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AMEND PERISHABLE AGRICULTURAL COMMODITIES ACT

GOVERNMENT

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HEARING

BEFORE THE

SUBCOMMITTEE ON DOMESTIC MARKETING,
CONSUMER RELATIONS, AND NUTRITION

OF THE

COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 4773 and H.R. 4777

JULY 26, 1978

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AMEND PERISHABLE AGRICULTURAL COMMODITIES ACT

WEDNESDAY, JULY 26, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC MARKETING,
CONSUMER RELATIONS, AND NUTRITION OF THE
COMMITTEE ON AGRICULTURE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:25 a.m., in room 1302, Longworth House Office Building, Hon. Frederick W. Richmond (chairman of the subcommittee) presiding.

Present: Representatives Panetta, Nolan, Volkmer, and Symms.
Staff present: Glenda Temple, clerk; Joseph R. Crapa and Mary C. Jarratt.

OPENING REMARKS OF HON. LEON E. PANETTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. PANETTA [acting chairman]. The Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition will come to order.

The chairman, Mr. Richmond, has asked me to chair these hearings on the Perishable Agricultural Commodities Act and the various proposals that have been introduced for its extension and modification.

Before we begin, I would like to commend the chairman for arranging these hearings on a matter which is of great importance to the fresh fruits and vegetable growers in my district and throughout the country.

The Perishable Agricultural Commodities Act promotes fair trading practices in the marketing of perishable commodities in interstate and foreign commerce. Without the protection of this act, our fruits and vegetable producers would be subjected to manipulation by merchants, brokers, and dealers who could easily take advantage of the unstructured way in which the marketing of these commodities is conducted.

The licenses required under this act provide the means for regulating the contracts of traders, retailers, truckers, and frozen food brokers so that prompt payment and delivery will be maintained. Through the years the Perishable Agricultural Commodities Act has served the people in the fast moving, financially hazardous produce business well. The job this subcommittee has before it today is to update the Perishable Agricultural Commodities Act so that it continues to serve the needs of both farmers and consumers. It is my hope that the final legislation this subcommittee approves in the weeks

ahead will enhance the effectiveness of the Perishable Agricultural Commodities Act and that it will continue to protect the producers of our most perishable commodities.

Does any other member of the subcommittee wish to make an opening statement?

OPENING REMARKS OF HON. STEVEN D. SYMMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. SYMMS. I, too, would like to thank Chairman Richmond for scheduling these hearings today. This is an area I have been interested in ever since coming to the Congress. I know there have been many requests from the fresh fruit and vegetable industry in this country to keep PACA self-funded and keep it where it can do its job as a referee in dealing with the highly unique business of the fresh fruit and vegetable industry.

The basic objective of the Perishable Agricultural Commodities Act is to foster fair trading practices in the marketing of perishable agricultural commodities in interstate and foreign commerce and to aid the enforcement of contracts for marketing these commodities.

These products, fruits and vegetables, being highly perishable need to be harvested, packaged, and distributed quickly because there are many opportunities for individuals and firms to take advantage of the unstructured way the marketing of perishable commodities is conducted.

This legislation was passed by the Congress in 1930 upon the request of the produce industry. The Perishable Agricultural Commodities Act establishes rules of fair trade so that those who buy and sell fresh frozen fruits and vegetables may trade with confidence.

I think what we have here is a situation where the Department of Agriculture with PACA serves properly as a referee to aid in this very important industry to our economy. I hope we will be able to update the act without any needless encumbrances and permit it to carry out the original responsibilities that the Congress intended in 1930.

I appreciate the chairman's leadership and the fact that we have called these hearings. I hope we can look forward to working out the problems. I also hope we can look forward this year to passing legislation which would help PACA meet the needs of today.

Mr. PANETTA. Thank you, Mr. Symms.

[The bills H.R. 4773, H.R. 4777, and the reports from U.S. Department of Agriculture follow:]

[H.R. 4773, 95th Cong., first sess.]

A BILL To amend the Perishable Agriculture Commodities Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499c), is amended by striking from the third sentence of subsection (b) the figure "\$100" and inserting in lieu thereof the figure "\$150".

SEC. 2. Section 1 of such Act (7 U.S.C. 499a) is amended by adding in subsection (6) (C) thereof after the word "commodity" the phrase "other than potatoes".

SEC. 3. (a) Section 1 of such Act (7 U.S.C. 499a) is further amended by striking from subsection (6) (B) the figure "\$100,000" and inserting in lieu thereof

the figure "\$200,000"; and by striking from subsection (7) the figure "\$100,000" and inserting in lieu thereof the figure "\$200,000".

(b) The amendments made by this section shall become effective beginning with calendar year 1977.

SEC. 4. Section 6 of such Act (7 U.S.C. 499f) is amended by adding at the end of paragraph (a) thereof the following: "*Provided, however,* That upon written request of the complainant and upon a determination by the Secretary that disclosure of such information would adversely affect the interest of the complainant and is not required in the public interest, the Secretary may withhold from public disclosure the name, address, and other identifying information about the complainant".

SEC. 5. Section 13 of such Act (7 U.S.C. 499m) is amended by renumbering paragraphs (b) through (e) as paragraphs (c) through (f) and by adding a new paragraph (b) as follows:

"(b) The Secretary or his duly authorized agents, in order to insure that the prompt payment provision of section 2(4) of the Act is being complied with, shall inspect at least once every six months for a period of two years the accounts, records, and memorandums of any commission merchant, dealer, or broker determined pursuant to section 6 of the Act to have violated such provision. The Secretary may also require that any such commission merchant, dealer, or broker furnish and maintain a surety bond in form and amount satisfactory to the Secretary as assurance that such commission merchant's, dealer's or broker's business will be conducted in accordance with this Act and that such commission merchant, dealer, or broker will pay all reparation awards, subject to its right of appeal under section 7(e), which may be issued against it in connection with transactions occurring within two years following determination of the violation."



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

Honorable Thomas S. Foley
Chairman, Committee on Agriculture
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

We appreciate the opportunity to provide the Committee with the Department's views on H.R. 4773, a bill "To amend the Perishable Agricultural Commodities Act and for other purposes."

This Department recommends enactment of H.R. 4773 if Sections 3, 4 and 5 are amended as outlined in the attached comments.

H.R. 4773 would amend the Perishable Agricultural Commodities Act to (1) increase to \$150 the statutory ceiling on fees for PACA licenses, (2) amend the definition of a dealer to include all potato processors, (3) increase to \$200,000 the value of fruits and vegetables retailers may purchase in a year before they become subject to the Act, (4) increase to \$200,000 the value of contracts which may be negotiated by certain frozen food brokers before they become subject to the Act, (5) establish conditions under which the identity of a complainant may be withheld from public disclosure, (6) establish requirements for surveillance compliance audits and (7) authorize the Secretary to require persons found to have violated the prompt payment provisions of the Act to post a surety bond.

Since the PACA program is funded essentially by license fees, there will be no significant effect on the Department's budget. License fees will be adjusted as appropriate to maintain the solvency of the PACA fund.

In accordance with the provision of Public Law 91-190, Section 102(2)(C), this legislation would have no significant impact on the quality of the environment.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Attachment

Secretary

United States Department of Agriculture
 Comments on H.R. 4773, a Bill
 "To Amend the Perishable Agricultural
 Commodities Act and for Other Purposes"

Section 1: This section would increase from \$100 to \$150 the statutory limit on license fees to provide for the financial solvency needed to administer the program since costs are paid essentially by the license fees. The need for authority to assess higher fees is necessary because of (1) decreasing number of persons requiring a license and (2) increasing costs of administering the PAC Act. The increase is necessary to maintain the full service to farmers and marketers of fruits and vegetables. Since there is no other source of funds, this program will have to be severely curtailed as the reserve fund is exhausted.

Section 2: This section would make all potato processors subject to license regardless of whether the potatoes are to be processed within the State where grown. Potatoes are the largest volume vegetable crop produced in the United States. Enactment of Section 2 would extend the benefits of the code of fair trading under the Act to all transactions between potato growers and all processors. We support Section 2 of the bill.

Section 3: This section would increase from \$100,000 to \$200,000 the value of fresh and frozen fruits and vegetables that a retailer may purchase or the value of transactions frozen food brokers, acting for a vendor, may negotiate before they become subject to license under the Act. This increase is substantially higher than the increase in the Cost of Living Index. The Index has risen since 1969 when the exemption was set at \$100,000. On balance, an exemption of \$150,000 would, in our opinion, be more appropriate. Setting the exemption figure at \$150,000 would result in 525 licensed firms that would no longer need a license, thereby reducing the number of licensed retailers to 1.6 percent of all retailers in the United States. The Department, therefore, recommends enactment of Section 3 if modified to change the retailer and frozen food broker exemption to \$150,000.

Section 4: This section outlines the conditions under which the Secretary may exercise discretionary authority and withhold the identity of a party who files a complaint under the Act. This section would amend Section 6(a) which applies to reparation proceedings. Since the Department is not a party to reparation proceedings, but merely acts as a forum for resolving contract disputes between opposing parties, we believe an amendment to Section 6(a) is inappropriate. However, if Section 4 is intended to relate to the filing and investigation of disciplinary complaints, Section 6(b) is the proper section for amendment. We have no objection to the addition

of this authorization to withhold the name of a complaining party if the bill is amended to modify Section 6(b), with the understanding that the authority to withhold the identity of a complainant is within the complete discretion of the Secretary except when the complainant's testimony or deposition, or other direct evidence pertaining to the complainant, is introduced during the course of disciplinary or other civil proceedings and it is therefore necessary, in order to comport with due process standards, to divulge such identity.

Our concern with an amendment to the reparation provision (Section 6(a)) of the Act stems from the fact that it would be virtually impossible to arrange settlements of disputes concerning contract liability if the name of a complaining party were withheld. In order to prevail, a complainant must establish (1) the existence of a contract and (2) that the respondent did not fulfill his contractual obligations which resulted in the complainant being damaged. The details of the allegation must be made fully available to the parties complained against so that they can answer the charges. Further no damages could be collected for an injured party without disclosure of the name of the person to be paid. We, therefore, recommend enactment of this provision if it is modified as suggested above.

Section 5: This section establishes requirements for surveillance compliance audits and authorizes the Secretary to require persons who have been found to have violated the prompt payment provisions of the Act to post a surety bond. It is our understanding that the audit provision will apply only to firms who are found to have violated the prompt payment provisions of the Act in a formal disciplinary proceeding. The additional cost of administering the PAC Act will be about \$77,000 the first full audit year. To clarify that this provision is applicable to formal disciplinary proceedings only, we recommend this section be amended to reflect this intent.

With respect to the bonding provision of Section 5, no sanctions are provided for a failure to comply with the Secretary's request that a bond be posted. If this bonding provision is to be effective, provisions must be included to give the Secretary authority:

1. To deny a license to applicants who were found in a disciplinary proceeding, or to persons who were responsibly connected with firms found in a disciplinary proceeding, to have violated the prompt payment provision of the Act.
2. To suspend the license of a person who fails to post and maintain a bond or to increase the value of a bond as requested by the Secretary.

We recommend enactment of this section of the bill with the suggested changes.

Exhibit A, attached, contains suggested language to amend the bill.

EXHIBIT A

H.R. 4773
SUGGESTED AMENDMENTS

Section 4, page 2, line 10, delete "(a)" and insert "(b)".

Section 5(b), page 3, line 2, insert after the word "determined" the words "in a formal disciplinary proceeding" and insert "(b)" after the words "section 6."

Page 3, line 5, insert after the word "broker" the following: "or any person responsibly connected with such firm."

Page 3, lines 12 and 13, delete the phrase "determination of the violation" and insert after the word "following" the words:

"publication of the facts and circumstances of the violation and/or suspension of the license of such offender pursuant to Section 8(a). After such publication and/or suspension, the Secretary shall notify the violator as to the amount and form of bond he has determined is necessary and such bond shall be furnished within 30 days of such notice. In the event the violator does not furnish such bond within the time specified or if the surety bond so furnished is terminated within two years for any reason without the approval of the Secretary, the license of the violator shall be automatically suspended as of the date of such failure to furnish or of such termination and such license shall not be reinstated during the two-year period following the publication and/or suspension pursuant to Section 8(a) without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is directed by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided."

[H.R. 4777, 95th Cong., first sess.]

A BILL To amend the Perishable Agricultural Commodities Act, 1930

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a), is amended by striking from subsection (6) (B) the figure "\$100,000" and inserting in lieu thereof the figure "\$125,000"; and by striking from subsection (7) the figure "\$100,000" and inserting in lieu thereof the figure "\$125,000".

SEC. 2. Section 3(b) of such Act, as amended (7 U.S.C. 499c(b)), is further amended by striking out in the third sentence the phrase "but in no event shall such fee exceed \$100" and inserting in lieu thereof "but in no event shall such fee exceed \$150".

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., May 16, 1978.

Hon. THOMAS S. FOLEY,
Chairman, Committee on Agriculture,
House of Representatives,
Washington, D.C.

DEAR MR. FOLEY: We appreciate this opportunity to provide the Committee with the Department's views of H.R. 4777, a bill "To amend the Perishable Agricultural Commodities Act, 1930." H.R. 4777 would amend the Perishable Agricultural Commodities Act to (1) increase to \$125,000 the value of fruits and vegetables retailers may purchase during a calendar year before they become subject to license; (2) increase to \$125,000 the value of contracts which may be negotiated by certain frozen food brokers during a calendar year before they become subject to the Act; and (3) increase to \$150 the statutory ceiling on fees for PACA licenses.

The Department has no objection to the basic principles of H.R. 4777, insofar as they go. However, the Department prefers the more inclusive provisions of H.R. 4773, and recommends enactment of H.R. 4773 if amended to incorporate the changes recommended by the Department in its report on that bill.

Since the PACA program is funded almost entirely by license fees, there will be no significant effect on the Department's budget. License fees will be adjusted as appropriate to maintain the solvency of the PACA fund.

In accordance with the provisions of Public Law 91-190, Section 102(2) (C), this legislation would have no significant impact on the quality of the environment.

The Office of Management and Budget advises there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

CAROL TUCKER FOREMAN,
Acting Secretary.

Mr. PANETTA. Our first witness will be the Hon. Bernie Sisk, Member of Congress from California.

I particularly wish to welcome my senior colleague from California who has a well-deserved reputation for protecting California's agriculture as well as that of the Nation.

**STATEMENT OF HON. B. F. SISK, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF CALIFORNIA; ACCOMPANIED BY LARRY
ADAMS, LEGISLATIVE ASSISTANT**

Mr. SISK. Thank you very much, Mr. Chairman, for those kind remarks. I have with me today my legislative assistant, Mr. Adams, in case we do have some questions.

Mr. Chairman, I appreciate the opportunity to appear before you this morning to discuss H.R. 4773, which deals with the Perishable Agricultural Commodities Act.

I recognize that there may be some opposition to some parts of this bill. We have tried to do the best job we can to meet whatever objections there may be, but we recognize that this is not always possible. I hope that the committee in making a decision on how to resolve the issues in controversy will keep in mind some of the points I wish to stress this morning.

I believe there is widespread agreement that it is desirable to keep the income and expenditures from the operation of the Perishable Agricultural Commodities Act in line. To do otherwise would mean that Federal tax dollars will have to be used to fund a program that has been self-sustaining for nearly 50 years through the collection of license fees.

The first amendment that my bill proposes is to raise the license fee for commission merchants, dealers, and brokers from the current \$100 to \$150. This is supported by the industry and by the U.S. Department of Agriculture. It was also supported by the previous administration, for the same reason: a declining number of licensees and the increasing cost of administering the PAC Act.

In a few years, the \$150 will be insufficient because of continually increasing costs and further consideration will have to be given to means of financing the administration of the act.

Although a simple increase to \$150 will have my fullest support, the Industry-PACA Advisory Committee, meeting in Los Angeles in February, came up with an alternative which addresses some of the concerns some of the members had when this subject was discussed in 1975. That question was this: Why does a supermarket chain pay the same fee as the small retailer? The answer is that that is the way it has been done. In 1950, Congress increased the fee from \$10 to \$15 per license. It was further increased from \$15 to \$25 in 1956—when there were approximately 27,000 licenses—and the last fee increase was in 1969. By the way, I happened to be a member of the committee at that time when we increased the fee to its present amount of \$100.

The proposal worked out by the Industry-PACA Advisory Committee is straightforward: increase the fee for all to \$150, and for all applicants who operate branches—as determined and defined by the Secretary of Agriculture—require an additional fee of \$50 per branch, but in no case would any applicant pay more than \$1,000. Legislative language to accomplish this is attached for the subcommittee's consideration. If the subcommittee sees fit to adopt it, it will have my fullest support.

Mr. PANETTA. Thank you, Mr. Sisk, and without objection, that material will be inserted in the record at this time.

[The attachment follows:]

A BILL To amend the Perishable Agricultural Commodities Act, 1930

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That Section 3(b) of the Perishable Agricultural Commodities Act, as amended (7 U.S.C. 499c (b)) is amended by adding "and to be furnished thereafter" to the end of the second sentence and by striking out "100" in the third sentence and inserting in lieu thereof:

"\$150 plus \$50 for each branch or additional business location as defined by the Secretary. The total of fees paid by any applicant shall not exceed \$1,000."

Mr. SISK. Section 2 of my bill would extend the provisions of the PACA to all potato processors, whether or not the commodity is involved in interstate commerce. Two previous administrations have recommended enactment of this provision which also has the support of the National Potato Council. In the past, serious problems have arisen in the Red River Valley of the north and in the State of Maine and this section will address those concerns.

I would like to depart from my prepared statement for just a moment to emphasize that although my district is not as heavily concerned with this potato issue as many other areas of the country are, I do recognize the serious nature of some of the problems, therefore, I would like to urge the committee to give serious consideration to bringing these people under coverage. It is my understanding that potato producers from California as well as Idaho, Maine, and various other areas of the country very much desire this. Certainly it does have my full support, even though I realize that within it there may be some controversy.

Section 3 of H.R. 4773 raises the exemption for low-volume operators from the current \$100,000 to \$200,000. The exemption was initially established in 1969 to accommodate inflation. From figures supplied to me by industry representatives, the wholesale price index for fresh and dried fruits and vegetables is up more than 109 percent, while the consumer price index for fruits and vegetables has risen 105 percent. Clearly, the \$200,000 is warranted.

On this point, however, the Department and I disagree. The Department supports an increase in the exemption to only \$150,000. While I prefer the \$200,000 figure, we could live with a \$150,000 exemption. I would urge the committee to review this matter most carefully before making a decision.

One thing is very clear, however. An increase in the exemption is called for.

Incidentally, Mr. Chairman, section 3(b) of my bill should be amended to make it read calendar year 1979 instead of 1977.

This brings us to the most controversial portion of my bill—the authority for the Secretary of Agriculture to withhold the name, address, and other identifying information about a complainant.

After this emerged as a major issue in 1976, I discussed it at length with individuals of differing views. There is still not a complete agreement, and I would hope that if an accommodation can be made, that this provision not be enacted into law, but be handled in the committee report.

Certainly, as far as I am concerned, Mr. Chairman, I have great faith in the wisdom of this committee and leave it up to you to make a determination. This has been a longstanding, serious problem. It is my understanding, of course, that the Secretary has certain powers in this area but there has generally been a question about using that power.

I have been told that the Secretary already has the authority to withhold an individual's name if it is an absolute necessity. If that is so—and I will have to leave that to the lawyers to judge—then I do not wish to tamper with it.

Section 5 of my bill, the final provision, is administrative in nature and would add a degree of assurance. On reflection it may be a more

prudent course of action to mandate one audit and leave subsequent audits discretionary. I would remind the committee that mandatory audits are costly, and while these will be paid for from license fees, it might in time offset the integrity of the PACA fund and force another license fee increase.

Mr. Chairman, I would again like to express my deep appreciation to you and your subcommittee for taking action on a matter that some of us have felt rather concerned about for a number of years. I am grateful for this opportunity to appear.

Mr. PANETTA. Thank you, Mr. Sisk. We appreciate your testimony and the time you have devoted in coming here.

I would like to make clear some basic distinctions. With regard to the increase in the exemption from \$100,000 to \$200,000, it is your stand that you would accept the increase of \$150,000?

Mr. SISK. In the final analysis, I do not think there is any question about the fact that we need an increase. Because of inflation, there is no question that it should be doubled, I think. If we are going to use inflation as an index, then that might be the case. I think we should use it.

The Department feels that maybe we are moving a little bit too far. I do not want to argue with the Department, but I think that legislation is more important than the other aspects and I hope we would not break down over that issue.

I just happen to believe that the \$200,000 is justified. On the other hand, I would leave it up to the judgment of this committee to make the decision.

Mr. PANETTA. In any event, we are related to the 1969 initial exemption in terms of the inflation factor?

Mr. SISK. Yes.

Mr. PANETTA. With regard to information on a complainant, it is your understanding that the Secretary has the authority to withhold a complainant's name at the present time?

Mr. SISK. That is my understanding, yes. We have given a great deal of thought to this. I remember back several years ago at hearings and testimony before this committee that it was our understanding, and is today, that the Secretary does have authority to do this.

You understand, of course, that because of other legislation which we have passed in matters of privacy and the right to face your accuser and so on, we have an intertwined situation here.

But, again, it is my firm belief based on what information I have that the Secretary does have that authority. I think he has been hesitant to use it, in all cases, not just in the case of the present Secretary. I would merely make the suggestion that if the committee saw fit to direct certain action in connection with the report that they, in fact, go ahead and use such authorities as they have rather than attempt to write legislative language which can be a problem in this area. Perhaps that would be the best way to handle this problem. I am happy to leave it up to the wisdom of the committee.

Mr. PANETTA. We will be receiving testimony from a representative of the Department of Agriculture and that will probably be the appropriate time to make a record on that, if that is the case.

Mr. SISK. That is right.

They certainly recognize this problem. There is no question about this. As my colleague from California knows, we have 40 or 50 percent of the handlers of perishable agricultural commodities who are involved. You know how they can discriminate against an individual and so on. I just think there should be some opportunity for a complainant to go in and complain and be protected from the kinds of pressures, and even threats and intimidations, that sometimes occur in connection with this.

Mr. PANETTA. Thank you very much. Mr. Nolan?

Mr. NOLAN. I have no questions.

[I just want to thank Mr. Sisk for taking the time to come over here and testify. This member, and the other members of the committee, will always greatly value the wise counsel that the gentleman brings.

Mr. SISK. I thank my colleague from Minnesota.

Mr. PANETTA. Thank you.

