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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 46

[Docket Number AMS-FV-07-0009; FV05-373]

RIN 0581-AC53

#### Amendments to Regulations Under the Perishable Agricultural Commodities Act (PACA) To Ensure Trust Protection for Produce Sellers When Using Electronic Invoicing or Other Billing Methods

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is amending the regulations under the Perishable Agricultural Commodities Act (PACA) to ensure that the status of sellers of perishable agricultural commodities as trust creditors is protected when electronic data interchange (EDI) or other forms of electronic commerce are used to invoice buyers. Specifically, the amendments require that a buyer licensed under the PACA or its third party representative accept the PACA trust notice submitted to it by a seller on a paper, electronic invoice, or other billing statement. In addition, the buyer must allow sufficient data space for the required trust language regardless of the billing medium. Finally, any failure, act or omission inconsistent with this responsibility is unlawful and a violation of the PACA.

**DATES:** *Effective Date:* June 29, 2007.

**FOR FURTHER INFORMATION CONTACT:** Karla Whalen, Section Head, Trade Practices Section, or Phyllis Hall, Senior Marketing Specialist, Trade Practices Section, 202-720-6873.

**SUPPLEMENTARY INFORMATION:**

#### Background of PACA and Trust Provisions

USDA's Agricultural Marketing Service (AMS) administers and enforces the Perishable Agricultural Commodities Act (PACA). The PACA establishes a code of fair trading 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.

In 1995, the PACA was amended to provide that licensed sellers of fresh and frozen fruits and vegetables may provide notice to buyers of their intention to preserve trust benefits by including specific language on invoice and billing documentation. The required language reads: "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." (7 U.S.C. 499e(c)(4)).

#### Amendment of PACA Regulations To Allow for Electronic Invoicing

The PACA regulations (7 CFR 46.46(a)(5)) were amended in 1997 to state that electronic communications are considered "ordinary or usual billing and invoice statements" within the meaning of Section 5(c)(4) of the PACA. Under the 1997 amendments to the PACA regulations, unpaid PACA licensed sellers or suppliers of fresh and frozen fruits and vegetables have the option of providing notice to buyers of their intention to preserve their trust rights by including the specified language contained in Section 5(c)(4) of the PACA on their billing or invoice statements, whether those statements are paper documentation or electronic transmissions. Alternatively, as provided in the PACA and regulations, sellers (licensed or non-licensed) can also satisfy the notice requirement by sending the buyer a separate detailed notice of their intent to preserve trust benefits within thirty (30) days of payment default. Whichever method of providing notice is used to preserve trust benefits, in order to claim the benefit of the trust, payment terms may not exceed 30 days from date of acceptance.

Since the amendment to the regulations, a number of produce sellers voiced concern that their PACA trust rights might not be preserved if: (1) The buyer/buyer's agent either willfully or through oversight did not receive the entire electronic transmission (i.e., electronic invoice); (2) the buyer/buyer's agent did not download the trust information; (3) the buyer/buyer's agent did not opt to receive the information; (4) the buyer/buyer's agent did not buy the data field that allows the inclusion of the trust language; or (5) the EDI service provider did not translate the field that contains the trust language. Additional concerns were expressed

that the alternate method of trust notice (i.e., separate trust notice letter) was not being accepted by some buyers who require electronic invoicing. Others in the industry expressed concern about being charged a fee by the buyer to accept the notice to preserve their trust benefits with an electronic invoice, a paper invoice, or separate trust notice.

#### Advanced Notice of Proposed Rulemaking

AMS published an Advanced Notice of Proposed Rulemaking in the **Federal Register** on January 30, 2006, (71 FR 4831) seeking comments on whether, and if so, how to amend the PACA regulations to address industry concerns regarding electronic invoicing. The Advance Notice of Proposed Rulemaking invited comments on: (1) The types of problems that may need to be addressed by new regulatory language; (2) any technological barriers and solutions; (3) any additional costs likely to be associated with appropriate regulations, and opinions regarding who should bear such costs; (4) whether the Agency should by regulation define electronic invoicing methods that must be made available by licensed buyers, (e.g., creating a separate field for trust notice language in electronic invoices); (5) whether buyers should be required to accept separate notices (i.e., electronic or paper PACA trust) without restriction or charge; and (6) other related issues and suggestions. The comment period ended on March 16, 2006. AMS received 65 comments. The vast majority of the comments favored amending the regulations to clarify electronic invoicing practices so that sellers have the same protection when using electronic invoicing as that afforded through traditional paper invoices. Therefore, AMS determined it was appropriate to issue a notice of proposed rulemaking.

#### Notice of Proposed Rulemaking

AMS published a Notice of Proposed Rulemaking in the **Federal Register** on November 8, 2006, (71 FR 65426) seeking comments on amending the PACA regulations to ensure that the status of sellers of perishable agricultural commodities as trust creditors is protected when electronic data interchange (EDI) or other forms of electronic commerce are used to invoice buyers. Specifically, the amendments would require that a buyer licensed under the PACA or its third party representative accept the PACA trust notice submitted to it by a seller on a paper, electronic invoice, or other billing statement. In addition, the buyer would be required to allow sufficient

data space for the required trust language regardless of the billing medium. Finally, any failure, act or omission inconsistent with this responsibility would be unlawful and a violation of the PACA.

The comment period ended on January 8, 2007. We received 41 comments. All commentators supported AMS's proposal to amend the regulations. The comments indicate that the proposed amendments would remedy a very serious potential commercial problem for shippers/sellers, as well as adapt to industry practices of enhanced technology; and, thus would provide the same protections for the shippers/sellers when paper invoices or EDI transmissions are used. Therefore, for the reasons given in the proposed rule and based upon comments received, we are adopting the proposed rule as a final rule, without change.

