA regulations; (2) the nature of the complaints or comments received from the public concerning the PACA regulations; (3) the complexity of the PACA regulations; (4) the extent to which the PACA regulations overlap, duplicate, or conflict with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the PACA regulations have been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the PACA regulations.

AMS published a notice of review and request for written comments in the **Federal Register** on March 21, 2008 (73 FR 15122). The comment period ended on May 20, 2008. AMS received three written comments in response to the notice of review.

One comment was received from Thomas R. Oliveri, Director of Trade Practices and Commodity Services, Western Growers (WG), Irvine, California. WG is an agricultural trade association whose nearly 3,000 members grow, pack, and ship approximately 90 percent of the fresh vegetables and nearly 70 percent of the fresh fruits and nuts grown in California and Arizona, which accounts for more than 50 percent of U.S. fresh produce production. WG was fully supportive of the program and the continued need for the PACA regulations. WG stated that the PACA is a user fee, self-funded program which has been supported by, and protecting the produce industry for nearly eighty years. WG stated that the primary purpose of the PACA is to prevent unfair and fraudulent marketing and selling of fresh fruits and

vegetables, and to facilitate the orderly marketing of fresh fruits and vegetables in interstate and foreign commerce. WG further stated that the program is the most efficient and inexpensive way for disputes between buyers and sellers of fresh fruits and vegetables to settle their differences under the Rules and Regulations of the PACA and its precedent decisions. AMS concurs with the stated position of WG.

Another comment was received from Elise Cortina, Executive Director of the Frozen Potato Products Institute (FPPI), McLean, Virginia. FPPI is a national trade association representing domestic manufacturers and processors of frozen potato products. Its member companies account for approximately 95 percent of the total annual United States production of frozen potato products. Ms. Cortina specifically urged AMS to retain the current regulations recognizing battered and coated vegetables as being within the PACA's scope. Ms. Cortina also stated that the inclusion of this definition has no detrimental impact on small businesses and, in fact, is beneficial to small businesses. AMS agrees that the definition of coated and battered within the regulations should remain as is.

An e-mail comment was received from Jennifer Jambor, a staff attorney for Farmers' Legal Action Group, Inc. (FLAG), of Saint Paul, Minnesota, on behalf of the Farmworker Association of Florida, Inc., which represents more than 6,330 farmer worker families from predominately Mexican, Haitian, African American, Guatemalan, and Salvadorian communities. FLAG works with beginning fruit and vegetable farmers from these and other communities in Florida to assist them in understanding their legal rights under the PACA.

FLAG suggested that although the PACA regulations set forth specific time frames for buyers to make payment to sellers, the regulations also permit buyers and sellers to enter into agreements for payment outside the prescribed time limits, thereby creating a perceived loophole. FLAG believes that this loophole provides a buyer the opportunity to undermine a grower's right to full and prompt payment because such an agreement may result in a waiver of the seller's right to payment under the PACA trust. In its comment, FLAG states that it is a common practice for packing houses to obtain growers' initials on a receipt for delivered produce that has a pre-printed purchase contract on the reverse side, which includes an express waiver of trust rights. The terms of the preprinted contracts are not subject to negotiation

and result in the sellers' unknowing and involuntary waiver of their trust rights. Growers are faced with a take-it-or-leave-it situation because of their relative bargaining position vis-à-vis the packing houses. FLAG argues that under these circumstances, no real agreement to alter the payment terms has been reached. FLAG therefore states that AMS should consider removing the provision in the PACA regulations that allows agreement to payment terms outside the prescribed time limits. In the alternative, FLAG suggests that the provision be amended to require that any waiver of trust rights under the PACA must be made knowingly and voluntarily. FLAG also opined that any written agreement must contain a disclosure describing a grower's right to full and prompt payment under the PACA and must either be in a language that the grower can read, or be read aloud to the grower in the grower's preferred language.¹

The agency does not believe that the best interests of the firms engaged in buying and selling fruits and vegetables would be served by significantly limiting, through regulation, the ability of these businesses to negotiate contract terms. Currently the PACA regulations set forth the payment terms under which payment must be made from buyers and sellers in order to comply with the PACA. However, the regulations allow the parties the flexibility to deviate from these terms, if they agree to different terms and enter into a separate written agreement prior to the date of the transaction. The regulations also specifically provide the maximum time that sellers can extend credit terms and still qualify for trust protection.

Aside from the comments from FLAG, the Department has not received complaints about the PACA regulations. Based on these comments, AMS has determined that the PACA regulations should be continued without change.

AMS has determined that the PACA regulations are not unduly complex and will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the PACA regulations.

The agency meets about twice a year with the Fruit and Vegetable Industry Advisory Committee, which is appointed by the Secretary, to discuss the administration of the PACA and other USDA fruit and vegetable programs. In addition, PACA

administrators continue to hold periodic discussions with industry associations, such as the government relations committee of the United Fresh Fruit and Vegetable Association, Alexandria, Virginia; the Produce Marketing Association, Newark, Delaware; Western Growers, Newport Beach, California; Food Marketing Institute, Arlington, Virginia; and other individuals and firms regulated under the Act. The recordkeeping requirements of the PACA have never raised great controversy in the industry. Changes in the regulations have been and will continue to be implemented through notice and comment rulemaking to reflect current industry practices and technological advances.

For example, a recent amendment to the PACA regulations was made as a result of changes in the produce industry's buying, selling and billing practices. The changes to the regulations will ensure trust protection for produce sellers using electronic invoicing or other billing statements to invoice buyers. The PACA trust provisions protect unpaid sellers in the event that a buyer files for bankruptcy or goes out of business. Under the new regulations, a buyer operating subject to the PACA, or its representative is required to accept a trust notice submitted by a seller in documentary form, by electronic invoice, or other billing statement. The buyer must also allow sufficient data space for the seller to include the required trust language in its electronic billing system. Any failure, act or omission inconsistent with this responsibility is unlawful and a violation of the PACA.

Based upon its review, AMS has determined that the Regulations (Other than Rules of Practice) under the Perishable Agricultural Commodities Act, 1930, as amended, should be continued without change. AMS plans to continue working with the fruit and vegetable industry to maintain an effective program.

Dated: March 16, 2009.

Robert C. Keeney,

Acting Associate Administrator, Agricultural Marketing Service.

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¹ FLAG recognizes that litigation can be used to challenge these contracts, but argues that amendment of the regulations would be a more effective and comprehensive response to the problem.