Without objection, at this point we will insert into the record the prepared statement of Senator Warren G. Magnuson from the State of Washington.

[The prepared statement submitted by Mr. Magnuson follows:]

STATEMENT OF SENATOR WARREN G. MAGNUSON, FROM THE STATE OF WASHINGTON

Mr. Chairman: I thank the Chairman and members of the Subcommittee for this opportunity to testify on behalf of legislation to amend the Perishable Agricultural Commodities Act. I support legislation to raise from \$100,000 the minimum invoice value of specified goods which any person must buy or sell or negotiate the sale of in order to be deemed a dealer or broker under the Act.

I am testifying on behalf of vegetable merchants from the Pike Place Market, an open-air market place located in Seattle, Washington. I have had personal contact with the vegetable vendors of the market, and they expressed to me their alarm when approached by two inspectors from the regional field office of the Department of Agriculture, located in Los Angeles. The inspectors informed the merchants that they are subject to the licensing fee of \$100 under the provisions of the Perishable Agricultural Commodities Act. The merchants were surprised, as they had never been informed that they were subject to this licensing fee.

The fact that these merchants are subject to the licensing fee under this Act, appears to be inconsistent with the original intent of the Perishable Agricultural Commodities Act. As I understand it, the Act was written to maintain controls along the production and distribution chain as it relates to perishable agricultural commodities. The vegetable merchants in the Pike Place Market are proprietors of small retail outlets; yet, these small businesses are subject to the same fee under this Act, as the owner of a large chain of grocery stores. Clearly, the uniform fee is unfair in this case; a fee based on a set percentage of the volume of business would be more equitable.

Also, I urge the Committee to support an increase in the minimum invoice value of goods which subjects a dealer to the licensing fee under this Act. While the \$100,000 level may have applied in 1970-71, the inflation factor has made this level unreasonable.

Therefore, I strongly support the effort to draft legislation which would exempt small businessmen, such as the vegetable merchants of Seattle's Pike Place Market, from the licensing fee of the Perishable Agricultural Commodities Act. I also support the legislative efforts to raise the minimum invoice value of goods which causes a vendor to be subject to the licensing fee under the provisions of the Act. I am confident that the Committee will duly consider the legitimate concerns of these small businesses.

Thank you.

Mr. PANETTA. Our next witness will be Ms. Barbara L. Schlei, Administrator, Agricultural Marketing Service, U.S. Department of Agriculture.

We appreciate your taking the time to testify in this issue.

STATEMENT OF BARBARA L. SCHLEI, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, U.S. DEPARTMENT OF AGRICULTURE; ACCOMPANIED BY FLOYD HEDLUND, DIRECTOR, FRUIT AND VEGETABLE DIVISION; AND JOHN GARDNER, CHIEF, REGULATORY BRANCH

Ms. SCHLEI. Thank you very much, Mr. Chairman. With the committee's permission, I would like to introduce Mr. Floyd Hedlund on my left. Mr. Hedlund is the Director of the Fruit and Vegetable Division of the Department of Agriculture. I would also like to introduce to the committee Mr. Jack Gardner, who is the Chief of the Regulatory Branch.

Mr. Chairman, I appreciate the opportunity to present the views of the Department of Agriculture on H.R. 4773 and H.R. 4777.

If I may, by way of background, state that the Perishable Agricultural Commodities Act was enacted in 1930 at the behest of the fresh fruit and vegetable industry. Its purpose, as the chairman has said, was to suppress unfair and fraudulent practices in the marketing of fruits and vegetables in interstate and in foreign commerce. I believe that this is a fine program and I think that we have done a fine job for the industry under that program.

During this current fiscal year, Mr. Chairman, we will have received and acted upon some 20,000 matters on behalf of persons involved in this industry. We were able to resolve over 17,000 of those matters on an informal level.

We will process over 3,000 informal complaints and resolve all but 750 by informal complaints.

During the formal complaint level, we will again during this year process over 400 cases. Settlements awarded during these processes will amount to close to \$9 billion on behalf of the producers of fresh fruits and vegetables and perishable agricultural commodities in this country. Mr. Chairman, this act is particularly important to our small farmers throughout various parts of the country, Florida, Texas, California—farmers who may be small and isolated throughout the San Joaquin Valley and may send a truckload of produce to a terminal market at Hunts Point, N.Y.

That produce might have a value of \$2,000. They would be totally unable to go out and hire a Wall Street lawyer to collect that money for them if there was not prompt payment. It is through this act that the small farmer is able to get a fair and prompt payment for his labor. We are proud of the program and we think it is an important program.

Mr. Chairman, I would like to limit my comments to H.R. 4773 because the provisions of H.R. 4777 are encompassed in that bill.

We recommend enactment of section 1, which would authorize the annual license fee to be increased from \$100 to \$150. This would continue the authority to adjust annual license fees on an as-needed basis to cover program costs. The cost of administering the act, exclusive of the Office of General Counsel, is paid entirely from license fee income. The present fee of \$100 per year, which has been in effect since January 1974, is the maximum authorized by this statute.

There are approximately 16,000 firms currently licensed. The number of firms has gone down each year as the size of the firm's license has increased.

The Department has received almost 20,000 requests for advice and assistance during this current year.

The increase in the costs of operation has taken place even though the number of employees engaged in the administration of this act has not increased over the past 10 years. We are doing work with the same number of people, but the inflationary costs have still made it prohibitive for us to continue at the \$100 license fee rate.

Adequate financing would enable the Department to carry out an effective program to suppress unfair and fraudulent practices in the marketing of fruits and vegetables.

Mr. Chairman, we support section 2 of H.R. 4773, which would make all potato processors in interstate or foreign commerce within the meaning of section 1(8) of the act subject to license even though the potatoes are processed within the State where grown. Potatoes represent the largest volume vegetable crop produced in the United States. During the past decade, there has been a significant increase in the consumption of processed potatoes. I think it is this change in the structure of industry that we are really addressing in section 2.

Of the 1976 potato crop, 29.5 billion pounds were used as food. Of this quantity, 58 percent of the raw product went to processors. A substantial portion of these potatoes is processed within the State where grown. Requiring all potato processors to hold valid licenses will mean that all of their raw product potato transactions would be subject to the act. This would afford farmers the right of recourse under the act.

Section 3 of the act would increase from \$100,000 to \$200,000 the value of fresh and frozen fruits and vegetables that a retailer could purchase before they would become subject to license under the act.

Obviously, as Mr. Sisk has said, the cost-of-living index has risen substantially since 1969 when the exemption was set at \$100,000, but it has not doubled during that time.

To increase the exemption from \$100,000 to \$200,000 would unduly expand the exemption, and is not warranted. We recommend enactment of section 3 if modified to increase the retailer and frozen food broker exemption to \$150,000.

If the exemption were increased—and this is really the point we would like to make to you this morning, Mr. Chairman—to \$200,000, then 950 presently licensed firms would no longer need a license. If the exemption were increased to \$150,000, 525 presently licensed firms would no longer need a license. We feel that the \$150,000 exemption more realistically comports with the cost-of-living index.

Section 4 outlines the conditions under which the Secretary may exercise discretionary authority to withhold the identity of a party who files a complaint under the act. This section proposes amendment of section 6(a). I think it is very important here, Mr. Chairman, to make a distinction between section 6(a) and section 6(b) of the act.

Section 6(a) applies to reparation proceedings in which persons seeking to recover damages resulting from a breach of contract are involved. Inasmuch as the Department is not a party to reparation complaints, they merely act as a forum for resolving contract disputes

between private parties. So, we believe it would be inappropriate to amend section 6(a). This is by its nature an action between a complaining party and a purchaser of the produce and therefore, the complaining party must be a party and must be named under section 6(a) in a reparation action.

Section 4, therefore, would more appropriately apply to section 6(b). Section 6(b) is a disciplinary proceeding. It is a proceeding where it is the Secretary of Agriculture versus somebody.

If the amendment were limited to section 6(b), the Department would not oppose the amendment because in the disciplinary action, the cases arise only when licensees commit repeated and/or flagrant violations of the statute. By the very nature of the case, the Department is always the complaining party.

We would, therefore, not object to the withholding of the name of the complaining party if section 4 were so amended to make it clear that it applied only to section 6(b) of the act, and if the authority were within the sole discretion of the Secretary.

Enactment of section 5 would establish mandatory requirements for compliance audits and authorize the Secretary to require persons who have been found to have violated the prompt payment provisions of the act to post surety bonds. It is our understanding that the audit provision would apply only to firms who are found to have violated the prompt payment provisions of the act in a formal disciplinary proceeding. Again, Mr. Chairman, this relates to section 6(b).

This provision would require approximately 64 audits per year at a cost of \$1,200 per audit.

Mr. Sisk addressed the committee concerning these audits and how costly they would be. If the provision were applied to section 6(a)—the reparation case—there would be an inordinate number of audits and we feel that would be an impossible burden on the licensees. The section should appropriately be limited to section 6(b), the disciplinary case, the repeated and flagrant violation.

A bond provision as proposed in section 5 would require supportive provisions. There is no overriding authority currently in the act which could be applied if there is a failure to comply with a request from the Department that a bond be posted. To make a bonding provision effective, authority must be included to deny licenses to applicants who fail to post bonds as requested under this provision and also to suspend licenses of persons who fail to post and maintain a bond or to increase the value of a bond as requested.

Experience in making follow-up audits of firms which have failed to pay promptly is that they have either cleared up any payment problems within a year or the problems have multiplied. An audit after the finding of violations in the disciplinary proceeding will establish whether there are continuing violations, in the vast majority of cases. We would therefore suggest that the committee consider establishing a provision that only one audit will be necessary following the posting of a surety bond. The purpose of the bond is to pay any reparation awards issued against the firm. Additional audits could be made at the discretion of the Secretary.

We would leave the additional audit provision discretionary rather than mandatory.

Mr. Chairman, this concludes my testimony. I would be pleased to respond to any questions that the subcommittee might have.

Mr. PANETTA. I thank you for your testimony.

Your presentation has been an in-depth one with regard to each of the various sections.

I would ask you, with regard to the identity of the complainant, should that provision relate to section 6(b) as opposed to section 6(a)?

Ms. SCHLEI. Yes. To a disciplinary case in which the Secretary is the moving party as opposed to a reparation case which is a contract dispute in which the complaining party must by the nature of the action be the plaintiff and therefore must be named.

Mr. PANETTA. Let me ask you this. Under that authority at the present time, does the Secretary have the power to withhold an individual's name?

Ms. SCHLEI. Mr. Chairman, that is really a legal question. There is apparently no existing precedent. I have explored that question with our Office of General Counsel. It is their belief that in a section 6(b) disciplinary case the Secretary would have such authority, subject to any legal requirement to disclose the information if it was used in the disciplinary proceeding, or if for other legal reasons it was required under due process standards to be disclosed.

For example, if an informant provided certain information that might be helpful to the person against whom the disciplinary action was being taken, under due process standards, this information would have to be turned over to the party against whom the disciplinary action was going to be taken.

I think that legally, however, given those restrictions and given the basic legal restrictions that Mr. Sisk referred to, the answer to your question would be probably yes. However, I cannot tell you that it is definitively yes because there is no legal authority in the field.

Furthermore, I think there is here a fundamental question of perception. I think that there are many small farmers who could be very severely impacted upon, or perceive that they could be, if they came forward and disclosed evidence to the Government. They could be retaliated against in ways that could have a devastating impact on them.

We have an enormous imbalance in economic power in this country between a very large number of small growers and a very small number of processors and buyers.

I think it is important to make those growers feel that they can come to their Government and have some sense of security when they tell the Government what their concerns are and who is treating them unfairly. They should have some legal assurance, not just a practice within the Department, but legal assurance that their information and their names would not be disclosed unless it is legally necessary to do so.

Mr. PANETTA. In the course of administering that part of the act, is there any evidence that the Department has that indicates that as a problem? That is, the question of intimidation because that person's name might be revealed?

Ms. SCHLEI. Mr. Chairman, we are constantly presented with this belief on behalf of many growers. I cannot confirm to you an investi-

gated case where somebody has had retaliatory action taken against them, with evidence of that action. However, it is clearly the perception of the small grower. Ninety percent of the vegetables in this country goes to processing. This is to a very small number of purchasers by a very large number of farmers who feel themselves at an enormous economic disadvantage. This is clearly their perception.

Mr. PANETTA. My concern would be the question of due process in the disciplinary hearing. I think the individual against whom the disciplinary action was brought would have the right of cross-examination with regard to the complainant. I am not sure that we could constitutionally limit that right with regard to due process.

It might be that under present authority you would have some options available to you. If the Congress gets involved things might end up more confused.

In any event, I appreciate your testimony on that point.

Ms. SCHLEI. Mr. Chairman, let me add that clearly we cannot legislate away due process rights, and that is not what we are suggesting here.

What we are talking about here is putting in the law a clear statement to producers across the country that, to the extent that it would not violate the due process right or any other legal right of the person against whom the disciplinary proceeding is taken, they can give us information and that information will be held confidential.

Many producers in a small area might come to us and talk about prompt payment provisions against a single processor or a single purchaser or a single broker or licensee. It would not necessarily be legally relevant for any of those to be the complainant. It is indeed the Secretary who is the complainant.

In many instances, it is not necessary for informants' names to be disclosed as long as it is not requisite under due process standards. Those are the people we would like to protect.

Mr. PANETTA. One last question, please. With regard to section 5 in the Sisk bill, do you support additional audits or not? Does the Department take a position with regard to section 5 of the bill itself? I am talking about the auditing.

Ms. SCHLEI. Mr. Chairman, on section 5, again, we would recommend that the audits be limited to the prompt payments provisions of section 6(b) and not section 6(a). That is the first point.

We would support them as applied to section 6(b). However, we point out to the committee that once a bond has been posted, the very purpose of the bond is to insure prompt payment. To then require four annual audits after a bond has been posted would be an unnecessary economic burden on the licensees of the program.

We would recommend that they would then become discretionary and there would be but one mandatory audit.

Mr. PANETTA. Thank you. Mr. Nolan?

Mr. NOLAN. I have a couple of questions. May I conclude from your testimony with regard to the identity issue that it is the Secretary's intention to exercise this authority in the future—that is the authority to withhold the identity of people who have filed a complaint for disciplinary reasons?

Ms. SCHLEI. Within his legal right to do so, it is his intention.

Mr. NOLAN. In the case where the complainant might be uncertain at the time of their complaint as to whether or not they are requesting disciplinary action or seeking remedy, in your judgment, would the Secretary have the authority to withhold the identity until such time that any kind of testimony or evidence became vital or necessary for a formal proceeding?

We are talking about a producer who has a complaint and he wants to file it with the Secretary but he is not quite sure whether or not they will seek damages, or whether or not they are simply going to ask the Secretary to take a punitive or disciplinary action.

Ms. SCHLEI. Mr. Nolan, my answer would have to be no. If we proceeded under section 6(a), then we would have to make the name known and it would have to be done at the informal complaint level.

Mr. NOLAN. I understand that. But at the time of the complaint, the complainant might be exploring the options. Maybe the complainant had not yet decided which way he wanted to proceed. Maybe you have not decided which way you want to proceed. So you are kind of in limbo.

The question of violation has been raised, let us say. There is still this uncertainty. Let us say you have not decided on whether it is section 6(a) or 6(b).

Ms. SCHLEI. Hypothetically, let me give you this answer. If someone came in and expressed to us a problem which they had experienced with a licensee under the Perishable Agricultural Commodities Act, then we would work with that person and advise them as to what their rights are and the courses of action that would be available. At that time, we would make clear that if they chose to file a complaint or have us take any action under section 6(a) on the reparation side, then it would be mandatory for us to disclose that person's name. They would have the right to make that election because they are the person who files the complaint. In a sense, it is like a civil action. In a civil action, the individual is the one filing the complaint and therefore has the option to make the determination understanding that the producer's name would have to be disclosed and that they would be the moving party.

I would like to make an analogy under section 6(b) to a criminal proceeding. There, they have no election to make. It is the State or the United States, or in this case, the Secretary of Agriculture, who is the moving party. If you will, it is like the situation of the rape victim. If the Government decides to move forward, they move forward regardless of whether the person would prefer to have their identity withheld.

Mr. NOLAN. Thank you very much.

Assuming that the Secretary would exercise his authority, but was somehow thwarted by court action with regard to the section 6(b), not because of a violation of due process, but let us say the court prohibited it because of a lack of explicit authority in the law, then would you come back to this committee to ask for that kind of explicit authority?

Ms. SCHLEI. Certainly.

Mr. NOLAN. I thank you for your testimony and the answers to my questions. I have no further questions, Mr. Chairman.

Mr. PANETTA. We want to thank you all for your presence here.

Our next witness will be Mr. Thomas F. Wenning from the National Association of Retail Grocers of the United States.

**STATEMENT OF THOMAS F. WENNING, NATIONAL ASSOCIATION
OF RETAIL GROCERS OF THE UNITED STATES**

Mr. WENNING. Thank you, Mr. Chairman. My name is Thomas Wenning. I am a partner in the law firm of Bison & Wenning with offices at 1625 Eye Street NW., Washington, D.C.

I serve as counsel to the National Association of Retail Grocers of the United States [NARGUS] on whose behalf I am appearing today. The National Association of Retail Grocers of the United States, headquartered at Reston International Center, Reston, Va., is a national nonprofit trade association representing approximately 40,000 owners and operators of local retail food stores. NARGUS members operate retail food stores including smaller outlets, convenience stores, and supermarkets.

Before addressing the specific provisions of primary interest to retail grocers in H.R. 4773, it may be helpful to observe the association's overall view regarding the Perishable Agricultural Commodities Act.

First, NARGUS recognizes the need to protect growers and shippers of fresh and frozen fruits and vegetables from unjustified and unfair trade practices, especially where the parties to a transaction involving perishable commodities operate some distance from each other.

Second, retail grocers purchasing perishable agricultural commodities solely for sale at retail from a PACA licensed wholesaler should not be required to purchase a PACA license. The purpose of the law is not served by regulating commercial transactions between wholesalers and their retail customers. The original intent of the law is not advanced by requiring a local retailer selling to household consumers to purchase a PACA license when the retailer buys his merchandise from a licensed local wholesaler.

Third, in 1962 the act was amended to exempt a retailer from having to purchase a PACA license if the invoice cost of his purchases of PACA commodities did not exceed \$90,000 in any calendar year. In 1969, Congress adjusted for inflation the retail exemption to \$100,000. If retailers are to retain the same exemption provided in 1962, and again in 1969, the \$100,000 exemption now provided in the law should be increased to compensate for the rate of inflation during the last 9 years.

H.R. 4773 would increase the retail exemption to \$200,000. NARGUS supports raising the exemption to at least \$200,000. Already the \$200,000 figure contained in H.R. 4773 has been surpassed by inflation. The Producer Price Index, which measures the price wholesalers pay for products, for fresh and dried fruits and vegetables for June 1978 was 230.2, compared to the 110 in 1969. This represents 109 percent increase. To be adequately protected from past inflation the retail exemption ought to be raised to \$210,000. This would be equivalent to action Congress took in 1969 to protect smaller grocers from needless regulation when the index rose from 99 to 110.

The Producer Price Index has been the measure used to gage the effects of inflation for purposes of the Perishable Agricultural Commodities Act. The original index was the Wholesale Price Index. That has been recently changed to the Producer Price Index. It is the same index; they simply changed the name to reflect that it was the cost that the wholesaler was paying rather than the price that the wholesaler was selling it for. But even other indexes, such as the Consumer Price Index, reflect the serious effects of inflation on fruits and vegetables. The Consumer Price Index for fruits and vegetables has increased from 108.9 to 222.8 from 1969 to May 1978, a 105 percent increase.

Both the Producer Price Index and the Consumer Price Index establish that the exemption for retail grocers should be increased to at least \$200,000 to prevent overregulation of small grocers.

In addition, Congress in 1962 in enacting the \$90,000 retail exemption expected the number of retail licenses to fall from 3,528 to about 1,200. Parenthetically, at that time they said if they would establish it at \$100,000, it would have only been 1,125. However, in 1976 over 3,000 retailers were licensed, in spite of the exemption increase to \$100,000 in 1969. NARGUS believes increasing the retail exemption to at least \$200,000 will preserve Congress' original intent not to unduly burden smaller retail grocers. Fairness dictates that if retail grocers are to retain the same exemption provided in 1962, and again in 1969, the \$100,000 exemption now provided in the law should be increased to at least \$200,000 to compensate for the rate of inflation during the last 9 years.

I wish to thank you for this opportunity to present the views of NARGUS on preserving the value of retail grocers' exemption.

I would like to make one additional comment. Congressman Sisk in his earlier remarks made reference to a proposal to raise an outlet provision for retailers and other outlets with a maximum capital of \$1,000. I would say that at this time, without any further indications of the specifics of that proposal, that the retail grocers would be opposed to that because it would do nothing to relieve the inequity in the current system, particularly if you have a retail-independent retailer—who has perhaps nine stores and would buy a license for \$150 and then would be faced with the \$1,000 cap.

Whereas, a chain with over 100 stores would be paying the same \$1,000. We do not see the equity of the small independent who has maybe seven or eight stores paying almost identically with a large, multi-unit operator.

That concludes my remarks.

Mr. PANETTA. Thank you, Mr. Wenning. We appreciate your time spent here with us and your statement.

Our next witness is Mr. Charles F. Haywood, vice president of the National Food Brokers Association. We welcome you to the proceedings today.

STATEMENT OF CHARLES F. HAYWOOD, VICE PRESIDENT, NATIONAL FOOD BROKERS ASSOCIATION

Mr. HAYWOOD. Mr. Chairman, my name is Charles Haywood and I am vice president of the National Food Brokers Association. I am

presenting this statement on behalf of Mark Singer, president of the National Food Brokers Association, who was originally scheduled to be here but is at home recuperating from an operation.

Our association is one of the oldest in the food industry, having been founded in 1904. Our members are located throughout this country and are responsible for the sales and merchandising of the majority of the processed foods in this Nation. They have served the Nation and the food industry well. On an average, one of our members represents 23 food manufacturers and processors. Many of our member firms have represented the same food processors for over a period of 50 years. This is a tribute to their stability and the quality of their service.

Speaking for the National Food Brokers Association and its members, we want to reaffirm our position on H.R. 4773 and other aspects of the Perishable Agricultural Commodities Act. Our members have very strong positions on the PACA. We request that the present \$100,000 exemption for frozen food brokers be increased to at least \$200,000.

Before I discuss this, I would like to point out that our members feel that there never has been a need for legitimate frozen food brokers to be licensed. The frozen food brokers who are members of our organization are paid a commission based solely on sales made on behalf of a food manufacturer or processor who is already licensed under PACA.