#### Executive Orders 12866 and 12988

This final rule has been determined to be not significant for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is not intended to have retroactive effect. This final 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 that must be exhausted prior to any judicial challenge to the provisions of this final rule.

#### Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), AMS has considered the economic impact of this final 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. There are approximately 15,000 firms licensed under the PACA, many of which could be classified as small entities.

The final rule clarifies how to preserve the trust benefit when using electronic invoicing. The use of electronic invoicing will provide companies an electronic alternative to paper documentation to give notice of intent to preserve trust rights, thereby reducing the time and expense

associated with preserving trust rights under the PACA.

Given the preceding discussion, AMS has made a determination that the provisions of this final rule would not have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act

In accordance with OMB regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are covered by this final rule were approved under OMB number 0581-0031 on October 5, 2004, and expire on October 31, 2007.

#### E-Government Act Compliance

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

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

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

■ For the reasons set forth in the preamble, AMS amends 7 CFR part 46 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 (f)(3) introductory text is revised and new paragraphs (f)(4) and (5) are added to read as follows:

#### § 46.46 Statutory trust.

\* \* \* \* \*

(f) \* \* \*

(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 as defined in paragraph (a)(5) of this section, whether in documentary or electronic form, to preserve trust benefits. Alternately, the licensee's invoice or other billing statement, given to the buyer, must contain:

(i) \* \* \*

(ii) \* \* \*

(4) If the invoice or other billing statement is in electronic form, the licensee has met its requirement of giving the buyer notice of intent to preserve trust benefits on the face of the

invoice or other billing statement if the electronic invoice or other billing statement containing the statement set forth in paragraph (f)(3)(i) is sent to the buyer and the electronic transmission can be verified. The licensee will be deemed to have given notice to the buyer of its intent to preserve trust benefits if the licensee can verify that the electronic invoice or other billing statement was sent to a third party electronic transaction vendor designated by the buyer. The licensee will have met the requirement of giving the buyer written notice of intent to preserve trust benefits using electronic means if it can verify that the electronic data invoice or other billing statement was transmitted to the buyer, or its designated electronic transaction vendor, irrespective of whether or not the buyer or third party vendor downloads or accepts the trust statement.

(5) If a buyer conducts its transactions in perishable agricultural commodities using an electronic system, the buyer or its third party electronic vendor must allow sufficient space for the seller to include the required trust statement of intent to preserve trust benefits in the buyer's electronic invoices or other billing statement forms. A buyer or its designated third party electronic vendor must accept a seller's notice of intent to preserve benefits under the trust using the required trust statement, whether in documentary or electronic form, as set forth in paragraphs (d) and (f) of this section. Any act or omission which is inconsistent with this responsibility is unlawful and in violation of Section 2 of the Act (7 U.S.C. 499b).

Dated: May 23, 2007.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E7-10262 Filed 5-29-07; 8:45 am]

**BILLING CODE 3410-02-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 925

[Docket No. AMS-FV-07-0028; FV07-925-1 FR]

### Grapes Grown in a Designated Area of Southeastern California; Change in Reporting Requirements

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

**ACTION:** Final rule.

**SUMMARY:** This rule revises the reporting requirements established under the California desert grape marketing order,

which regulates the handling of grapes grown in a designated area of Southeastern California. The marketing order is administered locally by the California Desert Grape Administrative Committee (CDGAC or committee). This rule requires handlers to provide an annual report to the committee which lists the acreages devoted to grapes for fresh shipment, the owners and locations of the acreages, and varieties produced thereon that the handler will be handling during the upcoming season. This change allows the committee to collect information on the acreage and varieties of desert grapes regulated under the marketing order, thus improving data collection and the efficient operation of the program.

**EFFECTIVE DATES:** May 31, 2007.

**FOR FURTHER INFORMATION CONTACT:**

Terry Vawter, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: [Terry.Vawter@usda.gov](mailto:Terry.Vawter@usda.gov) or [Kurt.Kimmel@usda.gov](mailto:Kurt.Kimmel@usda.gov).

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement and Order No. 925, both as amended (7 CFR part 925), regulating the handling of grapes grown in a designated area of southeastern California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file

with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule changes the reporting requirements under the order by requiring handlers to file an annual acreage survey which lists the acreages devoted to grapes, the locations and owners of the acreage, and varieties produced thereon for fresh shipment that the handler will be handling during the upcoming season. The form provides information necessary for the committee to estimate annual production, determine the necessary assessment rate, and establish an annual budget of expenses. This change was unanimously recommended by the committee at a meeting on February 6, 2007.

Section 925.60 provides authority for the committee, with the approval of USDA, to require handlers to furnish information to the committee. Currently, § 925.60(a) requires handlers to file reports of shipments of grapes. Under § 925.60(b), the committee is authorized, with the approval of USDA, to require handlers to furnish such other information as it may prescribe and may be necessary to enable the committee to perform its duties under the order.

The acreage survey is currently an approved form authorized for use by the committee. The form was initially included so that the committee could, at some future time, recommend requiring handlers to use the form if it were determined that aggregating information on grape acreage would provide a benefit to the industry.

The committee met on February 6, 2007, and discussed the grape acreage survey. At this time, the committee believes the report would provide valuable information and unanimously recommended that it be a mandatory report, such as those authorized under § 925.60. This change is intended to enhance the efficient operation of the program by permitting the committee to collect production data, which, in turn, would allow them to have more accurate information for establishing a crop estimate, determining an