In some cases, frozen food brokers represent packers who employ their own salaried sales force in some markets and work with frozen food brokers in other markets. The frozen food brokers may be required to have a PACA license, but the salaried salesmen are not. Yet they share the same responsibility and perform the same function.

The frozen food broker has absolutely no control over the products he sells for the manufacturer. The processor establishes the price for the product and the frozen food broker must sell the product for that price. The legitimate frozen food broker does not at any time take title to the merchandise. He cannot speculate with the product for his own account.

You can see why frozen food brokers feel they are being penalized because they are required to pay for an unnecessary license. We feel it is not equitable to require licenses of those whose operations, by definition, do not affect the control of a fruit or vegetable produce.

In view of this, we believe that it is most urgent that the PACA law at least be amended to increase the present \$100,000 exemption for frozen food brokers to a minimum of \$200,000. This increase in the exemption is made necessary by the inflation of wholesale fruit and vegetable prices that has taken place since the time the present exemption figure was established. From 1969 until April 1978 the Producer Price Index for fresh and dried fruits increased from 110.0 to 227.3 or over 100 percent. Increasing the frozen food broker exemption to at least \$200,000 would be in keeping with other actions by Congress to provide for the inflationary rise in prices. Congress has wisely recognized that statutory standards based on a constant dollar amount should be adjusted to take cognizance of the current inflationary effect on that standard.

At present, for the small frozen food broker with a volume of frozen food products barely exceeding the minimum exemption, the license is

a hindrance. The result could discourage such brokers from selling frozen food products. This could hurt the smaller and regional frozen food packer in obtaining adequate sales representation. It also could make it more difficult for local distributors both wholesale and retail to obtain the variety of frozen food products their consumer customers would desire.

In conclusion, NFBA believes the best approach for a continued successful PACA program is a simple bill raising the license fee to no more than \$150 and increasing the frozen food broker exemption to at least \$200,000.

Thank you.

Mr. NOLAN [acting chairman]. I have no questions, but we thank you for your very helpful testimony.

Mr. WENNING. Mr. Nolan, if I may, I would like to make reference to some material that we have from prior hearings. I would like to submit that for the record. It shows those companies, like the Great Atlantic & Pacific Co., that have the one license fee as does the smaller operator.

Mr. NOLAN. Without objection, that material will be inserted in the record at this time.

[The material referred to above is held in the committee files.]

Mr. WENNING. It also shows that there would still be 1,200 licensees even if the exemption were raised to \$1 million. It also shows that retailers file less than 1 percent of the reparation complaints under the act and only have less than 9 percent of those filed against them, while at the same time, 58 percent of the complaints are filed by shippers and 68 percent of the complaints are filed against wholesalers.

It will show that in 1969 the Wholesale Price Index was the actual index that was used to raise the exemption level from \$90,000 to \$100,000.

Mr. NOLAN. Our next two witnesses will be Mr. James F. Rill, counsel, American Frozen Food Institute, and Mr. Michael Brown, executive director, Frozen Potato Product Institute.

We welcome you, gentlemen, and you may proceed.

STATEMENT OF JAMES F. RILL, COUNSEL, AMERICAN FROZEN FOOD INSTITUTE

Mr. RILL. Thank you, Mr. Chairman. My name is James F. Rill and I am a member of the law firm of Collier, Shannon, Rill, Edwards & Scott. I am here today on behalf of the American Frozen Food Institute [AFFI], a national nonprofit trade association representing companies that manufacture and distribute frozen food throughout the United States. Included in its more than 400 members are the principal packers, suppliers, and marketers of frozen food products in the United States. AFFI and its members welcome this opportunity to present to the subcommittee the views of the frozen food industry on pending legislation to amend the Perishable Agricultural Commodities Act.

AFFI has no objection to those proposals which would increase the license fee and enlarge the volume criteria applicable to retailers and brokers under PACA. Similarly, AFFI has no objection to section 5

of H.R. 4773, provided that the mandate to the Department of Agriculture thereunder is limited, as in the present bill, to situations involving a respondent who has been found in a formal disciplinary proceeding to have violated the prompt payment provisions of the act. It is not clear, however, that this provision is necessary.

AFFI is principally concerned as to the provisions of section 4 of H.R. 4773 which purports to give the Department of Agriculture discretion not to disclose the identity, or information making possible the identification, of complainants. This provision is unnecessary and could generate confusion and a proliferation of legal controversy. Perhaps Mr. Panetta stated a little more clearly than I that if Congress attempts to legislate specific standards in this area where ample legal principles already apply, confusion could result.

Mr. NOLAN. Excuse me for interrupting you. Is it your opinion that the USDA does have existing authority to withhold names?

Mr. RILL. Yes, it is my opinion that they have the authority to do so consistent with the well-established common law informers privilege which is applicable in the civil court proceedings and administrative proceedings as well.

Mr. NOLAN. Would you object to the exercise of that authority?

Mr. RILL. Not at all, consistent with the legal principles that are established with regard to the informer's privilege that at some time, it may be necessary to make disclosure in the course of a proceeding in order to adhere to due process principles. The basic rule is one of nondisclosure and that basic rule is one that has been applicable to administrative agencies for years. We have no objection to its exercise.

To the extent that the section is merely an attempt to give statutory effect to an informer's privilege in PACA proceedings, it is not needed. The Department currently has the legal authority to withhold the identity of complainants unless to do so would be fundamentally unfair to other parties. To the extent that the section is designed to enlarge the privilege, it is undesirable and raises serious constitutional questions regarding the rights of respondents in proceedings under the act.

The proposal vests discretion in USDA to withhold the identity of complainants where disclosure would injure the complainant and is not required in the public interest. This proposed standard is neither appropriate nor consistent with applicable legal principles.

Under existing law, USDA has substantial discretion not to disclose an informant's identity. The informer's privilege is recognized as common law and has been applied and defined in prosecutions by the Federal Government. *Roviaro v. United States*, 353 U.S. 53-1957. The principles governing the privilege are applicable to civil as well as criminal proceedings. See, for example, *Westinghouse Electric Corp. v. City of Burlington*, 351 F. 2d 762-D.C. Cir. 1965. These cases confirm the Government's basic right not to disclose the identity of an informer.

Several important qualifications to the privilege have, however, emerged through litigation: (1) most important, it is not absolute but must be balanced against the need for the information involved and the possible unfairness of nondisclosure to the party seeking it; (2) the balancing function is to be performed by the court on a case-

by-case basis; (3) the privilege can be waived by the informant; and (4) the privilege is the Government's not the informer's, and can, therefore, be waived by the Government.

The analysis to be applied by the court in each case includes consideration not only of the relevance of the information but its importance in light of the offense charged and its utility in the preparation of a defense.

These determinations can only effectively be made in the context of each case. Congress cannot adequately develop standards which will be suitable or will insure fairness in each situation. Under the proposed bill, it is not at all clear that respondents in PACA proceedings would have the same access to relevant and possible vital information as under existing law. The standard set forth in H.R. 4773 is both unprecedented and threatens to submerge the fundamental rights of respondents in USDA proceedings. There has been no showing whatever that there is any need to depart from existing legal principles.

It is AFFI's understanding that the Department of Agriculture generally concurs in this analysis and recognizes that it has the authority to withhold information disclosing the identity of a complainant until such withholding is no longer justified under existing judicially established principles.

Indeed, the first remarks made by Ms. Schlei earlier this morning regarding the parameters of the informer's privilege expresses principles with which I am in total agreement. I would possibly depart from what Ms. Schlei said in her suggestion that the authority of the Department in the application of the privilege in departmental proceedings is not clear. I think the authority of the Department and the application of the privilege in departmental proceedings is absolutely clear and is, in fact, the progeny of a long line of cases that have equal effect to the Department as well as to any other administrative agency under established common law principles.

The other comment made by Ms. Schlei that perhaps persons wanting to complain of practices need some encouragement deserves some comment. It seems to me that, to the extent that people can be reassured that they would be covered by an informer's privilege, it is incumbent on the Department to reassure them of that. The legal principle is there and it is not necessary for Congress to act to give the Department some strength to inform people that they are going to be protected by existing law. That protection is there. If the Department needs some encouragement from this committee to adhere to the principles of existing law, I do not think it behooves the committee to try to develop some ad hoc standard but simply to say in the committee report that there is an informer's privilege which has circumscribed legal principles which can be followed. Mr. Nolan, your question earlier as to whether or not the Department has the authority to withhold the identity of a complainant right after the complaint has been filed until such time as the Department and the complainant are prepared to make a decision whether to go under section 6(a) or 6(b) has a ready answer. That answer is yes. There is authority to withhold information at that preliminary stage of departmental proceedings.

As a general matter, nondisclosure would be appropriate at investigative stages of a proceeding and would be less justified after a formal complaint has issued. We agree, of course, that there is no need for the Department to disclose a complainant's identity in order to commence an investigation under section 6(c) of the act. See 7 U.S.C. section 499f.

In view of the foregoing, I suspect it is not surprising that we do not believe there is any justifiable reason for the enactment of section 4 of H.R. 4773 and we submit that it should not be included in any subcommittee-approved bill.

We would be pleased to try to respond to any questions which you might have.

Mr. NOLAN. Thank you very much.

Mr. Brown, would you please proceed with your statement?

STATEMENT OF MICHAEL F. BROWN, EXECUTIVE DIRECTOR, FROZEN POTATO PRODUCT INSTITUTE

Mr. BROWN. Mr. Chairman and members of the subcommittee, my name is Michal F. Brown and I am here today on behalf of the Frozen Potato Products Institute [FPPI] which was founded in 1958. The Institute's members are engaged in the manufacture and sale of frozen potato products including frozen french fried potatoes. Institute members account for approximately 80 percent of all frozen potatoes produced in this country each year.

FPPI endorses the positions expressed concerning the legislation by the American Frozen Food Institute. In addition, FPPI would like to address section 2 of H.R. 4773. This provision would extend the coverage of the Perishable Agricultural Commodities Act to potato processors even though all their raw products are obtained within the State of processing. In general, FPPI has no objection to this provision. However, in its specific application to one processor, the legislation is punitive and could constitute a bill of attainder. If the processor in question is required to obtain a license, that license would be revoked because of events which would have been set in motion prior to enactment. Section 4(a) of the act, 7 U.S.C. section 499f, provides revocation of a license if a licensee is discharged as a bankrupt. It is my understanding that this provision has been construed as applying to bankruptcy reorganization proceedings, in which one potato processor is currently involved. This sort of particularized punitive legislation is unwarranted. If the subcommittee approved a provision similar to section 2 of H.R. 4773, it should provide that the section shall not operate to deprive a purchaser of commodities intrastate for processing of his license by reason of acts committed or conditions arising before enactment of the new requirement.

I would be pleased to answer any questions which the subcommittee might have. Thank you.

Mr. NOLAN. I have no questions. I want to thank both of you for your testimony. Let me say this also to assure you that the fact that there are not any other members here is not indicative of the interest in this legislation. We do have the commodities future commission legislation up on the floor of the House. Each of the members will be ana-

lyzing your statements carefully. So, we want to thank you very much for your presence.

Our next witnesses are Mr. Art Goldstein, from Frito-Lay, Inc., of Dallas, Tex., and Mr. Melville Ehrlich, counsel, Potato Chip and Snack Food Association, Bailey's Crossroads, Va. I want to welcome you both to this hearing. You may proceed as you see fit.

[The prepared statement submitted by Mr. Goldstein follows:]

STATEMENT OF
ARTHUR GOLDSTEIN
National Manager, Potato Purchasing Division
Frito-Lay, Incorporated, Dallas, Texas
Before
The Subcommittee on Domestic Marketing
and Consumer Relations of the
House Committee on Agriculture
July 26, 1978
With Respect To
H.R. 4773

My name is Arthur Goldstein. I am national manager of the potato purchasing division, Frito-Lay, Incorporated, Dallas, Texas -- a processor of potato chips and snack food items.

I am a past member of the PACA Industry Advisory Committee and am currently serving as Chairman of the Potato Chip/Snack Food Association Potato Industry Liaison Committee.

As a purchaser of potatoes and other agricultural commodities from growers, Frito-Lay is a licensed dealer under the Perishable Agricultural Commodities Act.

Frito-Lay operates 22 potato chip factories in 17 states. Our products are distributed and marketed nationally and our potato purchasing division is actively employed in handling and shipping potatoes from practically every potato-producing area in the United States, necessitating our involvement not only with the actual processing of potatoes for potato chips, but also in the variety development and improvement programs, the certified seed programs and the commercial production of potatoes for processing.

Although Frito-Lay does not object to the proposal to increase the license fee from \$100 to \$150 at the present time, as proposed by H.R. 4773, it does anticipate that if H.R. 4773 were to be enacted, the provisions of Sections 4 and 5 would inevitably require an increase in license fees to an unconscionable level.

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The strong objections of Frito-Lay to H.R. 4773 are based on the provisions of Sections 4 and 5.

These amendments to the current functional Perishable Agricultural Commodities Act would not only result in increased license costs, but would introduce undesirable factors into present legislation. The existing legislation under which the produce industry currently functions has been efficient and effective, and the respect and support of the industry given the PACA, since its inception, has been a classic example of industry cooperation with government in policing itself. The methods and manner in which the PACA functions, today, has earned the respect and confidence of the entire produce industry. The mechanics for establishing investigations, arbitrating disputes, and penalties for violations, under the existing legislation, already are in force and functioning satisfactorily.

Frito-Lay opposes Section 4 of the bill as needless and counter-productive. Aside from the further increase in license fees which it might necessitate, it would create a climate of suspicion and antagonism between producers, shippers, receivers and processors due to the "cloak and dagger" aspects of an unidentified accuser, who may or may not have a legitimate claim, instituting an action by PACA which may or may not be legitimate. It would encourage spurious claims by secret dissatisfied or malicious individuals, and cause needless expense and a waste of time and effort that could be channeled into more productive endeavors.

The magnitude of the Frito-Lay potato division and the wide range of activities that we engage in could, if H.R. 4773 is enacted, cause an unnecessary waste of time and money whenever any disgruntled, misdirected producer, shipper, packer or broker chose to harass us spitefully and anonymously. In normal business transactions, it is customary and proper for a creditor to face his debtor and request due payment for legitimate claims. We feel that the produce business, or the potato processing business, should not be different than other mercantile practices. The precedent of face-to-face confrontation, accuser to accused, has been a traditional and cherished right in our judicial system.

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The produce business should not be singled out as one where investigations are carried out by the government at the behest of nameless, faceless, secret accusers.

We also object strenuously to Section 5. Establishing mandatory requirements for surveillance and compliance audits is nothing but an exercise in futility, incurring costs out of all proportion to any possible benefits. The only positive effect of such mandatory audits would be to increase costs of administration to such an extent that excessive license fees would be required to keep the program on a self-sustaining basis.

It should be recalled that in February, 1976, there was under consideration by this subcommittee, a bill known as H.R. 10988. That bill contained provisions similar to Section 4 of H.R. 4773 and also similar to Section 5, except for the requirement of four mandatory audits per year instead of two. On February 7, 1976, in San Francisco, H.R. 10988 was discussed at a meeting of the PACA Industry Advisory Committee. That Committee consisted of representatives of growers, shippers, brokers, receivers, service wholesalers, retailers, processors and a public representative. The Committee voted unanimously in opposition to H.R. 10988, due to the anonymous complainant and mandatory audit provisions.

There is no more need or justification for Sections 4 and 5 of H.R. 4773 at the present time than there was for similar provisions of H.R. 10988 in 1976.

I appreciate the opportunity to express our views and I hope this statement will contribute to a proper and equitable conclusion with respect to H.R. 4773.

Mr. NOLAN. Thank you very much. Mr. Ehrlich, you may proceed.

Mr. EHRLICH. I would like to ask permission, Mr. Chairman, to have my prepared statement made a part of the record.

Mr. NOLAN. That will be appreciated. Without objection, your statement will be inserted into the record.

[The prepared statement submitted by Mr. Ehrlich follows:]

STATEMENT OF MELVILLE EHRLICH, COUNSEL, POTATO CHIP AND SNACK
FOOD ASSOCIATION

My name is Melville Ehrlich. I am counsel for the Potato Chip/Snack Food Association (PC/SFA) and am making this statement on behalf of PC/SFA and its members.

PC/SFA is a non-profit trade association of manufacturers of potato chips and various snack foods.

The members of PC/SFA account for approximately 90 percent of the domestic production of potato chips and substantial quantities of various snack foods.

The members of PC/SFA purchase substantial quantities of raw potatoes and other produce directly from farmers and because of these purchases the majority of the members of the Association are licensed brokers under the Perishable Agricultural Commodities Act and pay the license fees assessed under the Act.

H.R. 4773 proposes to increase the license fees paid by brokers, including members of PC/SFA, from \$100 to \$150, in order to keep the administration of the Act on a self-sustaining basis. PC/SFA supports this proposal, except that it makes the reservation that other provisions of H.R. 4773, to which it strongly objects, may necessitate future very substantial increases in license fees to make the administration of the Act self-sustaining.

The vigorous and emphatic objections of PC/SFA are directed to Sections 4 and 5 of H.R. 4773.

Section 4, in substance, permits a complaint to be made without disclosure of the identity of the complainant. Although the whole trend today is for open dealings, for governmental operations to be openly conducted in the light of day, this proposal is a throw-back to the days of a nameless, faceless secret acuser who refuses face-to-face confrontation.

Let us consider for a moment what the secret accusation permitted by H.R. 4773 really entails. A complaint may be made by an unwarrantedly disgruntled grower. But whether warranted or not, if an investigation is to be made of a complaint by a secret accuser, obviously the investigation cannot be limited to the account of transactions of the secret complainant, because that would immediately remove the cloak of secrecy in which the complainant has wrapped himself. To protect the identity of the secret complainant, the Secretary would, of necessity, have to undertake such a broad investigation of the dealer that the identity of the complainant would be hidden by the sheer mass of the investigation. It can readily be foreseen and anticipated that in many instances a complete audit of a dealer may become necessary to protect the identity of the secret complainant.

It also should be noted that in the event the Secretary finds that the secret complainant actually does have a good claim, he cannot make a settlement for a secret claimant nor can he bring action on behalf of an unnamed complainant.

Although PC/SFA has supported the increase in the license fees now proposed, we cannot be so naive as to say that we will in the future support license fee increases which may become necessary because of the massive investigations required to protect the identity of a complainant.

PC/SFA also vigorously objects to Section 5 which provides, in substance, that if a licensee has been found to have violated the prompt payment provisions, the Secretary shall (must) inspect at least once every six months for a period of two years, the accounts, records and memorandums of such licensee.

This is an incredible provision. It requires an absolute minimum of four inspections and makes such inspections mandatory regardless of any complaint and even if each examination shows super-meticulous compliance.

On the basis of cost against benefit, let us examine the facts. What a number of mandatory examinations of such scope and frequency can mean in terms of augmented PACA staff, staggers the imagination.

Heretofore, in H.R. 10988 which came on for hearing in 1976, a similar proposal was made, but requiring double the number of examinations, at least once every three months for two years, instead of the presently proposed once every six months. But to get an idea of the costs involved in such a provision, we can profitably look at the testimony given with reference to H.R. 10988.

A statement was submitted by Floyd F. Hedlund, Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, dated February 4, 1976, with respect to H.R. 10988. He estimated that the cost of the required audits proposed by the bill would be approximately \$3,752,000 the first year and double that, over \$7,000,000, the second year, which would require an annual license fee of about \$800 to cover costs.

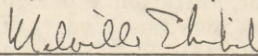
True, H.R. 4773 proposes one-half the number of audits proposed by H.R. 10988 in 1976, but assuming the figures then given are still valid (even though everything costs more now) that still amounts to \$3 1/2 million a year and might require a \$400 license fee.

But the main question is why? What is accomplished to justify all these costs? These mandatory examinations serve no useful purpose but would serve only to skyrocket the necessary license fees.

To summarize, PC/SFA objects to proposed Sections 4 and 5 because:

1. They introduce an element of secrecy into what should be open, face-to-face dealings between licensees and growers.
2. Any investigation must be unnecessarily broad in its scope if the secret identity of the complainant is to be preserved.
3. If the PACA administration ordered any action to be taken, or payment to be made by the licensee, that would automatically dissolve the secrecy.
4. The provision for mandatory auditing of a licensee a minimum of twice a year for two years, even if each audit discloses full compliance, is unnecessarily punitive and unnecessarily expensive; and
5. If there are licensees who are not in compliance, the present provisions of the Act are adequate to deal with the problem.

Respectfully submitted



Melville Ehrlich
Counsel for
Potato Chip/Snack Food Association
919 - 18th Street, N.W.
Washington, D.C. 20006
(202) 296-3144

Mr. NOLAN. Gentleman, I have no questions. I want to thank you on behalf of the subcommittee for your testimony.

That concludes our scheduled witnesses for this morning.

At this time, I would like to call on the panel which is scheduled for this afternoon. We will call at this time Mrs. Dorothy Kelley, Mr. Basil Fox, Mr. Clarence Parr, Mr. Merle Anderson, and Mr. Eloi K. Hamre.

If any of these folks are here, we would like for you to come forward and we will take your testimony ahead of your scheduled time.

The Chair recognizes Mr. Symms.

Mr. SYMMS. Thank you, Mr. Chairman. I apologize to the members of the subcommittee. I had a pending amendment before the House which has now been taken care of. Mr. Panetta has sent his apologies to the witnesses that he now has a pending amendment so he will have to remain on the floor until he can offer that. That is the reason, ladies and gentlemen, why I was detained.

Mr. NOLAN. Mrs. Kelley, would you like to proceed with your statement at this time?

STATEMENT OF DOROTHY P. KELLEY, EXECUTIVE VICE PRESIDENT, MAINE POTATO COUNCIL

Mrs. KELLEY. My name is Dorothy Kelley. For the past 3 years I have been employed as the executive vice president of the Maine Potato Council, an organization representing over 1,300 potato growers in the State. The previous 5 years, I was employed as secretary to the council. During this 8-year period, I have filed many PACA complaints and I would venture to say that my name is well known in the New York and Washington offices.

The potato is the single basic crop in Aroostook County, Maine, where 95 percent of the State's potatoes are grown. We still have small family farms in Maine with the average acreage being 104 acres. The cost of production has tripled during recent years with potato growers presently investing \$750 to \$1,000 per acre. We are talking about a great deal of money each individual is investing and, therefore, the grower needs the protection of the PAC Act.

For 7 years, growers in Maine have had problems with "slow pay" or "no pay." During this period of 7 years, growers have experienced "nonpayment" of over \$13 million. Through the PACA and State legislation introduced by the council, we have managed to collect \$5½ million for the growers. Not all of the \$13 million was due from processors nonpayment, but the large defaults were the result of nonpayment by various processors. Therefore, we urge the passage of section 2 of the proposed amendments calling for PACA licensing of processors of potato products.

When the present act was passed in 1930, frozen potato products were of little consequence, whereas, today nearly one-half of the total Nation's production is processed. This section would give the PACA the necessary authority to assist growers in obtaining their payment when default occurred.

Due to the "slow pay and/or no pay" situation, the council in 1971 introduced legislation requiring all dealers within the State be licensed and bonded.

Four years later processors were included under the licensing and bonding act. We have tried to help ourselves, but we find that the PASA Act has a lot more authority than State law. In 1976 we legislated a "lien law" which gives the producer a lien upon the inventory of a processor who does not pay the producer within the specified contract time. This piece of legislation has one flaw in that the producer has only 10 days after payment due date to file for a lien.

This may not seem like a problem to you, but a producer is very reluctant to take any action against the buyer of his commodity. In regard to the lien law, the payment date passes and the producer talks with the processor who promises that payment will be made within a few days, if the producer will only be patient. Our agricultural producers throughout the Nation are patient as well as trusting people, and normally the 10 days expires before the facts are known.

The council favors the amendment giving the Secretary authority to withhold a complainant's name under specific conditions. Many times a would-be complainant does not file a complaint because he fears that in doing so he will eliminate one of his markets.

Informal complaints have been filed by the council, and the PACA has been successful in securing payment without going the formal route. This has been accomplished by notification that a complaint has been received against said respondent in a certain amount. A licensee does not wish to lose his PACA license and many times a payment schedule has been worked out before a formal complaint is filed.

Therefore, it seems very logical that the Secretary upon determination that disclosure of a complainant's name would adversely affect the interest of the complainant could give the PACA authority to proceed with action against the respondent, and in most cases disclosure would not be necessary.

Section 4 calling for nondisclosure would be of extreme value to the producers who are reluctant to file in fear of future reprisals or the loss of a market.

Due to past experience, we feel section 5 giving authority for inspection of records every 6 months during a 2-year period to be of great value for the insurance of prompt payment. This section is important as once a violation has been proven, it is extremely valuable to assure against future violations. Under this section, it might be determined that a company could operate for 2 years following a chapter XI bankruptcy with a restricted PACA license or more or less on probation. This section is very valuable in proving operation under "good business practices."

In such cases, it would be most important that a surety bond be established in an amount satisfactory to the Secretary. We have found the licensing and bonding law in Maine to be too lenient in the amount of the bond required, however, it does help the producer in the fact that any dealer or company holding a bond will work out a schedule or some manner of payment to prevent the loss of their bond. Those holding a bond realize that once said bond is attached they will be unable to secure another bond, and the same is true of a PACA license as once it is violated said licensee is out of business for a couple of years. To hold a PACA license is actually a privilege to do business.

If the license fee is increased to \$150, it seems logical the exemption should be increased in a similar manner, that being \$150,000. By such

action, the necessary funding would be available to the PACA for policing the other amendments included in H.R. 4773.

In closing, I would be remiss if I failed to mention the excellent cooperation the Maine Potato Council has received from the PACA officials through the years. The Perishable Agricultural Commodities Act is a most useful and fair tool and the amendment in H.R. 4773 will only strengthen the authority of the PACA.

Mr. Chairman, I thank you for the opportunity to appear before you today.

Mr. NOLAN. Thank you very much, Mrs. Kelley. If you can remain, there may be some questions.

Let me at this time call Mr. Anderson.

[The prepared statement submitted by Mr. Anderson follows:]

STATEMENT OF MERLE ANDERSON, RED RIVER VALLEY POTATO GROWERS
ASSOCIATION

My name is Merle Anderson. I am from Climax, Minnesota, in Red River Valley. I am a past president of the National Potato Council. I am a past president of the Red River Valley Potato Growers Association, and I have served the potato industry in many capacities in the last 20 years.

I am a farmer. I operate a 1,400-acre farm and we grow from 150 to 350 acres of potatoes each year.

I am pleased to offer testimony in support of the amendments contained in H.R. 4773. My testimony will cover two areas of subject matter: One will be to clarify our position, as I have worked with the National Potato Council; and, two, as it affects the potato grower and our marketing conditions in the Red River Valley.

I want to assure this committee that the National Potato Council seeks only to raise the level that this industry conducts its business. The National Potato Council has worked long and hard to find a way to work and cooperate with the Department of Agriculture and the officials of PACA.

In the year 1972, by the process of our annual meeting, the potato growers across the country gave the specific direction to our steering committee and to our officers to work with the Department to seek a change in the administration of the PACA Act. The problems then, as they are today, were: Slow pay, no pay, unwarranted rejections, unwarranted discounts, double brokerage, and other violations of the act.

A committee was formed known as the PACA Committee of the National Potato Council. Many trips to Washington and many meetings in the Department of Agriculture, at all levels, amounted to only good visits and no change of administration of the act. We believed then, as we do now, that all of this could have been accomplished by administrative rule. Since we were over ruled at every crossroad we had no alternative but to seek legislation. Then Congressman Bob Bergland understood the problems the producers were having and he along with Congressman Sisk of California assisted us by introducing these Amendments in the Congress in 1976. We are very appreciative of his efforts and understanding while a member of this Committee and now as Secretary of Agriculture.

Last year, our good Minnesota friend and member of this Subcommittee, Congressman Rick Nolan picked up the ball and has been tremendous in his efforts to get these amendments enacted. We deeply appreciate his efforts.

I should say that we are not totally critical of the act. It is a good act, but nothing is so good that it does not need some change and review after 45 years of constant administration.

I want to assure you that there is a very serious problem within the industry that can be corrected to a great extent by the amendments offered in H.R. 4773. In representing the growers' interests, we have to stand up and raise objection to continued and flagrant violations of the act.

In the interest of time, I will not cover each and every one of the amendments to this act. But I would like to speak on a few of the suggested sections.

It has been said that "the PACA, in the past, has not attempted to interfere in the contracts negotiated between a buyer and a seller."

I would submit, Mr. Chairman, that a violation of the PAC Act is simply a violation of the act. Interference has nothing to do with it. Section 4 deals with the disclosure of the name, rank and serial number of the complainant. I must tell you that it is a proven fact that producers just don't sign complaints against their receivers. That is his market outlet for now and in the future. With fewer and fewer outlets for him to market to, he is not going to risk being blackballed by these receivers.

We fully recognize that the name of complainant must be disclosed in the case of a reparation complaint. But, in the case of a disciplinary complaint, there simply is no need for disclosure of that name.

The opponents of this bill say that a respondent must have the right to know who filed a complaint against him in order to proceed with a defense.

No defense is necessary until after an investigation is conducted. Only then, after the Secretary has ruled the complaint valid and in order, does he charge the respondent with a violation.

If a grower complains to the Department and has documented proof that a violation has occurred, then the Department should conduct an informal investigation. If those records reveal that the complainant as well as other producers have not been paid, then I would submit they should all be paid, and there is no need for the complainant to be the sacrificial lamb.

Mr. Chairman, in discussions with the administrators of the Department, by their own admission they pretty well know who the violators of the act are. But we are told they cannot act without a formal complaint. This is why we are asking for this amendment.

It is not the intent of the surveillance portion of Section 5 that a full-blown audit be required. It is a simple matter that, after a licensee has been found to be in violation, it is not going to be a time-consuming procedure to determine if that licensee stays in compliance.

It is our opinion that, when the problem receivers recognize that they must now raise the level by which they do business, the number of violators will be greatly reduced. Therefore, we do not feel that the administrative cost will be increased as was suggested by the department in the past. In fact, it is possible that, as time goes on it may even reduce the administrative costs.

The slow pay and sometimes no pay problem is a growing cancer to our industry. Looking back over the recent years, in case after case there is living proof that growers losses could have been greatly reduced and bankruptcy prevented had receivers and processors conducted their business within the provisions of the act.

In the Red River Valley, our processing market has actually been crippled by the failure of some of our processors to conform to the provisions of their license. Two processing plants were closed and in bankruptcy and continued to operate for years in

violation of the act. The Department of Agriculture knew they were in violation, but they said they couldn't act. Again -- no formal complaint.

It was bad for the growers to lose all that money, but even worse to have lost that volume of our processing market.

In fact, millions of dollars are still owed growers because of the ease in which receivers can fail to pay their bills and run into bankruptcy with little or no fear of the PAC Act being administered against them.

In the past shipping season I know of receivers who had accounts beyond 120 days old that were not paid for. And this is a violation of the Act.

Let me assure you, the potato growers of the Red River Valley are concerned about these problems.

Mr. Chairman, I would have to ask the opponents of these amendments, "What are you afraid of?" If you are conducting your business in a manner that conforms to the law and your license, then you have nothing to fear. These amendmenst will not affect adversely any of those receivers that are conducting their business properly.

Mr. Chairman and members of the Committee, I appreciate your hearing me out on these matters. Potato growers and other fresh fruit and vegetable farmers need your support.

Thank you.

Mr. NOLAN. Thank you for your testimony.

Mr. Hamre, would you like to proceed with your statement?

Mr. HAMRE. Thank you, Mr. Chairman. My name is Eloi Hamre. I am reading a prepared statement for the president of the National Potato Council, Mr. Dell Raybould, who could not be here this afternoon. He is a potato grower in Idaho.

I am the executive director for the National Potato Council in Denver, Colo.

[The prepared statement of Mr. Raybould follows:]

STATEMENT
OF
DELL RAYBOULD - REXBURG, IDAHO
PRESIDENT

THE NATIONAL POTATO COUNCIL
301 MONTBELLO OFFICE CAMPUS
EAST 45th and PEORIA
DENVER, COLORADO 80239

JULY 25, 1978

The National Potato Council is a non-profit trade association of potato growers from throughout the continental United States.

I am testifying on behalf of the commercial potato growers who produce an estimated 97% of all potatoes grown in the United States.

We would like to express our appreciation for the opportunity to appear before this Subcommittee and be heard. We would also like to commend the Chairman, Congressman Richmond, and his committee members for their expressed concern with the possible inadequacies in the existing Perishable Agricultural Commodities law, and we sincerely hope their efforts will lead to a streamlined effective revision tailored to meet the needs of the fruit and vegetable industry without imposing undue hardship unfairly upon anyone. We must all recognize that just as marketing has changed, so must the regulatory laws that control the system be changed in order to adequately protect the interest of everyone concerned.

Potato production last year totaled over 357 million hundredweight in the United States. The means by which that 357 million hundredweight of potatoes moves to market, is processed, handled, merchandised, and consumed has changed radically in recent years and is a far cry from the way the potato crop was handled and utilized only a few years ago -- to say nothing of 48 years ago when the PAC Act became law.

The acquisition of the potato crop from the producer in today's market system is in the hands of far fewer people than it was a few years ago. To the grower, this means reduced selling power because he has fewer market alternatives. This is evidenced by the fact that the number

of PACA licenses has decreased and the trend continues. In 1953 there were 25,443 licensees and in 1977 there were only 15,941. Fewer licensees has not resulted in less business, rather today's licensee may be easily in the multi-million dollar bracket, yet his peer of a few years ago counted his volume in mere thousands or at the most, a few hundred-thousand dollars. This change in the system has created new problems for the producer.

In the fruit and vegetable business the integrity of the individual is of prime importance. Most sales are by telephone; sight unseen sales; in transit juggling by brokers, buyers, or other middlemen; the virtually total inability of the producer to control transactions beyond the farm gate.

Mr. Chairman, I would like to briefly enunciate for you the position of the National Potato Council on each of the Sections of HR4773.

Section I and Section III: The National Potato Council recognizes that times have changed and that there is a necessity to update many facets of the law, including the license fees. Inasmuch as most potato growers are not licensees the National Potato Council takes no position in the determination as to the proper level for the new fees, or for the exemption for retailers. We are confident that whatever this Subcommittee and USDA can workout will be satisfactory.

In June of 1975 the Subcommittee on Department Operations, Investigations and Oversight held two days of hearings to review complaints about the administration of the PACA. The National Potato Council and representatives from various parts of the country testified at some length on that occasion. Again, in December of 1975 and February of 1976 the Subcommittee on Domestic Marketing and Consumer Relations held three days of hearings on proposals to amend PACA. The National Potato Council again testified at great length as to the necessity of updating certain sections of the Act. Others from potato producing states will testify here today. We do not feel it is necessary to reiterate the points that we made in our previous testimony; however, I do think that it would be helpful to the Subcommittee if we could summarize our position on three of the most important Sections.

Section II: This is the Section which would make all potato processors subject to license even though the potatoes were processed within the state where grown. In the past serious problems have arisen in the Red River Valley of the North and in the state of Maine as a consequence of potato

processors going bankrupt and leaving growers holding several million dollars worth of unpaid invoices. The necessity to have a PACA license would greatly reduce the chance for this to occur in the future. This Section is of particular importance to Maine and the Red River Valley growers.

Section IV: In many cases in the United States, the producer may have just one outlet through which to market his crop. Because of this weak marketing position, the producer is subject to rejections, adjustments, or dumping, knowing full well that any effort to register a complaint, though fully justified may cause his handler to refuse to accept his crop in the future or may accept it at less than market value.

Subjecting the producers to such procedures is certainly not the purpose of the Act . . . and I believe this points to a very important matter that has always been the position of the National Potato Council. We believe a producer should have the right to lodge a complaint with the Secretary of Agriculture when he is subjected to slow pay or no pay by a handler. At the beginning of such a proceeding a producer should be able to request anonymity, in the effort to prevent coercion and other unfair trade practices or other means of retaliation that have become common practice in the past. There are those who argue that anonymity does not permit an accused the right to face his accuser, but since there is complete discretion with the Secretary and since we are talking about only the very preliminary part of an investigation, I am sure the personnel of the USDA will be able to determine whether or not it is a single complainant with an axe to grind or if it is in fact a pattern of abuse placing a number of producers in the position of not receiving payment for their produce. Should such an investigation thus instituted reach the point of formal proceedings, we realize that any statements, invoices, or other evidence in the possession of the complainant may be required for formal proceeding to proceed.

Most of the licensees operating under the PAC Act are honorable businesses behaving in a way in which we all can be proud; however, there are just a few "bad apples" that make it necessary for this Section to be added to the Act to provide additional protection to small growers who would otherwise have no other place to turn.

Section V: I think it is clear that in the instances when licensees are found in violation of the slow pay provisions of the Act pursuant to formal proceeding, there is every reason that the Department should maintain surveillance to protect against future such violations. Such a system of checks and balances would protect the grower and probably require the licensee to do a better job of conducting his business and probably help him to develop a pattern of bookkeeping and other behavior that will serve to his advantage as well as the producers advantage.

Mr. Chairman . . . my thanks for the time to appear and express to you the position of the National Potato Council on HR4773.

Mr. HAMRE. Mr. Chairman, I would like to make an observation which is not included in the prepared remarks. In view of previous testimony, not only by USDA officials but also by other witnesses, acknowledging the prerogative of the Secretary of Agriculture to provide anonymity to the producer complaint during the informal procedures, it would be the position of the National Potato Council that when this committee writes its report stating this position as public policy the passage of section 4 would not be necessary.

Mr. SYMMS [acting chairman]. Thank you very much.

I will send a message to Mr. Dell Raybould from my State that we were pleased with your testimony, and that you did an excellent job before the subcommittee.

I apologize that I was not here when the Department testified, but I take it from your testimony that you are saying if section 4 were included in a report, it would not be necessary for it to be in a legislation.

Mr. HAMRE. It has been the position of the council since 1972 that the prerogative did exist and it has been stated here today. On that, we would be very happy.

Mr. SYMMS. All right.

At this time, our next witness will be Mr. Bernard Shaw. Mr. Shaw, would you like to proceed with your statement, please?

STATEMENT OF BERNARD SHAW, VICE PRESIDENT, NATIONAL POTATO COUNCIL

Mr. SHAW. Mr. Chairman and members of the subcommittee, my name is Bernard Shaw. I am a potato grower in Limestone, Maine. I am the immediate past president of the Maine Potato Council, in which capacity I served for 3 years, presently I am vice president of the National Potato Council and a member of the Maine Potato Commission. I have also served on the advisory committee to PACA.

Mr. Basil Fox was unable to attend the hearing today, so with your permission, I would like to testify in his stead for the Maine potato growers.

We in Maine have had vast experience with the PACA since 1971 when we started experiencing nonpayment by potato processors. The Maine Potato Council established a claim service and through the cooperation of PAC officials we have managed to collect several hundred thousands of dollars.

The Perishable Agricultural Commodities rules and regulations are extremely valuable to good business practices but a few revisions are presently required to update the rules to bring them in line with today's fresh fruit and vegetable business.

Growers in Maine deliver approximately 40 percent of their production to potato processors within the State, therefore, due to past experience with "slow pay" by processors, we support section 2, subsection 6(c) calling for manufacturers of canned and processed potato products to be licensed by the PACA Act.

We, in Maine, feel that section 4, calling for anonymity, is important to potato growers. It has been the experience of growers that once a claim is filed against a processor or dealer many times said buyer will delay buying from the grower complainant.

In 1974, the grower who filed the first complaint against a large processor was told, "We are going to make you deliver the balance of your contract last", which was several months later.

The following year the same processor failed to pay, and growers were extremely hesitant to file a claim. The threat of reprisal was haunting growers and it was 3 months before the first grower dared take action.

In Maine we presently have two processors in a chapter 11 bankruptcy. Complaints have been filed in previous years against both processors. If authorized agents of the Secretary had been inspecting the accounts of these processors every 6 months, perhaps the bankruptcy actions could have been averted and growers' losses prevented.

If a licensee is complained against, found guilty, and there is no way to determine if he has corrected his errors, then he may continue his way of doing business and end up in bankruptcy. This has happened in Maine, and, therefore, we urge support of section 5.

We realize the amendment calling for a 2-year inspection of accounts would require more personnel and finances for PACA, and, therefore, we support the license fee increase up to \$150. We feel this is not an excessive burden for anyone and would assure the continuation of the PACA agency.

I would like to depart from my testimony at this point, to make some comments which are not to be mistaken for putting the finger on a single processor in Maine. Across the United States, there have been 9 potato processors who have gone through bankruptcy, leaving the growers of these potatoes holding the bag for millions and millions of dollars. We are trying to correct here an inequity that should be corrected for an old law.

Maine has found the PAC Act a most useful tool and a fair tool. The Maine Potato Council has received excellent cooperation from the PAC administration under the present law, however, we feel inclusion of these amendments would give the agency more enforcement power.

Mr. Chairman, I would like to thank you for the opportunity to appear before you today and that completes my statement.

Mr. SYMMS. I want to thank all of the witnesses who have appeared here today. I would like to say on behalf of the subcommittee that, unfortunately, the House Agriculture Committee has the Commodity Futures Commission bill on the floor. The lack of attendance here is certainly not an indication of lack of interest on the part of this subcommittee.

All of your statements will be considered by all of those on the committee before any action is taken.

Mr. Anderson, did you wish to speak?

Mr. ANDERSON. Mr. Symms, I wanted to make a short comment.

First, I think you recognize that Clarence Parr was scheduled to be here. He is from your State of Idaho. Unfortunately, he had a personal problem. He wishes to send his regards to the subcommittee.

He has been the person that I have worked with when I refer in my testimony to work I have done over several years. We are sorry he could not be here today to represent that part of the country.

Mr. SYMMS. I am glad you brought that up. I thought he was going to be testifying this afternoon. I did not realize he was not going to be here.

Mr. ANDERSON. He became a grandfather and there were some serious problems preventing him from being here at the last moment.

I would like to add something else. In September 1976 the full House Agriculture Committee adapted the provisions identical to sections 4 and 5 by virtually a unanimous vote in its consideration of H.R. 10988. The National Potato Council thinks that that is significant. Hopefully, this subcommittee will give that the same consideration.

Mr. SYMMS. Mr. Anderson, you are representing a different group than Mr. Hamre?

Mr. ANDERSON. No, I am a past president of the National Potato Council. Since 1972, I have been working on the PACA problems. I have attended and testified at hearings. Clarence Parr and I are on the legislative committee of the National Potato Council. We kind of head up that effort.

Mr. SYMMS. You would prefer to have section 4 in the bill, is that what you are saying?

Mr. ANDERSON. Yes.

Mr. SYMMS. Rather than have it in the committee report?

Mr. ANDERSON. I agree with the previously stated position. I am concerned about the future. If the Secretary does have the authority to do this, then we have discussed it.

Mr. SYMMS. I believe they do have that authority. If it is in the committee report, that might be adequate.

Mr. ANDERSON. Yes, we were happy with that.

Mr. SYMMS. Thank you very much. If there are no further comments by the witnesses, we will stand in recess until 2 p.m. this afternoon.

[Recess taken.]

AFTERNOON SESSION

Mr. PANETTA [acting chairman]. The hearings of the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition will continue on the question of the extension or the amendment of the Perishable Agricultural Commodities Act of 1930.

Before we proceed with the witnesses, I would like to apologize to the witnesses who are here for the absence of members of the subcommittee including myself. At this very moment many members of the committee are involved in the amendment process in the debate on the Commodities Futures Trading Commission on the Floor of the House.

With that, I would call as our next witness, Mr. Jules Salzbank, president, American Kitchen Foods, Inc., from Roslyn Heights, N.Y.

Mr. Salzbank, on behalf of the subcommittee, we thank you for taking the time to come here and testify.

[The prepared statement and attachment thereto submitted by Mr. Salzbank follow:]

TESTIMONY OF JULES SALZBANK, PRESIDENT
OF
AMERICAN KITCHEN FOODS, INC.

Mr. Chairman and Members of the Committee:

I am Jules Salzbank, President of American Kitchen Foods, Inc. (AKF), a potato processing company located in Aroostook County, Maine. Accompanying me today are Gerald Donovan, AKF Comptroller, and Harvey Levin, counsel.

On October 17, 1975, AKF and its subsidiaries, two of which, Potato Service, Inc. and Northern Processors, Inc., are current licensees under the Perishable Agricultural Commodities Act (PACA), filed petitions under Chapter XI of the Bankruptcy Act. This proceeding is pending before the United States District Court in Maine. AKF has continued operating its business in the normal and regular course throughout the pendency of the Chapter XI proceeding and has remained current on all of its ongoing obligations to customers and creditors. The Chapter XI proceeding has been closely monitored and supervised by the court and by representatives of secured and unsecured creditors. The proceeding has enabled the company to (a) restructure its operations to assure profitability; (b) formulate a plan which has been accepted by creditors; (c) arrange for ongoing working capital and term loan financing; and (d) remain a viable and productive business entity in Maine. The company expects to emerge from the jurisdiction of the court in October of this year by virtue of an order confirming this plan.

The PACA provides for the automatic termination of the license upon a licensee's being discharged as a bankrupt. This provision of the PACA, having been implicitly held to include Chapter XI confirmations, creates an anomaly in the law and is in irreconcilable conflict with the rehabilitative purposes of Chapter XI of the Bankruptcy Act.

AKF, however, is convinced, based in part on opinion letters from the Department of Agriculture, that under the PACA AKF can continue to operate and conduct its business in the normal course following confirmation without having to possess a PACA license. All of AKF's raw potato purchases are of potatoes grown in Maine and will continue to be on a solely intrastate basis. The PACA, in Section 1 (6) (C), historically has exempted and continues to exempt from the Act's licensing requirements, with an exception not applicable herein, persons who process (or can) a perishable agricultural commodity within the state where that commodity was grown. This, in substance, is the prospect of continued operations upon which AKF, its creditors and the growers have relied preceding and throughout the Chapter XI decision making process.

Section 2 of H.R. 4773 would remove this exemption for processors (and canners) purchasing and processing potatoes, and potatoes only, even though purchased wholly intrastate. I respectfully submit to this Subcommittee that Section 2 of

H.R. 4773, while ostensibly speaking to all processors of potatoes purchased intrastate, is impermissibly directed, in purpose and effect, solely at AKF.

I base this contention on several factors. First, the legislative history of the predecessor of this bill, H.R. 10988 in the 94th Congress, and the only supporting documentation of record, cites only the then existing, now stale, financial difficulties of AKF as justifying this legislative action. These financial difficulties, occurring in 1974 and 1975, were referred to previously as resulting in the Chapter XI proceedings. Mr. Floyd Hedlund, Director, Food and Vegetable Division, Agricultural Marketing Service, Department of Agriculture, testified before this Subcommittee on H.R. 10988 in 1976 that the "problems in the potato industry" were in 1975, and that in 1976 the Administration no longer supported Section 2's identical predecessor. I am not aware of other difficulties which gave rise to or could be remedied by this amendment. Moreover, apparently neither is the Department of Agriculture.

Present Department officials, when queried directly several days ago, could cite no companies other than AKF as justifying this measure, either at the time of H.R. 10988 or at present. In fact, one official stated that of the approximately 100 licensed potato processors, only two

bought solely within the state in which the processing operations were undertaken. I can assume only that these two are the licensee subsidiaries of AKF, Potato Service and Northern Processors.

In its effect, this provision impacts adversely again only upon AKF. Assuming for this analysis that AKF's subsidiaries inevitably will lose their licenses, it is plain that Section 2 would put the entire operation out of business by requiring a license under circumstances in which AKF would be precluded, by reason of its having lost its licenses, from obtaining a license by other provisions of the PACA. No one, including the Department and industry trade organizations, has been able to bring forth any other example of an operation being so directly affected of Section 2.

To the extent that there exist real problems in the perishable agricultural commodities industry which need remedy, AKF certainly has no objection to legitimate relief by way of legislation which is properly tailored to meet the problems. However, to the extent that such legislation isolates one person for legislative punishment for past financial difficulties now on the verge of cure and is discriminatory in its intent, effect, underinclusiveness, lack of rational basis, and staleness, AKF respectfully suggests that such legislation at best demeans the legislative process. Additionally, this extension of regulation would

seem to run contrary to an avowed goal of this Administration which has so strongly decried unfair and unnecessary regulation.

Further, AKF, its current creditors, its potential creditors, the Bankruptcy Court, and the growers who continue to sell to AKF have relied upon AKF's continuing business following confirmation of the Chapter XI plan in the myriad decisions made over the past several years. Quite obviously, instituting and continuing the Chapter XI proceedings, rather than, for example, Chapter X, make sense only in this context. Section 2, if enacted, would vitiate retroactively all decisions and actions taken and sums expended in reliance upon continued operation. This further effect of singling out AKF for extinction exacerbates the unfairness, if not illegality, of the enactment of Section 2.

The purpose of the PACA is to protect the interests of growers of perishable agricultural products. This protection is both necessary and understandable. It should be kept in mind that, in addition to the protection afforded growers of potatoes by virtue of the PACA, Maine has passed legislation which the company believes affords growers of potatoes greater protection against processor defaults than is available to growers in any other state. The Maine Potato Lien Law, passed on January 28, 1977, grants to growers of potatoes a lien on the finished product and inventory of a processor

and the proceeds thereof to the full extent of the price of the raw product delivered to the processor by the grower. This lien is subordinate only to liens of financial institutions making advances to a processor for working capital needs.

Because of this law, commercial lenders providing working capital to processors in Maine are most vigilant with respect to controls on processors' liabilities to growers for raw product delivered, since the creditor holding a secured position in a processor's inventory and receivables must guard against possible conflicting lien claims which might affect the processor's operations and its ability to meet its obligations to the commercial lender. AKF feels that this Act accords growers in Maine security for payment which is more real than that afforded by Section 2, adequate to protect against any possible default on the part of a processor, and the most far-reaching protection available in the commercial market place. A copy of the statute is attached to this statement.

In practical terms, the passage of Section 2 would legislate this company out of business and have the following adverse economic impacts.

A home will have to be found for:

Approximately 20% of the potato crop in Maine, 6,000,000 cwt. of potatoes valued at	\$20,000,000
90,000 cwt. of peas valued at	1,000,000
1,500 people with a gross payroll of approximately	<u>12,000,000</u>
for a total of	\$33,000,000.

The following taxes will not be forthcoming annually:

Federal Payroll Tax	\$ 2,500,000
State Payroll Tax	1,000,000
State Sales Tax	500,000
Local Real and Personal Property Tax	<u>400,000</u>
for a total of	\$ 4,400,000.

The following local purchases will not occur:

Utilities	\$ 1,500,000
Freight	3,500,000
Miscellaneous	<u>2,000,000</u>
for a total of	\$ 7,000,000.

The effect of the closure of the business operations on employment in the area would be as follows, based upon May, 1978 labor statistics for Presque Isle and Caribou, Maine:

Total work force	19,300
Present unemployment	1,630 = 8.4%
AKF employment	1,500 = 7.8%
Related services employment	1,200 = 6.2%
Resulting total unemployment	4,330 = 22.4%

I have labored long and hard for the successful rehabilitation of this company, having resumed management responsibilities following the financial difficulties of 1974 - 1975. After having built up the company, and now contributing my time and resources without compensation, I respectfully request that you do not single this company out for its demise by the passage of Section 2.

I thank you for this opportunity to appear before you today.

(The attachment follows.)

STATE OF MAINE

BY GOVERNOR

PUBLIC LAW

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

H. P. 22 — L. D. 31

AN ACT to Amend the Potato Lien Law.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the One Hundred Seventh Legislature of the State of Maine at the First Special Session between January 19, 1976 and April 29, 1976 enacted chapter 725, the Potato Lien Law, MRSA Title 10, chapter 606, which became effective on July 29, 1976; and

Whereas, the intent of the Legislature in enacting that legislation was to provide for a potato producer's lien upon the raw and processed potato inventory of a processor who purchased potatoes from the producer thereby securing payment to the producer, subject to prior liens on that inventory held by financial institutions; and

Whereas, that legislation limited that priority to financial institutions chartered in Maine or federally chartered without affording the same protection and priority to financial institutions chartered by any of the other 49 states; and

Whereas, potato processors may in the immediate future obtain working capital from financial institutions chartered by other states in the United States by granting to the financial institutions security interests in the inventory of such processors, which working capital will enable the processors to purchase substantial quantities of potatoes from potato producers, and which expanded market will enhance and improve the potato industry of this State and therefore the prosperity and welfare of the State; and

Whereas, the borrowing by processors from out-of-state banks can be accomplished only if the out-of-state banks are afforded the same protection as financial institutions in Maine or federally chartered financial institutions; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety: now, therefore,

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 10 MRSA § 3324, first sentence, as enacted by PL 1975, c. 725, is amended to read:

Except as herein provided, the producer lien, attached to the finished product manufactured or processed by a processor shall take effect immediately upon notification by a producer within 20 business days from the date specified

in the contract, express or implied, for payment of insufficient or no payment to the producer for the raw product delivered to the processor.

Sec. 2. 10 MRSA § 3325, as enacted by PL 1975, c. 725, is repealed and the following enacted in its place:

§ 3325. Preference of liens

The producer's lien is a preferred lien attached to the finished product in inventory and to the proceeds thereof to the full extent of the price of the raw product delivered to the processor and shall be preferred to all other liens, claims or encumbrances except for the liens or security interests of financial institutions chartered by the Federal Government or by any state of the United States, including, without limitation, trust companies, commercial banks, savings banks and savings and loan associations, and commercial finance companies and other institutional lenders, granted upon the inventory of a processor and all proceeds and products thereof to secure existing and future loans, advances and all other indebtedness of the processor to financial institutions, as described when such liens are granted to such financial institutions prior to notification by the producer to the commissioner of insufficient or no payment for the product delivered to the processor.

If any financial institution described in this section shall foreclose upon its lien, the proceeds realized after foreclosure shall be applied first to satisfy all producers' liens having priority over the lien of the financial institution and then to satisfy the lien of the financial institution. The balance of the proceeds, if any, shall be remitted to the Commissioner of Agriculture or his designee for distribution to producers having liens approved by the commissioner under section 3324 in the order of their priority. Any surplus remaining thereafter shall be remitted to the processor.

Sec. 3. 10 MRSA § 3331, as enacted by PL 1975, c. 725, is repealed and the following enacted in its place:

§ 3331. Violations and penalty

It is unlawful for any processor to remove any farm product which is delivered to him, or any processed form of the farm product, from this State or beyond his ownership or control upon which any of the liens which are provided for in this chapter are attached, except any of such product or processed form of the product as may be in excess of a quantity which is on hand of a value that is sufficient to satisfy all existing liens, provided, that neither this section and the penalties provided herein or any other provision of this chapter shall affect, impede or restrict the rights and remedies of a lienor or holder of a security interest having priority under section 3325 to enforce its liens or security interests against the inventory of a processor, and the proceeds and products thereof and no such lienor or security interest holder or any person cooperating or acting in accordance with the request of such lienor or security interest holder shall be in violation of this section.

Any violation of this chapter is a Class E crime as defined in Title 17-A, section 4.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

IN HOUSE OF REPRESENTATIVES, JANUARY 27, 1977

Read twice and passed to be enacted.

..... John L. Martin Speaker

IN SENATE, JANUARY 27, 1977

Read twice and passed to be enacted.

..... Joseph Sewall President

Approved... January 28, 1977

..... James B. Longley Governor

Mr. PANETTA. Thank you. The situation now is that you now are under a chapter XI proceeding?

Mr. SALZBANK. That is right.

Mr. PANETTA. Do you have a license with PACA at the present time?

Mr. SALZBANK. We have a license at the present time under PACA, yes.

Mr. PANETTA. Do you anticipate that that license will be terminated?

Mr. SALZBANK. Unfortunately the law reads that at discharge we automatically lose our license.

Mr. PANETTA. Right. So, you will automatically lose your license. Your interpretation is that you can proceed in the business because you are dealing with potatoes without a license?

Mr. SALZBANK. That is correct.

Mr. PANETTA. One of the concerns I have, obviously, is that while we are dealing with the problem of perhaps just one company, the thing we have to look at is the national scope and implications of this kind of law.

While Maine may have sufficient protection under its State laws for what happened in your instance, it is not a matter of record at this point whether other States have those kinds of laws. I do not know. Perhaps the subcommittee can look at that.

The question I would raise is this. Assuming that we were not applying this to the American Kitchen Foods, Inc., what would be your position generally with regard to the issue of bringing potato growers under section 2 under PACA?

Mr. SALZBANK. I would probably have no objection to the passage of this act if I had not spent the 3 years waiting for rehabilitation. I had no violations.

The purpose of the Bankruptcy Act is to rehabilitate a company. If the law specifically states that a license would be required, then we would immediately file for a chapter X and dissolve the entire company.

Mr. PANETTA. Is it your understanding that that is an automatic termination or does the Secretary of Agriculture have discretion as to whether a license will be terminated at that point?

Mr. SALZBANK. What finance company will give you money on the speculation that the Secretary of Agriculture might, in his discretion, give you a license?

Mr. PANETTA. Is that the case, though? Does the Secretary have the discretion to retain a license?

Mr. SALZBANK. The license is automatically terminated according to the act. So, I don't know whether the Secretary of Agriculture has the discretion to reinstate the license or give us a new license. That, I believe, the PACA people can answer better than I can.

Mr. PANETTA. Let me ask this. What facts led to the bankruptcy in your particular situation?

Mr. SALZBANK. Over-expansion and the over-ambition of the operating officer at the time.

Mr. PANETTA. Were you involved in management at that point?

Mr. SALZBANK. Yes. I was involved in management. I was not actively involved.

Mr. PANETTA. It was your feeling that it was the management of the operation which had over-expanded as far as the markets were concerned, or the purchases, or what?

Mr. SALZBANK. Over-expanded into another operation in the Red River Valley.

Mr. PANETTA. I see.

May I ask the amount of the overall debts owed at the time that went under chapter XI?

Mr. SALZBANK. \$20 million. That was unsecured. We had other debt which was secured. This was not all to growers, however. This was not solely to growers.

Mr. PANETTA. I see. Of those debts, may I ask what percentage of that \$20 million was owed to growers?

Mr. SALZBANK. The percentage is approximately 50 percent. That was to the growers.

Mr. PANETTA. I see. Through the chapter XI proceeding, when do you anticipate that that proceeding will be discharged?

Mr. SALZBANK. Hopefully, this coming October.

Mr. PANETTA. To your knowledge, is there any other processor who is involved in the same problems that you incurred? I am talking about in Maine or wherever else you do business?

Mr. SALZBANK. There was a recent bankruptcy of a small operator. I don't know whether he was in violation of the PACA Act or not. However, we are the substantial and maybe the only one.

Mr. PANETTA. I take it it was not required under PACA that you obtain a license. What was the purpose of your obtaining a license? Was that to deal in other areas rather than just in potatoes?

Mr. SALZBANK. At times we would bring in potatoes from other States. That would require a license. We had it solely for that purpose.

Mr. PANETTA. I see. Thank you.

Mr. Volkmer?

Mr. VOLKMER. Mr. Salzbank, I would like to know how the act automatically after discharge can preclude AKF from continuing operations.

Mr. SALZBANK. Section 2 would require our having a license.

Mr. VOLKMER. What else?

Mr. SALZBANK. I cannot get a license.

Mr. VOLKMER. Why?

Mr. SALZBANK. Because I automatically lose it when I am discharged from bankruptcy. That is according to PACA. Anyone discharged from bankruptcy automatically loses their license. That is under PACA. That is in direct conflict with the purpose of chapter XI which is to rehabilitate the company.

Mr. VOLKMER. It is a part of the present act?

Mr. SALZBANK. That is correct.

Mr. LEVIN. Excuse me. I believe that is in 7 U.S.C. 499(d). In the final sentence there is a proviso at the end of the first section. I don't recall the precise wording.

Mr. VOLKMER. Does it appear in any other place than that.

Mr. LEVIN. Yes. I believe it is in subsection (a) of 499(d) which pertains to the issuance of licenses following the setting forth of the procedure. It is about how one goes about applying for a license. There

is a final proviso and it says, "Provided that any license shall terminate upon being discharged in bankruptcy."

Mr. VOLKMER. Did we change the Bankruptcy Act? Did we change that in the Bankruptcy Act passed by the House and which is now in the Senate, that is, to provide that he does not have an automatic, but that it is a ground for not issuing a license?

Mr. PANETTA. If the gentleman will yield, I offered an amendment on the floor which would—the provision still is that once they are bankrupt, they can reapply for their license again. My amendment would allow the Secretary of Agriculture the discretion to make that decision.

Mr. VOLKMER. It is not automatic under the Bankruptcy Act?

Mr. PANETTA. That is correct. It is not automatic.

Mr. LEVIN. There is one other difficulty which I suppose should not be glossed over. That is the fact that the events that gave rise to the bankruptcy proceedings in 1974 and 1975 also are the subject of departmental action seeking to revoke the licenses. Under that provision, should the licenses be revoked for the same events—it is just a different proceeding—the PACA, as it now stands, presently forbids the issuance of a license and would preclude the operation from obtaining a new license.

Mr. VOLKMER. That was in 1974 and 1975?

Mr. LEVIN. Yes. It was from September 1974 through July 1975.

Mr. VOLKMER. The other question I have is more out of curiosity rather than anything else.

Mr. Salzbank, you say that you are conducting the operation of this company without compensation?

Mr. SALZBANK. I went 1 year without pay, and I have continually kept refinancing the company with my own money at no interest charges. As a matter of fact, as of yesterday I had \$100,000 returned to me which had been kept for some time at no charge of interest.

Mr. VOLKMER. What is your status under the chapter XI proceeding?

Mr. SALZBANK. My status?

Mr. VOLKMER. Yes, your individual status.

Mr. SALZBANK. Under chapter XI?

Mr. VOLKMER. Yes.

Mr. SALZBANK. I am involved in that other than being head of this organization as president of the company. Personally I am not involved. I am debtor in possession.

Mr. VOLKMER. I see. Do you have any investment yourself in the company?

Mr. SALZBANK. Yes.

Mr. VOLKMER. Is that a considerable investment?

Mr. SALZBANK. Ten percent of the company.

Mr. VOLKMER. Have you in the past drawn a salary from the company?

Mr. SALZBANK. Yes.

Mr. VOLKMER. How long ago was the last time?

Mr. SALZBANK. I am on salary right now. This is with the permission of the court. I received permission from the court to set the salary.

Mr. VOLKMER. How much is it?

Mr. SALZBANK. It is \$5,000 each month.

Mr. VOLKMER. I have no further questions.

Mr. PANETTA. Thank you. Mr. Symms?

Mr. SYMMS. Mr. Salzbank, I notice on page 7 of your prepared testimony that you are doing 20 percent of the production of the Maine potato crop that is being processed at your plant. What would happen if you were not granted a license and for some reason no one else assumed ownership or management of the operation? Is there adequate facilities in Maine to handle the crop?

Mr. SALZBANK. Mr. Symms, 20 percent out of a crop of 27 or 30 million bags with 6 million bags finding difficulties of disposing of the crop to the fresh market at the present time would create a tremendous burden upon the farmers.

As a matter of fact, my feeling is, coming from the commodity meeting, the futures market would drop a dollar or a half a dollar per hundredweight if we went out of business. It would do that automatically. The same day it would drop that way there would be no home for the potatoes.

French, which was operating last year, is not operating this coming year. If they are going to operate, it will be to a limited extent. A. & P. is questionable whether it will operate the plant. So, the entire operation in the State of Maine for processors will be solely in the hands of one individual, McKane from Canada. It is a Canadian organization.

Mr. SYMMS. They do the other 80 percent?

Mr. SALZBANK. No. They do the other—we use 20 percent of the crop. There is a total of 40 or 50 percent of the crop that goes to the processors.

Mr. SYMMS. In Maine?

Mr. SALZBANK. At the present time I feel they use approximately 20 percent of the crop, that is of the processed crop. That is, 50 percent of the processed crop and 20 percent of the total crop.

Mr. SYMMS. I see. In other words, if you went out and no one else would take over the capital investment or the tools and equipment in the plant, the physical facilities, and operate it, the Maine potato farmer and the repercussions would go to farmers everywhere and they would have a bad time. Is that right?

Mr. SALZBANK. Yes, they would have a problem getting any money for their crop. Not only that, if we go out, we would have to go into chapter X which would be receivership. Then it would take 2 years before something might happen to the organization.

Mr. SYMMS. To the physical facilities—that is what I am speaking about.

Mr. SALZBANK. Both. The facilities would be on the market. My feeling is that it would take 2 years before they could find purchasers for it and dissolve the business.

Mr. SYMMS. Then the removal of section 2 from H.R. 4773 would allow you to continue to operate, you think.

Mr. SALZBANK. That is correct.

Mr. SYMMS. And it would help avoid this market disaster?

Mr. SALZBANK. That is correct.

Mr. SYMMS. Thank you very much.

Mr. LEVIN. Excuse me, Mr. Chairman. I would like to make a comment about the concern for the national effect of section 2.

Section 2 in H.R. 4773 goes only to one limited licensing exemption in the Perishable Agricultural Commodities Act. It does not speak—there is no guarantee in the enactment of section 2 that will meet the problems. There is a possibility—a theoretical possibility—that it will by its nature encompass all processors of potatoes. But that is by no means guaranteed. That is because it speaks only to one limited exception that now exists in the Licensing Act. It does not affect the definition of the perishable agricultural commodity. It does not affect the other exceptions to the licensing requirement.

I believe that was a contention of several people this morning who rather blithely stated that all potato processors would be brought in—that may or may not be the case. We don't know.

Second, Mr. Salzbank is not aware of this but I have some statements which we received from substantial growers in Maine who are not aware of H.R. 4773 and certainly not aware of the poignancy of section 2 on their activities. They are five statements which were just put together yesterday. They are opposed to the enactment of section 2 of H.R. 4773. At this time I would like your permission to have those entered in the record.

Mr. PANETTA. Without objection, they will be entered into the record at this point.

[The material referred to above follows:]

Statement of Donald W. Chandler, Presque Isle, Maine

My name is Donald W. Chandler, I am a life long resident of Presque Isle, Aroostook County, Maine, and a potato farmer. Since the end of 1975 I have served as one of four farmer members on the Creditors Committee appointed by a Bankruptcy Judge in Chapter XI proceedings involving American Kitchen Foods, Inc., a major potato and vegetable processor operating processing plants in Presque Isle and Caribou, Maine. I have been informed that the rehabilitation of American Kitchen Foods and its emergence from bankruptcy in the near future may be frustrated by the passage of H. R. 4773 in its present form. As a farmer, I endorse H. R. 4773 except for that part which appears to discriminate against the company and will force it out of business for defaults that took place more than three years ago. From information available to the Creditors Committee, it appears that since that time it has paid its obligations not only to the business community but to those farmers who have delivered agricultural products to its plants.

As the company is the largest employer and purchaser of goods and services, as well as being the largest taxpayer in this area, its continued existence should be an important consideration to this Committee which I know is familiar with the plight of the small farmer and particularly those growing a single crop. The company consumes approximately 20% of the total potato production in Aroostook County and the loss of these processing facilities, even on a temporary basis, will not only disrupt the marketing of potatoes, with resulting lower prices, but will leave a Canadian owned potato processor for all practical purposes in complete control of the processing industry in northern Maine. Such ownership and monopoly bodes no good to the farmers in this area.

As a farmer, it is difficult for me to comprehend that Governmental action may result in eliminating a company from the processing field with such harmful affect on so many innocent people. It is hoped that this Committee will redraft the Bill presently being considered in such a form that will afford American Kitchen Foods an opportunity to continue in business and provide much needed support for our local farming industry. I know this opinion is shared by many other farmers, even those who have suffered losses for nonpayment of potatoes delivered to the company more than three years ago. Therefore, I urge that you take whatever action is necessary to allow the company to complete its rehabilitation and to continue its processing of vegetables in Aroostook County, Maine.

POND FARMS, INC.

P.O. Box 429

Fort Fairfield, Maine 04742

TEL. 473-7511

July 25, 1978

Domestic Marketing Subcommittee
of the House Agricultural Committee

Mr. Chairman, Honorable Members of the Committee:

My name is John R. LeVasseur and I reside in Fort Fairfield, Maine. I am President and sole stockholder of Pond Farms, Inc., a Maine corporation engaged in farming only. This company grows in excess of 1,000 acres of potatoes and uses local potato processors as its major outlet. Out of the 1977 crop production, the company delivered 130,000 hundredweights of potatoes to American Kitchen Foods processing plants. The company was one of the largest unsecured farmer creditors of American Kitchen Foods and filed a claim in bankruptcy in excess of \$300,000.00.

It has been brought to my attention that the passage of H. R. 4773 in its present form will prevent American Kitchen Foods from continuing in its potato and pea processing business. This loss will be felt not only by the many farmers dependent upon it as a major marketing outlet but the closing of the processing plants will have a ripple effect on the entire economy of Aroostook County, Maine which is dependent upon the potato farming industry.

The 1977-78 potato marketing season which was recently concluded was an economic disaster to the farmers in this area and only financial assistance by the Farmers Home Administration through its disaster loan program has permitted a large number of farmers to plant a crop in 1978. At this time, prospects for a prosperous industry during the 1978-79 season looks very bleak and the closing of processing plants in this area will cause a further deterioration of prices. It is an accepted fact that the Aroostook County potato industry cannot survive without a strong and successful processing program. At present, two of the processors located in this area are in Chapter XI proceedings and there are strong indications that other processors will either curtail their operations or cease doing business.

Since initiation of bankruptcy proceedings during the latter part of 1975, American Kitchen Foods has demonstrated its ability, even under extremely difficult conditions, to remain operational and to maintain its important position in the potato processing industry. It would be tragic if Governmental action, albeit well-meaning, would result in the closing of the American Kitchen Foods processing plants since it would result in irreparable damage to the farmers not only during the 1978-79 season but for many years to come. It should be pointed out that American Kitchen

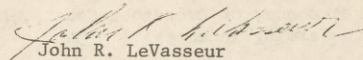
Domestic Marketing Subcommittee
of the House Agricultural Committee
Page 2
July 25, 1978

Foods has contracted approximately 3,000,000 hundredweights of potatoes from farmers in the Aroostook County area for processing during the ensuing year at prices above the cost of production and in most instances higher than market prices. I have been informed that these contracts represent approximately one-half of the normal raw product consumed by the company in a crop year. If these potatoes cannot be delivered, you can well imagine the effect this would have on the price structure and particularly since the other processors in this area have shown reluctance to contract a large percentage of their needs.

I am aware of the importance of the P.A.C.A. and the role it plays in agriculture. However, it seems to me that no useful purpose will be served by legislative action that has the effect of closing processing plants so necessary to the survival of our local potato industry. It is hoped that this Honorable Committee can find some solution to this dilemma and thereby help an already troubled industry.

I appreciate the opportunity to express my views and thank you for your kind attention and consideration.

Sincerely,


John R. LeVasseur
President, Pond Farms, Inc.

July 25, 1978

Domestic Marketing Subcommittee
of the House Agricultural Committee

Dear Mr. Chairman and Honorable Members of the Committee:

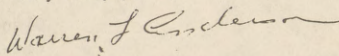
My name is Warren L. Anderson and I reside at 15 Prospect Street in Caribou, Maine. I have been a farmer for more than thirty-five years and in recent years have grown approximately 1500 acres of potatoes and 170 acres of peas. I delivered approximately 400,000 hundredweights of my 1977 potato crop, as well as all of my pea crop, to American Kitchen Foods. This year I have already contracted 165,000 hundredweights of potatoes for delivery to the company.

I understand that your Committee is considering legislation which would have the effect of bringing American Kitchen Foods' processing activities to an end. As this is an important outlet for potatoes in this area, such a result would have extreme adverse effect on the already low potato prices currently being quoted. This company's operations not only affect the farmers in Aroostook County, Maine but our working people in the entire business community as well and hence, the loss of these processing facilities would have a disastrous effect on the entire economy of our area.

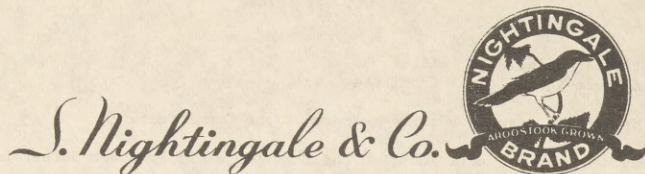
You might be interested to know that I have filed claims in the pending bankruptcy proceedings in the approximate amount of \$300,000.00 representing nonpayment by the company for potatoes I delivered during previous years. The Creditors Plan, which has been accepted, will only return a small portion of this obligation. Nevertheless, I feel that the continued existence of the American Kitchen Foods processing facilities are of the utmost importance to our potato industry. Further, their elimination would not only increase my losses as well as other farmers in this area, but would seriously damage their future farming prospects.

I am aware that the Committee must consider other interests and other problems. However, I hope that the present legislation you are reviewing can be changed in such a manner to permit American Kitchen Foods to remain in the processing business and give our potato industry a better chance to survive under existing difficult marketing conditions.

Very truly yours,



Warren L. Anderson



GROWERS AND SHIPPERS OF SEED AND TABLE POTATOES

BOX 173

FORT FAIRFIELD, MAINE 04742

July 25, 1978

Domestic Marketing Subcommittee
of the House Agricultural Committee

Dear Mr. Chairman and Honorable Members of the Committee:

My name is Glendon R. Wathen, I live in Fort Fairfield, Maine, and have been a farmer all of my adult life. I am the owner and operator of an agricultural corporation known as S. Nightingale & Co., Inc. which is located in Fort Fairfield. This company grows 900 to 1000 acres of potatoes each year and sells a substantial portion of its crop to the area processors and in particular, to the plants operated by American Kitchen Foods.

Originally, S. Nightingale & Co., Inc. concentrated on seed potato farming, but during the last few years Maine has lost its preeminence in this field to other potato growing areas requiring us to use other outlets and in particular, processing. Aroostook County, Maine is essentially a one crop agricultural area and its lack of diversification has caused economic hardship on many occasions. Because of recent unfavorable potato prices, the farming community is in a financially unsound condition.

I am told that the Bill you are considering may cause American Kitchen Foods to stop operating its processing plants. Such action could prove disastrous for this area which, except for lumbering operations and small businesses, is solely dependent upon the potato industry. While I support the aims of the P.A.C.A., I do not feel it equitable or sensible to change that legislation in a way that would have an adverse effect on the already hard pressed farmers of northern Maine. It seems to me that the Committee can achieve the bulk of its goals without hurting a substantial number of farmers. I urge you to take whatever steps are necessary to help us maintain the well-being of the potato industry in Maine.

Respectfully submitted,

S. NIGHTINGALE & CO., INC.

Glendon R. Wathen
President



Herschel A. Smith

Post Office Drawer N
Mars Hill, Maine 04758



Tel. 425-3421
Area Code 207

July 28, 1978

Chairman, Domestic Marketing Committee
House Agricultural Committee
House of Representatives
Washington, D.C. 20000

Dear Sir:

RE: HR 4773

I am deeply involved in the production and marketing of Maine potatoes. I produce 2200 acres of potatoes and also pack and market potatoes for other growers. I handle between five and seven percent of the Maine crop annually.

I have been informed that if HR 4773 becomes law, it will effectively close down Potato Service Inc., the largest potato processor in Maine. This would be an absolute disaster for our whole industry.

This season is shaping up like another surplus potato year and Maine will need every available outlet. 1977 saw Maine farmers lose approximately 45 million dollars on their potatoes. The Farm Home Administration came in and baled out growers with emergency loans to the tune of 20 million dollars. We can not afford another bad year.

It is a well known fact that after several meetings with the P.A.C.A. people, and with full cooperation of Senators Hathaway and Muskie, and Representatives Cohen and Emery, over a period of two years, Potato Service has been unable to negotiate a P.A.C.A. license under any circumstances.

Potato Service is under Chapter 11 Bankruptcy. They have made good progress and conditions look favorable for a refinancing arrangement to be completed by October 1978.

If, however, HR 4773 were passed, or the possibility that it might pass, in its present form, no financing would be available to Potato Service. Therefore, the plant will be closed. The chances of new ownership for the plant for this season is nil.

The Maine Potato Industry is facing a crisis. We already have Potato Service Inc. in Chapter 11. Another potato plant, Cyr Bros. is also in Chapter 11 and closed. R.T. French, who built a new plant in Maine four years ago, have elected not to operate this season. The A. & P. plant here is for sale.

If Potato Service is closed down by HR 4773, it will leave the Maine Potato Industry at the mercy of one buyer; McCain Foods of Canada.

Please do not recommend the passage of HR 4773 without special consideration for Potato Service Inc. of Maine while they are trying to move out from under Chapter 11 Bankruptcy.

Yours truly,

Herschel A. Smith

HAS/mt

Mr. SYMMS. Mr. Volkmer?

Mr. VOLKMER. In the bankruptcy proceeding are the creditors some of the growers?

Mr. SALZBANK. Yes.

Mr. VOLKMER. Was that the substantial amount of the creditors in number and in dollar amounts?

Mr. SALZBANK. Yes. I think we have 11 people on the creditors' committee and four of them are farmers.

Mr. VOLKMER. But, of the total amount—

Mr. SALZBANK. Approximately 30 percent of the debt was to the farmers.

Mr. VOLKMER. I see. How much are they going to be paid back?

Mr. SALZBANK. 30 cents on the dollar or 50 percent of the profits until we pay 70 cents on the dollar.

Mr. VOLKMER. As for the people that you dealt with before, that is, that AKF dealt with before prior to bankruptcy, are they the same people you will be dealing with afterwards?

Mr. SALZBANK. We have dealt with the same people prior to, since then, and will continue with the same people.

Mr. VOLKMER. Thank you.

Mr. PANETTA. Mr. Salzbank, how many other potato processors are there in Maine right now?

Mr. SALZBANK. You have McKane, A. & P.—I referred to them previously and I would feel they will not operate this year—French—which has publicized the fact that they are going to limit their operation—and a gentleman by the name of Cyr. I don't know whether he will be in operation. So, outside of ourselves the only one that will be operating that I know of is McKane.

Mr. PANETTA. In the event you could no longer proceed, would McKane pick up the balance?

Mr. SALZBANK. He will pick up the business but not the plants. He would have no need for the plants. He would have a monopoly.

Mr. SYMMS. Does he have the capacity to process?

Mr. SALZBANK. I believe the plants he has acquired in the last 3 years give him the capacity to take up the slack or whatever would be left after we go out of business. There is no assumption that he will be able to pick it all up. The rest of the country will capture some of it.

Mr. SYMMS. Excuse me, Mr. Chairman, I thought I understood you to say earlier when I asked you the question that you said that 20 percent of the crop was 4 or 5 million bags and that there was not the capacity in Maine to do it without the physical facilities that you now control.

Mr. SALZBANK. I said that we were the only ones—I did not say that the facilities were not there. The facilities are there but he does not have the business for it.

Mr. SYMMS. I see. In other words, you still hold to your other statement that there would be chaos if you closed the doors as far as the market is concerned?

Mr. SALZBANK. He may have the capability of processing these potatoes but he doesn't have the capability of selling them.

The only thing that has maintained this organization in the last 3 years is the amount of friends we have established over the 25 or 30 years that I have been in this industry who have continued doing business with us the past 3 years even though we have been in chapter XI. We are doing business with the most substantial firms in the country such as Safeway, Kroger, Grand Union, and all of the national chains.

Mr. SYMMS. I have one more question, Mr. Chairman.

About these farmers who are creditors of yours, do you still have the same farmers that you owe money to from past crops coming in and bringing in this year's crop and last year's crop?

Mr. SALZBANK. Yes, sir.

Mr. SYMMS. A large percentage?

Mr. SALZBANK. They have all contracted to supply us with potatoes for the next year.

Mr. SYMMS. In what respect? Do you suppose half of your creditors still do business with you? Would it be two-thirds or what?

Mr. SALZBANK. I would say 100 percent of them, practically, do business with us. Some of the letters that were submitted by those farmers will show that they are principal creditors. I read one of the letters hastily. I saw one individual to whom we owe \$300,000 and he claimed he had sold us 130,000 bags of potatoes this past year. He received payment for every bag.

Mr. SYMMS. He was paid?

Mr. SALZBANK. Yes; in the last 3 years we have had no violations. We have lived up to the letter of the law.

Mr. SYMMS. Thank you.

Mr. PANETTA. Thank you, Mr. Salzbank, and those who accompanied you.

Our next group of witnesses is a panel with Mr. Stephen Tavilla, Mr. Arthur Slavin, Mr. Bernard Imming, and Mr. Jackie Bowers.

Gentlemen, the subcommittee welcomes you and thanks you for taking the time to testify on this legislation. Mr. Imming, please proceed.

STATEMENT OF BERNARD IMMING, PRESIDENT, UNITED FRESH FRUIT & VEGETABLE ASSOCIATION

Mr. IMMING. Thank you, Mr. Chairman.

I am Bernard J. Imming, president of the United Fresh Fruit & Vegetable Association headquartered in Washington, D.C. United is the national trade organization for the fresh fruit and vegetable industry with more than 2,700 member companies throughout the United States. The membership is engaged in the production and distribution of fresh fruits and vegetables as well as providing goods and services to the industry. They handle approximately 80 percent of the Nation's tonnage of commercially produced fresh fruits and vegetables—a \$14 billion annual business with a physical volume of over a million carloads per year.

With me today are Messrs. Jackie Bowers, general manager, Jersey Fruit Cooperative Association, Moorestown, N.J.; Stephen Tavilla, president, P. Tavilla Co., Inc., Chelsea, Mass. and Arthur Slavin, executive vice president, New York Produce Trade Association, who is

accompanied by Messrs. Arthur Kreinces, president, Fruitco Corporation, and Sydney Schwartzreich, president, E. Boker, Inc.

These people represent the various types of PACA licensees—the grower/shipper, the wholesaler, the distributor and broker/agent. Messrs. Bowers and Tavilla are also members of the Industry PACA Committee.

I will keep my own remarks short today in order that the subcommittee may hear from these industry representatives.

Briefly, the United Fresh Fruit & Vegetable Association supports H.R. 4777 which increases the ceiling of the PACA license fee to \$150 and increases the retail exemption to \$125,000. With regard to H.R. 4773, United supports section 1 which increases the license fee ceiling to \$150. United has no position on section 2 which is the inclusion of potato processors under the PACA. Section 3 of H.R. 4773 increases the retail exemption from the current \$100,000 to \$200,000. United recommends that the exemption be increased only to a maximum of \$150,000. Sections 4 and 5 of H.R. 4773 are strongly opposed by the fresh fruit and vegetable industry generally. Section 4 which provides for the withholding of a complainant's identity is unacceptable to our industry.

I would now like to allow our witnesses to expound upon the position of the fresh fruit and vegetable industry.

Let me interject at this point, however, our support for a variable PACA fee schedule. A \$150 flat fee with \$50 extra per branch, as determined by the Secretary of Agriculture, with a ceiling of \$1,000 is supported by the industry. This concept was discussed at the Industry-PACA Committee meeting held this past February and unanimously agreed to.

The United Board of Directors has affirmed its support of all the positions I have taken in this statement.

Thank you for this opportunity to appear, Mr. Chairman. I will be available for questions from the committee.

Mr. PANETTA. Mr. Imming, we thank you for your testimony. Mr. Bowers, you may proceed.

STATEMENT OF JACKIE M. BOWERS, GENERAL MANAGER, JERSEY FRUIT COOPERATIVE ASSOCIATION, INC., MOORESTOWN, N.J.

Mr. BOWERS. Mr. Chairman and members of the subcommittee, I thank you.

My name is Jackie M. Bowers. I am general manager of Jersey Fruit Cooperative Association, Inc. of Moorestown, N.J.

Jersey Fruit is a group of growers marketing together. We grow and sell apples and peaches and are 30-odd growers in number. We represent in excess of one-half of the apples produced in the State of New Jersey and a very high percentage of the peaches.

I appreciate this opportunity to speak on behalf of our growers and to present our views on H.R. 4773 and H.R. 4777—the current legislative proposals dealing with the Perishable Agricultural Commodities Act.

Our industries definitely need PACA and there must be sufficient revenue to adequately administer it. We, therefore, support section 1 of H.R. 4773. We have no opposition to section 2.

In section 3, we think an increase is in order but believe \$125,000 to \$150,000 would be more ideal than the proposed \$200,000.

We do, however, have very serious concern, and opposition to section 4. As much as I have at times wished for rights without responsibility, there is no way that we can support this request. Beyond the point of ethics and the right to know, the accused could not properly proceed with his defense if he did not know who filed the complaint.

We, as growers, would not want to be placed in the unpleasant position of attempting to defend ourselves against accusations of an unknown, unhappy, material supplier.

We feel that unidentified accusations would be a hindrance rather than a help to the integrity of our industry.

We have no position on section 5.

Our position is one of support for H.R. 4777.

I wish to express my appreciation for the opportunity to comment on these two bills and hope that my expressions may contribute to your sound judgment on these important decisions for our industry.

Mr. PANETTA. Thank you. Now, Mr. Tavilla.

**STATEMENT OF STEPHEN TAVILLA, PRESIDENT, P. TAVILLA CO.,
INC., BOSTON, MASS.**

Mr. TAVILLA. Mr. Chairman and members of the subcommittee, my name is Stephen Tavilla. I am president of the P. Tavilla Co., Inc. of Boston, Mass. Our firm is engaged in the production, transportation, and wholesale distribution of fresh fruits and vegetables. We have operated successfully under PACA since its beginning for 45-years ago. In addition to our Boston operations, the company has terminal markets operations in Miami and Houston.

I have had the privilege of serving on the industry PACA committee for the past several years. Previous to that I served three terms on the PACA advisory committee.

The industry recognized their own need for coverage of the transactions and negotiations involving purchases and the sales of fresh fruit and vegetables and directly related matters. We feel that the fundamental needs are substantially unchanged since the enactment of the PACA and look forward to the continuation of its effective operation.

There is no question but that the sound business relationship between the industry and the PACA has contributed to the good of our industry. We have found PACA personnel not only absolutely fair and objective, but as helpful and cooperative as possible.

The PACA-industry advisory committee represents fairly all factors in our industry and those for whom PACA was created. It has been an indispensable mechanism for the industry and we believe it has been equally as useful a mechanism from the viewpoint of PACA.

Mr. Chairman, I believe it is significant that the PACA is financed, not out of general revenue, but entirely out of the funds paid by the licensees under the act. This is exemplary among regulatory agencies of the Federal Government and our industry is proud that PACA is so financed.

I would like to comment on H.R. 4777. I support the PACA license fee to \$150 and increasing the retail exemption to \$125,000. On H.R.

4773—section 1—again I support the license fee to \$150 and go along with the industry-PACA committee to add \$50 license fee per branch but not to exceed a total of \$1,000 from any one applicant. This concept was unanimously agreed to by our entire industry PACA committee at our meeting last February.

I have no objections to section 2.

As for section 3, I recommend the retailer limit be raised to a maximum of \$150,000. Anything over that would make it difficult to collect from a large group of present PACA licensees.

Section 4 of H.R. 4773 authorizes the Secretary to withhold the identity of a complaint upon the complainant's written request. Our industry strongly opposes this provision. A respondent must have the right to know who filed a complaint against him in order to proceed with his defense. He must have certain detailed information, such as the provisions of the contract with the complainant to determine the complainant's case, possible breach of contract, and the possible damages. And, of course, if damages are to be paid, the respondent must know the name of the complainant. This also would tend to extend Federal regulations even further into business. We should not turn the PACA into a credit and collection agency.

Section 5 states that the accounts of any licensee who has violated the provisions of the act—even parties who are in an honest dispute—would be subject to routine examination by PACA personnel. The record of our industry with respect to PACA does not indicate a need for fishing expeditions by the PACA personnel. This is anything but a desirable practice in the near unanimous view of our industry. Also, the personnel and time costs to perform this surveillance would add significantly to the cost of the PACA—more costs which would raise again the level of the annual PACA license fee to unbearable levels.

Thank you very much for this opportunity to come before you today.

Mr. PANETTA. Thank you.

Mr. Schwartzreich?

STATEMENT OF SIDNEY SCHWARTZREICH, PRESIDENT, EDWARD BOKER, INC., NEW YORK, N.Y.

Mr. SCHWARTZREICH. Thank you, Mr. Chairman and members of the subcommittee.

I am Sidney Schwartzreich, president of Edward Boker, Inc., and other companies doing over \$100 million in food distribution in the New England area for the past 40 years.

I am astounded when I read section 4, which as amended, would keep the name of the complainant a secret. This would take justice back 200 years prior to our original Bill of Rights.

All court practice, both in the Federal and State courts, have moved to give the respondent all possible information in order to properly defend justifiable complaints. Any competitor will love the opportunity to harass his rival by making false accusations that he would not have to justify and be cross-examined on.

I also feel that section 5 of H.R. 4773, as amended, would place an additional burden on the Department of Agriculture and respondents to handle unnecessary audits at a time when government is attempting to cut administration expenses and budgets.

Thank you for this opportunity to appear today, Mr. Chairman. Mr. PANETTA. Thank you. Mr. Kreinces, you may proceed.

STATEMENT OF ARTHUR D. KREINCES, PRESIDENT, FRUITCO CORP., BRONX, N.Y.

MR. KREINCES. Mr. Chairman and members of the subcommittee, my name is Arthur D. Kreinces. I am the president of Fruitco Corp., located in the New York City Terminal Market. My firm specializes in the handling of fruit, in carload lots, handling about 1,500 carloads or carload equivalents each year, with a sales volume aggregating \$15 million per year.

I am deeply involved in the fresh fruit and vegetable business and its functioning under the Perishable Agricultural Commodities Act. As a concerned member of the industry I have served, from time to time, in various official capacities, including the presidency and board chairman of the New York Produce Trade Association and the New York chapter of the United Fresh Fruit and Vegetable Association, and presently as a member of the board of United Fresh Fruit & Vegetable Association.

In general, I support H.R. 4777 which increases the ceiling of the PACA license fee to \$150 and increases the retail exemption to \$125, and H.R. 4773, section 1, which increases the license fee ceiling to \$150.

As a fruit merchant, I do not have any opinion on H.R. 4773, section 2, which seeks to include potato processors under the PACA.

I agree with Mr. Imming that the exemption expressed in section 3 of H.R. 4773 should be increased to a maximum of \$150.

However, I strongly oppose sections 4 and 5 of H.R. 4773. Section 4 would authorize withholding the complainant's name from the respondent. This is abhorrent to our basic American and democratic concepts. In basic fairness every accused has the right to face his accuser. Knowledge of the identity of the complainant better enables him to defend himself, since then the accusers motivation, which may be based upon prejudice or unfair competition, may be more readily apparent. Under this amendment it would become simple for one to set up his competition against a false or unfair charge, with impunity, knowing that his identity would not be revealed.

Section 5 would compel the USDA to inspect the records of such a respondent once every 6 months, for 2 years. First, the USDA already possesses the authority to inspect books and records on a discretionary basis without this statute, so that it would appear to be superfluous and unnecessary. Second, the added cost of conducting such audits on a compulsory basis would eliminate the Department's use of discretion and create a new and staggering cost. Such added costs would be both unwise and unnecessary.

Accordingly, I respectfully recommend that sections 4 and 5 be dropped from H.R. 4773.

Thank you for this opportunity to express my views.

Mr. PANETTA. Thank you. Mr. Slavin, you may proceed.

[The prepared statement submitted by Mr. Slavin follows:]

STATEMENT OF ARTHUR SLAVIN, EXECUTIVE VICE PRESIDENT, NEW YORK
PRODUCE TRADE ASSOCIATION, INCORPORATED

Mr. Chairman and Members of the Committee:

My name is Arthur Slavin. I am Executive Vice-President of the New York Produce Trade Association, Inc., a non-profit membership organization, incorporated as a Board of Trade for those merchants, in the New York City Terminal Market.

The Terminal is the largest in the world, receiving and distributing perishable agricultural commodities in carloads and carload equivalents from all corners of the Country and foreign countries, and exporting domestic agricultural commodities to foreign countries all over the world. We number approximate 100 separate trading firms, employ about 6,000 people and do a business of between 2 1/2 and 3 million dollars a day. The statement which I make here represents the views and opinions of all of our members regarding the proposed amendments to the Perishable Agricultural Commodities Act (PACA). At the outset, we support H.R. 4777 which increases the ceiling of the PACA license fee to \$150, and increases the retail exemption to \$125,000.

Likewise, we favor H.R. 4773, Section 1, which increases the license fee ceiling to \$150 and increases the retail exemption, however, to a maximum of \$150,000 only. We also support the variable fee schedule proposed by Rep. Sisk which proposes a \$150 flat fee plus \$50 extra per branch, as fair and equitable.

However, we oppose the proposed amendments outlined in Sections 4 and 5 of H.R. 4773 in the strongest possible terms.

The PACA was enacted in 1930 and has been amended from time to time since then. It is defined as an act to suppress unfair and

fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce. In both form and practice it does just that. In our long history in this industry, we have found enforcement of its provisions to be strict, and its punishment of offenders swift, forceful and vigorous. On many occasions we have complained that it is, at times, too strict and possibly unfair and harsh. I do not know of any code of laws which regulates any other industry as rigidly, nor any wherein which the sanctions imposed on offenders are as stringent and severe.

For some years now the Potato Councils have striven to force their own particular ends upon all of us. It would appear that these proponents would have this carefully structured Act, designed to serve those dealing in, or handling, all perishable agricultural commodities, radically restructured to serve the unique (if real) problems of the relatively few growers of a single agricultural commodity. This would appear to be unique in legislative history.

There is really nothing that the PACA, in present form, cannot accomplish for these proponents, other than two which be unconstitutional and undemocratic. Let us examine the PACA, in pertinent structure and practice:

1. Section 2 prohibits unfair conduct, defined, in part to include false or misleading statements, failure to truly and correctly account, failure to make full payment promptly, and failure to perform any specification required by the terms of the contract.

2. Section 6 provides for filing of a complaint against an alleged offender. This may be informal and written on a postcard. If in the opinion of the Department of Agriculture, such complaint warrants investigation, the Department will dispatch its trained and able investigators to the respondent's place of business and examine its books and supporting records, with a fine toothcomb. Little escapes the diligent and close scrutiny of these investigators. A written report of such investigation is then sent to both sides. These quasi judicial proceedings are concluded by a trial in which both parties may furnish testimony and evidentiary matter, and the decision and reparation order.
3. Section 7 provides, substantially, that if the reparation order is not complied with, within 5 days of the expiration of the period allowed for compliance, the offender's license is automatically suspended.
4. Further provisions of the Act, Section 8, provide, substantially, sanctions against offenders whose licenses have been suspended or revoked, prohibiting any licensee under the Act from employing them, in any capacity whatever, ranging, in reparation proceedings to a period not to exceed 90 days, and where the violation is flagrant or repeated, to two years.

Against a strong history of enforcement and effectiveness, what exactly are the proponents of this Bill seeking to establish? Basic in the history of American jurisprudence is the principle that the accuser must be named and must face the accused. How else can he fairly and adequately defend himself. Section 4 of H.R. 4773 by providing for anonymity of the accuser would seek to impose "star-chamber" proceedings. It is a throwback to the middle ages. It would foster complaints bottomed on malice, inference and innuendo, with impunity to the complainant, and would be a most dangerous practice indeed. We have already had too much of that sort of thing.

Section 5 of H.R. 4773 would then mandate an audit of the records of any offender in order to insure that the prompt payment provision of the Act is complied with. Such audit must be conducted once every six months for a period of two years.

The Department of Agriculture already has the right to inspect the accounts, records and memorandum of any commission merchant, dealer or broker, however, on a discretionary basis. It has used such discretion justly and wisely. Why, then, make it obligatory, and force upon the Department actions which it deems unwise, unjust or unnecessary. I will not go into the enormous cost of implementing and supervising the mandatory audit system because it is apparent and has been adequately covered by other objectants to Section 5 of H.R. 4773. However, it is our opinion that this provision would result in such a proliferation of self-serving complaints that the cost of implementation and supervision would be staggering.

Then too, Section 5 proposes that the offender may be required

a bond in such an amount to insure that he will pay all reparation awards which may be issued against it in connection with transactions within two years thereof. My experience with such bonds is that the surety company requires either a cash or property deposit equal to the amount of the bond, or a financial statement so favorable that it will virtually guaranty indemnification to the surety of the amount of the bond. Such a requirement would be beyond the ability of many of the small businesses, and would force them out of business. I am sure that the Bill does not intend such effect.

I think it important that you be informed that on February 12, 1978, the PACA-Industry Advisory Committee met in San Francisco to consider HR 4773 among other things. After full consideration, the Advisory Committee unanimously voted against Sections 4 and 5 of this Bill.

Finally, Gentlemen, I would respectfully urge that the Department of Agriculture was not intended to be, nor should it be permitted to become a credit and collection agency.

The proposed objectionable provisions could place an insidious tool into the hands of a hachetman and are obnoxious to American ideals of fair and decent conduct. They should not be permitted to replace the existing usage of sound business common sense in normal business, and the present use of good judgment and discretion now exercised by the Department of Agriculture.

PACA was created by the Congress as a shield against certain unfair practices. Let us not make it a weapon, instead, for particular interests.

Thank you for this opportunity to present these views.

Mr. SLAVIN. I would like to make one further comment.

I have read at length that the statements submitted by Barbara Schlei of the Department of Agriculture in which she estimates that 64 audits at a cost of \$1,200 per audit is all that would be required if section 5 were to be followed. Frankly, that is done upon the presupposition that the audit would be conducted only in a disciplinary proceeding. In other words, where there have been repeated or flagrant violations of the act under which a complaint is made by the Department of Agriculture itself.

I cannot find that anywhere in that act. I do not know whether that is the intention of the act or whether Ms. Schlei has the right to assume that this is what the act really means.

I rather doubt it. However, in the event that the act does not suppose or rest upon application only in the case of a disciplinary proceeding, then you are going to have the kind of staggering cost that we are talking about. I cannot give you a figure off-hand of how many complaints are filed, but I venture to say that there are many, many thousands. If you multiply that \$1,200 for each audit, and then you have it every 6 months or twice a year, then you have a lot of money and personnel that you have to come up with.

I thank you very much, gentlemen, for this opportunity.

Mr. PANETTA. Thank you for your testimony. Obviously, you all take substantially the same position with regard to the proposals before this subcommittee.

Let me ask you two things with regard to the sections that you oppose, essentially sections 4 and 5, dealing with the identity issue and the issue of acquiring a surety bond with regard to the audit section.

With regard to the identity issue, there was testimony by Mr. Sisk this morning that he felt the Secretary had the authority to withhold an individual's name if it was an absolute necessity at the present time. Is that your understanding of the law as it applies now in this area?

Mr. IMMING. May I respond to that?

Mr. PANETTA. Certainly.

Mr. IMMING. In an informal discussion with representatives of the U.S. Department of Agriculture not too long ago, I did hear a representative of the Office of the General Counsel of the USDA say that he believes that the Secretary does, indeed, have such authority as he needs in this respect. Of course, our position is that if this is the case, then let this section be deleted. It is unnecessary.

It is also our understanding that those who sought this provision in the first place, given this knowledge and this understanding, also believe that the provision is now unnecessary.

Mr. PANETTA. I would take it that if there is mutual agreement that the Secretary has that authority under the law at the present time that that certainly would be sufficient to deal with that particular issue if we can make it clear. Is that right?

Mr. IMMING. That is right.

Mr. PANETTA. The second area I want to ask about is this. The Agriculture Department referred to the fact of audits as well as the issue of identity and they said in the testimony of Ms. Schlei that they have no difficulty in applying that section with regard to 6(b) as opposed

to 6 (a). I take it, Mr. Slavin, that it is your feeling that that also would be objectionable, or what is the position with regard to that?

Mr. SLAVIN. Yes; I think it would be objectionable in either event.

I know that the Secretary of Agriculture presently, under the law as it now stands, has the right to make these investigations. As I said in my prepared testimony, if you were to make a complaint as informal as on a postcard, they would have a right to send their representatives into the field to make a detailed and studied audit of your books and records and then come back with a report on that. They have the right to do that now.

Why go any further?

Mr. PANETTA. That is the point I was going to make. It is your understanding that obviously, under the present laws, the Department has the discretion to conduct those audits at the present time; is that correct?

Mr. SLAVIN. Yes, sir.

The words that you use are the most important. In other words, I think there should be discretion rather than compulsion. I do not think the Secretary ought to be required to do anything. I think the Secretary should have a right to do something but that is the difference.

He has got to use his own wise judgment and discretion as to when he should and when he shouldn't. Otherwise he is going to go out on all kinds of piddling things and waste time and money and the effective use of manpower. It is not necessary.

Mr. PANETTA. Gentlemen, we want to thank you very much for your testimony. Mr. Symms?

Mr. SYMMS. I would like to thank all of these gentlemen for coming down to testify before the subcommittee.

Let me have one thing clarified. This may have been covered in the morning session during the time I was not here.

Why not the \$200,000 exemption?

Mr. IMMING. Principally because it was generally—I think it was the consensus of the committee. This is my position also. The \$150,000 limitation would be desirable at this time.

Mr. SYMMS. Who gets exempted? Can you give me a specific example? Who would get exempted?

If I put \$125,000 in the bill I introduced and I am certainly not opposed to \$150,000, but I have tried to figure out who it is that is going to be exempted if it goes to \$200,000?

Mr. IMMING. Off hand I honestly do not have that information.

Mr. KREINCES. It would affect a lot of small retailers.

Mr. SYMMS. Small, independent retail grocery stores?

Mr. KREINCES. Yes, and there are many of those.

Mr. SYMMS. At the rate that Congress depreciates the value of the money, then maybe \$200,000 won't seem like much in a couple of years.

Mr. KREINCES. With the prices that exist now in agricultural commodities, unfortunately \$200,000 was almost \$100,000 2 or 3 years ago. That may not apply 2 years from now.

Mr. SYMMS. I see.

Mr. IMMING. I found here in Ms. Schlei's testimony from this morning the information that PACA has put together. If the exemption were increased to \$200,000 then 950 presently licensed firms would no

longer need a license. If the exemption were increased to \$150,000, 525 presently licensed firms would no longer need a license. So, the \$150,000 exemption, looking at the total number of licensees, would result in only 1.9 percent of all food retailer firms in the United States being licensed or 2,831 licensed retailers. These are substantially very large retailers and it seems appropriate that they should operate under the same regulations as other volume dealers in fresh fruits and vegetables.

Mr. SYMMS. Thank you very much.

Mr. PANETTA. Gentlemen, we thank you for your testimony.

Our next witness is Mr. John L. Fuller, Jr., assistant to the executive vice president of the International Apple Institute.

We welcome you, Mr. Fuller.

We thank you for taking the time to testify and you may proceed.

[The prepared statement submitted by Mr. Fuller follows:]

STATEMENT OF JOHN L. FULLER, JR.
ASSISTANT TO EXECUTIVE VICE PRESIDENT
INTERNATIONAL APPLE INSTITUTE
BEFORE THE
DOMESTIC MARKETING, CONSUMER RELATIONS AND
NUTRITION SUBCOMMITTEE
OF THE
COMMITTEE ON AGRICULTURE
U.S. HOUSE OF REPRESENTATIVES

JULY 25, 1978

Mr. Chairman and members of the subcommittee:

My name is John L. Fuller, Jr. and I am Assistant to the Executive Vice President of the International Apple Institute. We greatly appreciate the opportunity to present the views of our membership regarding HR 4773 which, in amending the Perishable Agricultural Commodities Act, is of great interest to those members.

Our membership encompasses over 13,000 commercial apple growers in all producing states and many hundreds of the major packer-shippers, f.o.b. sales agencies, processors, brokers, distributors, exporters and importers.

The apple business, like the rest of the produce business, is a fast moving and far flung operation, and the PACA is of immeasurable value in establishing a fair and reputable mechanism for ensuring prompt payment and preventing misbranding and misrepresentation. The PACA offers protection to the small grower with a few acres of trees or to the sales agent who handles millions of dollars a year in sales.

Therefore, the IAI strongly supports Section 1 of HR 4773, which would increase the statutory limit on license fees from the present \$100 to \$150. The increase is vital to maintain the full service and protection of the Act to all factors in the entire Produce Industry (grower through distributor). The costs of administering this valuable basic program are completely paid from the license fees received from the industry factors requiring a

license under the Act. In recent years the number of persons requiring a license has decreased, and we all know how ever constant inflation has adversely affected costs. Hence, the need for the increase is evident re financial solvency and program maintenance.

Section 2 would extend coverage under the Act to all transactions between potato growers and potato processors, including transaction of potatoes that are processed within the state where grown. All potato processors would be required to secure a license. The IAI is neutral re this proposed amendment. Reportedly, the potato industry, being centrally located in a few heavy producing states, has a unique problem re prompt payment. In our judgment, the necessary solution is contained in the present Act. Further, why just potato processors? Such an amendment could open a pandora's box, i.e., requests for legislation to similarly cover apple processors, peach processors, etc.

Section 3 would increase the value of fresh and frozen produce from the present \$100,000 to \$200,000 that a retailer may purchase before being covered by the Act and required to have a license. The same increase (\$100,000 to \$200,000) would also apply to the value of transactions of frozen food brokers. The IAI is opposed to this proposed amendment. Volume of business has no impact on the degree of fair trading and unfair trading. Unless covered by the Act, a "small" retail firm, having produce purchases totaling \$105,000 or \$110,000, could "milk" a small apple grower (or a large one for that matter), and the grower's only recourse would be via expensive legal action. Also, the increase in the dollar value volume would further unnecessarily decrease the number of licensed firms which would have an adverse impact on the financial solvency and maintenance of the program.

Section 4 would provide the Secretary discretionary authority to withhold identity of a person who files a complaint under the Act. The Institute is completely and strongly opposed to this In our judgment, the accused has the right to know the identity of the accuser with the initiation of any accusations. This is true for both Section 6(a) (reparation proceedings) and Section 6(b) (disciplinary complaints).

Section 5 would setup surveillance compliance audits and authorize the Secretary to require persons guilty of violating the prompt payment provisions of the Act to post a surety bond. The IAI supports the surety bond amendment, but strongly recommends that it be changed to provide sanctions (i.e., denial or suspension of licenses) for failure to comply with the Secretary's request that a bond be posted.

Reportedly the audit provision would only apply to firms found guilty of violating the prompt payment provisions of the Act in a formal disciplinary proceeding. To some degree the Institute believes the audit provision is unnecessary and only adds to the administration costs. If the provision is maintained, the adopted language should clearly indicate that the audit provision applies only to those parties found guilty of prompt payment violations.

In our judgment, the only needed change in the PAC Act is the license fee limit from \$100 to \$150. If the dollar exemption for retailers and frozen food brokers is felt necessary, then we sincerely recommend that the limit be raised to \$150,000 -- not \$200,000.

Thank you for your time and interest, Mr. Chairman.

Mr. PANETTA. Thank you very much for your testimony.

I have one brief question.

Your position on the retail exemption is not to increase it at all to either \$150,000 or \$200,000. Again, I would be interested in what your reasons are. I am not sure that I understand what you meant by "milking" the small apple grower.

Mr. FULLER. Let's say you are doing \$125,000 worth of business. We don't see how that has an impact on whether you are a fair trader or an unfair trader, and it seems like you would be losing a lot of needed licenses at a time when the PACA needs the revenue very badly.

Also, it might pave the way for more abuses than now exist because it would obviously exempt some people that are now covered by the act. That may give them a chance to take advantage of the situation. This may not necessarily be true, but we are just saying this could open the way for such practice.

Mr. PANETTA. Are you aware at the present time of anyone below the \$100,000 exemption who is currently exempt under PACA? Are you aware of any facts in which the smaller individuals have engaged in that kind of activity?

Mr. FULLER. I know of no instances that I could give you at this time.

Mr. PANETTA. We thank you for your testimony. Mr. Symms?

Mr. SYMMS. Thank you, Mr. Fuller, for your testimony.

I think that one of the reasons that the exemption is in the legislation was to try to rally more support for it. Some of us felt it was necessary to keep PACA self-funded and that it was essential to be able to pass legislation, but do you suppose there might be a case where some new market starting—say a farmers' market or something—that just the buying of a license might be a deterrent to keep somebody from going in business. As you know, most big businesses start out small. Maybe the exemption should not be so high. I wonder if there isn't some room where we don't have to have the young guy who starts out in a pickup truck and a sign—

Mr. FULLER. Yes, that could be true. A compromise of \$150,000 might be all right. We could live with that.

Mr. SYMMS. Do you think you could live with that?

Mr. FULLER. Yes.

Mr. SYMMS. Thank you very much. We appreciate your presence.

Mr. PANETTA. Thank you.

Our last panel will be made up of Mr. Joseph Procacci, Mr. Maury Feldbaum, and Mr. Daniel Storey.

Gentlemen, we welcome you to the subcommittee. We appreciate your taking the time to appear on this issue. We look forward to your testimony.

Mr. Procacci, will you please proceed?

**STATEMENT OF JOSEPH G. PROCACCI, PROCACCI BROS. SALES CORP.,
PHILADELPHIA, PA.**

Mr. PROCACCI. Thank you, Mr. Chairman.

I certainly appreciate the opportunity to provide the subcommittee with my opinion and the opinions of other dealers in the Philadelphia area on H.R. 4773 and H.R. 4777.

With regard to section 1, my company is in favor of increasing the licensing fee from \$100,000 to \$150,000. My company would not object to increasing the licensing fee if it would be necessary to support the activities of the Department. However, the proposal appears to be inconsistent with the proposed change in section 3, in that it is suggested that the exemptions from the act be increased from \$100,000 to \$200,000. If the number of licenses were increased, it may eliminate the need for the proposed increase in the licensing fee. My company would even favor increasing the license fee to \$300 as originally proposed in H.R. 9288 2 years ago.

With regard to section 2, I am in agreement with the amendment that all potato processors should be subject to licensing.

With regard to section 3, I oppose the increase of the exemption from \$100,000 to \$200,000. If the exemption were increased, the number of firms operating under the jurisdiction and scrutiny of PACA would be reduced by some 525. Increasing the exemption would make it extremely difficult to resolve disputes which are presently resolved by regulatory department personnel by exchanging a letter or two or a phone call.

If the number of firms presently subject to the jurisdiction of the Department were reduced, it would compel the present licensees to spend large sums in legal fees in an attempt to collect moneys which are due and owing.

As for section 4, I strongly object to this proposed amendment. This amendment would legislate away parties' rights to face their accusers. It would appear to be a violation of the due process clause of the Constitution and would shield unprincipled parties in the industry that make unjustified complaints against other members in the industry.

With regard to section 5, I strongly oppose changing PACA into a surveillance statute and feel that it is unwarranted and unnecessary.

PACA records reveal that the industry generally lives up to the code of fair trade practices as shown by the many thousands of shipments valued at more than \$20 billion annually where disputes only arose in approximately 2,000 cases.

This section if enacted would substantially increase the PACA workload and require hiring more personnel and setting higher license fees.

The excellent job that PACA is performing on their present functions would suffer with the audit surveillance duties, since these extra duties would tend to reduce an outstanding group of professionals to a group of high-priced traveling bookkeeping clerks.

The receivers would also be burdened with having to provide support manpower to assist PACA auditors, thereby causing additional expense which would further reduce the very small existing profit margins. Naturally, we would have to pass this expense along to the consumers.

The produce industry utilizes two great credit organizations—the Blue Book and the Red Book, the bibles of the produce industry—which rate the financial ability as well as the integrity of everyone in our industry. These ratings are published weekly and are available to everyone in the industry.

All shippers review these ratings and have the option of either shipping open account or drawing a draft upon the receiver's bank

which guarantees payment. Receivers have an incentive to pay promptly to retain favorable ratings in the Red Book and Blue Book.

If our customers do not pay within a reasonable time, we discontinue selling to them. If we do not pay our farmers and shippers within a reasonable time, they discontinue selling to us. We do not feel that the Government agency should be used as a crutch to support poor business judgment.

Thank you for this opportunity to express my opinions.

Mr. PANETTA. Thank you. Mr. Feldbaum, will you please proceed with your testimony?

**STATEMENT OF MAURY FELDBAUM, MAX FELDBAUM & SONS CO.,
PHILADELPHIA, PA.**

Mr. FELDBAUM. Thank you, Mr. Chairman.

With regard to H.R. 4773, I wish to go on record as being opposed to section 3, changing the figure of \$100,000 to \$200,000. First, it would greatly reduce the number of retailers, brokers, and middlemen, et cetera, who are presently responsible to operate under the PACA. There has been a strong upsurge of independently owned stores operating collectively being furnished produce supplies through an organization or broker—yet these supplies are billed directly to the individual supermarket.

By amending the figure of \$100,000 to \$200,000, you would be giving a twofold edge to these retailers. First, they would not be subject to the act and could indiscriminately make deductions from their bills, delay payment of their bills, and not be subject to PACA rules. Second, it would reduce the operating revenue of the PACA or unfairly put the burden on fewer licensees to help meet the expenses of the PACA.

I have no objection to the PACA increasing their licensing fee because of inflationary pressures, but I do object to reducing the number of firms operating under the PACA. It would benefit the agency, the growers, shippers, and wholesalers if in lieu of the \$100,000 figure it was amended to \$50,000. Without a strong PACA the produce industry could and would experience chaos. Let us not reduce the liability or create an escape vehicle for any wholesalers or retailers to act outside of the arm of the PACA. Would it not be better to license a small retailer for an amount less than that charged to the larger and stronger firms? But license him or you will weaken the structure, purpose, and future actions of the PACA.

I would like to go on record as being vehemently opposed to changes in section 4. As a layman, I will not challenge the legality of the proposed amendment but will voice my objection to an amendment that provides for an accuser to hide behind the skirts of a regulatory branch of the Government.

No wholesale, commission merchant or receiver is strong enough, or large enough to intimidate a grower-shipper, therefore, we view the proposed amendment as ludicrous.

Anyone having a complaint under the present PACA section 4 has satisfactory and complete procedures to effect an adjustment or settlement and need not have anonymity.

The many thousands of us operating under the PACA are happy with the results of this fine governmental agency. I am the third gen-

eration operating under the PACA and can assure you that the proposed amendment will only harm relationships that have existed over the years.

Thank you for this opportunity to express my views.

Mr. PANETTA. Thank you. Mr. Storey, will you please proceed.

STATEMENT OF DANIEL J. STOREY, DAN STOREY CO., PHILADELPHIA, PA.

Mr. STOREY. Thank you, Mr. Chairman.

Our family has been in the produce business for over the past 50 years beginning with my father who founded the present companies; myself for the past 28 years; my cousins for the past 16 years, and up to my sons and daughters for the past 8 years.

We have worked hard and long as do most self-employed small business people. Our reputation for honesty, integrity, ability and moral character need not be espoused by ourselves for we humbly believe that these facts can be readily verified by our peers.

Regarding H.R. 4733, our people feel as follows:

As for section 1, we would be in complete agreement with whatever necessary increase the capable people of the department responsible for decisions regarding license fees feel should be required. Our opinion, in reality, is to strike the clause limiting the fee and avoid necessary future legislation and additional taxpayers' expense later on, should a cost increase be required in future years. It is inconceivable that men of intelligence would utilize this to the detriment of the purpose of the act.

As for section 2, we honestly believe that if we were to include potato processors as subject to the act, requiring of them a license, we would be discriminating against them as opposed to the users of the many other items in the fresh fruit and vegetable industry. We think, however, that licensing all processors of fresh fruit and vegetables for the sake alone of preventing the possibility of business operations that would prevent the fruition of the very objective of the act, it is a commendable and recommendable move and should be done.

As for section 3, we are opposed to the change of the limits from \$100,000 to \$200,000 because it is only giving wider latitude to those who would flout the very purpose of the act. Those who would be of a character ideal to the act would not and do not object to the current level. In changing this section, we would only encourage those who have no regard for the law at all.

As for section 4, we are strongly opposed to the idea behind the wording in this section. Such paraphrasing of the law seems to contradict the purpose for which it is written. If someone feels he is entitled to redress, for what reason would he want to remain anonymous? What rationale is the party wronged using to hide his identity.

As we are all human beings, what is so inconceivable to suppose it could be used as a personal weapon to exercise a vendetta or prolong harassment. It is an unthinkable piece of legislation as proposed here.

Since we were children, the whole concept of being confronted by your accuser, in my memory, has always been inculcated into our minds as one of the benefits of our constitutional form of government.

The act was created to protect the farmers and those who aid in the distribution of his produce—the very backbone of our country. It should not be twisted to subvert the equal rights of all of us who participate in its benefits.

We would like to point out here that we feel the effort is being made to prevent an injustice but the method is not justifiable. Those in our industry who are honest, sincere, and capable do not question the ends hoped to be reached by this piece of legislation, but the means to obtain it.

Congress, it seems, would be condoning here to a degree what it has legislated against the recent “public right to know law” as we understand it.

As for section 5, perhaps here we incorrectly interpret the words used. It has been our understanding that if someone is found to be in violation of the act, that someone loses their license to operate and, therefore, cannot conduct any business in fresh fruit and vegetables. Why then is there a clause to check the books of a company that is supposed to be out of business?

It seems here we have a “Catch 22” condition. If someone is found to be dishonest, do we permit them to operate under supervision for 2 years and then turn them loose? Does 2 years of supervision make a dishonest businessman honest?

We, for these reasons, strongly suggest that whatever is supposed to be accomplished by this section be so specifically stated and so worded as to be able to reach its objective.

I thank you for granting me the time to appear.

Mr. PANETTA. Thank you, gentlemen. We want to thank all three of you.

I have no questions at this time. Mr. Volkmer?

Mr. VOLKMER. I would like to address a question to section 5. I gather you have objections to section 5.

Mr. PROCACCI. Yes; I do.

Mr. VOLKMER. Do you also have objections to that part of section 5 insofar as the bonding requirement is concerned? Section 5 provides for basically this. If you violate it and there has been a violation of the prompt payment provision under section 6, and if that has been determined there, then section 5 provides for the inspection at least every 6 months for 2 years.

Then it says that the Secretary “may” also provide a bond to insure that payment will be made.

Do you have any objections to the bonding requirement?

Mr. PROCACCI. I do not oppose that.

Mr. VOLKMER. It is just the inspection requirement and people coming in to bother you in your business?

Mr. PROCACCI. That is right.

Mr. VOLKMER. Let's say that you have a house that has had a violation and that this has been determined that there is a violation. Assuming that we would not go along with the inspection, and assuming that we would drop that part, and assuming that later on a complaint comes in showing that they have not made a prompt payment again—what about that?

Mr. PROCACCI. They should be penalized according to the act as it exists now.

Mr. VOLKMER. Start proceedings all over again?

Mr. PROCACCI. No. I think the act provides for that.

Mr. VOLKMER. How about flagrant violations?

Mr. PROCACCI. You would be penalized more severely on the second offense than you were on the first one.

Mr. VOLKMER. Is your objection then to the inspection? Do you have a problem in having to stop everything and go to the books and spend time with the people who are inspecting; is that it?

Mr. PROCACCI. That is one of the problems. Also, I think of PACA. It would be an endless task. I do not think that PACA would have enough men to do all of this work.

Mr. VOLKMER. This only applies when there has been a finding that there has been a violation of the prompt payment provision.

Mr. PROCACCI. Yes.

Mr. VOLKMER. I don't know the answer to this. Maybe the PACA could give us information about how many of these actually occur in 1 year, or 2 years, or even 3 years time.

Mr. FELDBAUM. I am under the impression that anyone with a PACA violation must have a bond as it now stands. Mr. Gardner, is that correct?

Mr. GARDNER. No.

Mr. VOLKMER. How many violations of the prompt payment provision occur within a year's time?

Mr. GARDNER. If you are talking about a disciplinary proceeding, it would be approximately 16 firms in a year's time. That would be disciplinary proceedings.

Mr. VOLKMER. Under section 6?

Mr. GARDNER. Yes; 16 firms in 1 year's time.

Mr. VOLKMER. Those are the only 16 that would actually be audited then?

Mr. GARDNER. And the next year there would be 16 more.

Mr. VOLKMER. So you are talking approximately 32 audits—

Mr. GARDNER. It would be a 64-audit total in a 2-year period.

Mr. VOLKMER. You would have more than that. Maybe I am wrong. I will accept your 64 figure. What is the manpower?

Mr. GARDNER. The manpower, if we had to perform the full audits, would take an increase of manpower of perhaps five to six people.

Maybe I should tell you in all honesty that if we had a firm that was found and sanctioned in a formal disciplinary proceeding for the failure to pay promptly and if we made an audit and found a violation, then there would not be a problem with any more audits because we would initiate a new action for a more severe sanction.

Mr. VOLKMER. Why do you have to have that many audits then?

Mr. GARDNER. This is the suggestion in the bill.

Mr. VOLKMER. Yes. The bill suggests 6 months. What do you think?

Mr. GARDNER. We customarily follow up now. We think that as supplied in the testimony, it would be appropriate to say that we would have the four audits but if there were a bond posted to guarantee payment of any reparation awards that only one audit following posting the bond would be necessary.

Now you understand that that bond would be required probably as soon as the sanction period was over. So you would be doing business

with bond and one audit as a matter of practicality if the committee amends this bill in this fashion.

Mr. VOLKMER. Do you have any idea about what the approximate premium would be on that bond?

Mr. GARDNER. Roughly it would be 125 percent to give you 100 percent collateral and charge you a tremendous fee because they are bad.

Under the law there are only three provisions for bonding and they all deal with people who have been in trouble. When you get to dealing with bonding companies and people in trouble, it is usually 100 percent collateral plus a very high fee.

The bond is usually based on two-thirds of an average month's business during a 12-month period.

Mr. VOLKMER. That doesn't help them much. On the average company how much are we talking about in dollars?

Mr. GARDNER. Dollars of bonds?

Mr. VOLKMER. The dollar for the premium.

Mr. GARDNER. Dollars for premium? I don't know what they are, but I do know that our bond probably would run in the neighborhood of 25 to 50 or a \$75,000 bond. So we are talking about 100 percent collateral plus the premium.

Mr. PANETTA. Mr. Gardner, we thank you for that information. Mr. Slavin?

Mr. SLAVIN. I would like further clarification. I do not disagree with anything that Mr. Gardner has just said. However, there are two sections of the act that we have to be concerned with.

One, Mr. Gardner limited this to disciplinary proceedings.

There is another section which deals with reparation proceedings. A reparation proceeding is one in which any licensee under the act can bring a complaint against any other licensee under the act and the Department has within its purview and jurisdiction quasi-judicial functions. They have courts and hearing officers and they take testimony and they come out with decisions that are called reparation orders.

Failure to pay those reparation orders results in a forfeiture of your license. Now, those reparation proceedings also are precipitated by failure to pay. In some cases there is an honest dispute as to how much is due and in other cases it is a matter of a person not being able to pay.

In either event, you are dealing with a problem which is a failure to properly pay an account within the proper time limit.

There are, in fact, investigations conducted and audits conducted by the Department in those proceedings as well. I would dare say that in the case of reparation proceedings the number of complaints filed each year could number into many thousands. Am I correct?

Mr. GARDNER. Yes.

Mr. SLAVIN. So we are not dealing with 64 audits. We may be dealing with 6,400 audits.

If you multiply those by \$1,200 an audit times twice a year times 2 years—

Mr. VOLKMER. This section does not apply to that.

Mr. SLAVIN. It doesn't say otherwise. That is the point of our discussion here. There is nothing in the bill, as I see it, that limits these audits to disciplinary proceedings.

Mr. PANETTA. That is correct, Mr. Volkmer. The testimony by the Department this morning from Ms. Schlei indicated that the Depart-

ment would want to restrict them to the disciplinary proceedings. That is not the way it is worded in the bill at the present time.

Mr. VOLKMER. I will admit that that is vague. Maybe I am wrong but that was the intent, was it not? That is, to include the disciplinary?

Mr. GARDNER. Yes.

Mr. SLAVIN. Again, it is not in the bill. It is going to lead to a lot of litigation. That possibly ought to be clarified—

Mr. VOLKMER. I see.

Mr. SLAVIN. With regard to the second point you raised, Mr. Volkmer, I would like to say that the ability of a small firm to get a bond is virtually impossible in many instances. It is not a matter of how many dollars it costs in premiums. The premium on a \$25,000 or a \$50,000 bond can be \$50 or \$100. I guess they can stand that.

The point is that they cannot get those bonds because they cannot put up 100 percent collateral. They want dollar for dollar or they want a financial statement of such a nature.

Mr. VOLKMER. The bonding company does?

Mr. SLAVIN. The surety company does. They want you to put up a dollar for dollar, cash for cash, or property in such an amount that they absolutely assured of indemnification in the event that there is failure to pay.

In such an event some can't afford this.

Mr. VOLKMER. If it's a small firm with a \$50,000 bond and if they were to put up security of some type as collateral—

Mr. SLAVIN. With \$50,000—

Mr. VOLKMER. Then the surety company will write the bond?

Mr. SLAVIN. That is right.

Mr. VOLKMER. Plus pay the premium?

Mr. SLAVIN. Yes. Otherwise you can do it another way. The only exception is if you can show by your financial statement that your net worth is so great that you do not require that, in which event you do not require a bond.

As against that, you can get a surety for the surety. In other words, if I apply for a bond and I don't have the money and I can't put up the security, they get somebody I know to guarantee it for me. That can be done. But that is most difficult. I think that the small businessman would be driven out of business.

Mr. VOLKMER. Do we have any provision under the present law for self-surety?

Mr. GARDNER. They may post cash or its equivalent in negotiable securities.

Mr. VOLKMER. They can do that. Thank you.

Mr. PANETTA. Mr. Slavin, before you return to your seat, could I ask you to comment on the possibility of requiring one audit following the posting of a surety bond?

Mr. SLAVIN. I am not sure I heard your full question, sir.

Mr. PANETTA. The Department, as I understood it, this morning in their testimony indicated that they would like to see a requirement for a mandatory audit with regard to the disciplinary proceeding section. They would like to see a mandatory audit once after the posting of a bond. I wondered if you had a position on that?

Mr. SLAVIN. I have no objection to that. With regard to disciplinary proceedings, I have no objection.

Mr. PANETTA. Thank you. Mr. Symms?

Mr. SYMMS. I have no further questions. I only want to say that I appreciate the testimony today. I think the hearings have been very helpful.

I would hope that now after the resolution of this hearing record that we would be able to absorb what we have had and move forward with corrective legislation to keep PACA alive and well. I think this has been amply demonstrated by witnesses today as being necessary. I hope that we will be able to accomplish it this year.

Mr. PANETTA. Thank you, Mr. Symms.

Gentlemen, we want to thank you for your testimony. We appreciate it.

I would like to thank the members of this subcommittee, Mr. Volker and Mr. Symms, and others who have participated in the hearing. I want to thank all of the witnesses who appeared and who have provided testimony on this issue. It is an extremely important issue, obviously, with regard to the fresh fruit and vegetable industry and it is something that we will have to look at closely to make sure that what we do does retain PACA as an effective mechanism for your protection as well as for the consumer's protection.

I would ask unanimous consent that letters that have been received by the chairman be placed in the record of this hearing at this point. Without objection, it is so ordered.

I would also ask unanimous consent that any others wishing to provide communications, letters, or testimony may do so. We will have 5 legislative days and keep the record open for that purpose.

Without objection, it is so ordered.

Without further comment, the hearing stands adjourned.

[Whereupon at 4:30 p.m., the subcommittee was adjourned.]

[The extraneous material submitted to the committee follows:]

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

Many Farm Bureau members are commercial producers of fruits, vegetables, and potatoes and are directly affected by the Perishable Agricultural Commodities Act.

The importance of the Perishable Agricultural Commodities Act to Farm Bureau members was underscored by adoption of the following policy by the voting delegates of the member State Farm Bureaus at the most recent annual meeting of the American Farm Bureau Federation:

"We recommend that the Perishable Agricultural Commodities Act be amended to provide for constant surveillance and supervision of trading practices in the purchase and sale of perishable agricultural commodities.

"We favor the vigorous enforcement of the PACA regulation which requires that the producers of perishable commodities be paid within 10 days of delivery unless other provisions are made in a written contract.

"The Act should be amended to provide specific authority, similar to that in the Packers and Stockyards Act, for regulations to require that producers be paid promptly.

"The Act also should be amended to include honey and vegetables for processing, including potatoes."

Farm Bureau supports provisions of H.R. 4773 which (1) increase the license fee ceiling to \$150 and the retailer exemption to \$200,000. (2) amend the definition of dealer to include frozen potato processors (3) permit the withholding of a complainant's name by the Secretary of Agriculture, and (4) authorize the Secretary to require persons found to have violated the prompt pay provisions to post a surety bond.

We also support the inclusion of specific language to recognize honey as a perishable agricultural commodity.

These amendments to the Perishable Agricultural Commodities Act, for which we have indicated support, will increase protection for producers and improve the effectiveness of the Perishable Agricultural Commodities Act.

We appreciate this opportunity to present these views on behalf of Farm Bureau members.

NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES,
Washington, D.C., May 12, 1978.

HON. FREDERICK W. RICHMOND,
House of Representatives,
Washington, D.C.

DEAR MR. RICHMOND: With respect to the current proposals before the Subcommittee on Domestic Marketing, Consumer Relations and Nutrition, dealing with the matter of Perishable Agricultural Commodities Act (PACA) amendments, the Governing Board of the National Association of Retail Grocers respectfully asks that the retail exemption be increased to \$200,000 for firms required to have PACA licenses.

This is necessary to offset the effects of inflation, alone. Prior to 1962, when the first \$90,000 exemption for retailers was implemented, about 3,528 retailers had PACA licenses. Congress had expected that the \$90,000 exemption would require only 1,200 retailers to have PACA licenses, while the later increase to \$100,000 would cover only 1,125. In 1976, 3,173 food retailers still must have PACA licenses, 2,000 more than the 1962 estimates. The effects of the licensing provision have gone far beyond the intent of Congress.

We agree that the maximum PACA license fee should be no more than \$150.

NARGUS through its federation, has a total membership of about 40,000 companies operating food stores. This issue is of direct concern to them, and we will appreciate your consideration of the views of our Board of Directors, which I believe accurately reflects the views of the great majority of our members.

Sincerely,

FRANK D. REGISTER,
Executive Director.

NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES,
Washington, D.C., August 4, 1978.

HON. FREDERICK W. RICHMOND,
Chairman, Subcommittee on Domestic Marketing, Consumer Relations and Nutrition,
U.S. House of Representatives, Longworth House Office Building,
Washington, D.C.

DEAR MR. RICHMOND: The National Association of Retail Grocers appreciated the opportunity afforded us to submit testimony on H.R. 4773 on July 26, having to do with matters relating to the Perishables Agricultural Commodities Act.

Because of the impact of inflation, we ask your support of increasing the exemption for licensing under the Act from \$100,000 to at least \$200,000. This would seem to us to be consistent with the intent at the time the program was put into effect, and would not penalize smaller retailers, for whom the licensing provisions were not intended.

Thank you for considering this request.

Sincerely,

FRANK D. REGISTER,
President.

W. J. HASSELMAN, INC., FOOD BROKERS,
Pittsburgh, Pa., May 18, 1978.

HON. FREDERICK W. RICHMOND,
Chairman, Domestic Marketing Subcommittee, House Office Building, Washington, D.C.

DEAR SUBCOMMITTEE: I am writing to oppose H.R. 4647, which is to increase PACA License fee.

Since 1969, the Wholesale Price Index has increased through April 1978 from 110.0 to 211.0, or 92 percent. I urge you to adopt the lowest license fee pos-

sible and raise the value of the 1969 \$100,000 exemption to \$200,000. Failure to increase the exemption results in government regulation just because of inflation. Your consideration in this matter will be most appreciated.

Regards,

W. J. HASSELMAN, INC.
LEE B. HASSELMAN,
President.

THE LEAMAN CO., FOOD BROKERS,
May 25, 1978.

Hon. FREDERICK W. RICHMOND,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RICHMOND: I refer you to H.R. 4647 concerning the PACA License Fee for Frozen Food Brokers. I would hope that you would vote against any increase for the PACA License Fee.

It seems that inflation feeds on inflation and that the United States Government is continually adding costs to doing business, which in turn creates additional inflation.

Thank you for your consideration of the above.

Sincerely,

JAMES K. MCCracken.

M. K. HOROWITZ Co., FOOD BROKERS,
Atlanta, Ga., May 31, 1978.

Subject: H.R. 4647

Hon. FREDERICK W. RICHMOND,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RICHMOND: As chairman of the Agriculture Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition, I am encouraging you to amend the measure in question.

I would recommend two courses of action. One would be to raise the minimum sales from \$100,000 to \$200,000. Since 1969 the wholesale price index has increased through April 1978 from 110.0 to 211.0 or 92 percent. Failure to increase the exemption results in government regulation just because of inflation. Secondly, I would urge that the license fee be examined carefully and held to the minimum increase necessary.

Very truly yours,

M. K. HOROWITZ.

E. M. HEATH, INC.,
Center Harbor, N.H., May 31, 1978.

Hon. FREDERICK W. RICHMOND,
Representative State of New York, Chairman, House Agriculture Subcommittee on Domestic Marketing, Consumer Relations and Nutrition, Washington, D.C.

DEAR REPRESENTATIVE RICHMOND: You will be considering new amendments to the PACA laws soon, pertaining to license costs and exemption limits. I would like to register some opinion of my own concerning PACA.

First I would like to say that I don't feel that many retailers understand PACA and that it is really only those who are honest or up on all regulations who purchase a PACA license. There seems to be no enforcement for those who don't.

Second I feel (maybe I am wrong) that PACA licenses are really meant for those who purchase perishable commodities at the wholesale market. Most retailers do not and therefore should not have to have a PACA license if they purchase from a licensed wholesaler or co-op. This is like double taxation.

If your subcommittee does not agree with my thinking on this, I would hope that at least they would substantially increase the exemption to compensate for inflation. I would suggest that it should at least be in the area of \$200,000.

Thank you for your time and consideration.

Sincerely,

ROBERT E. HEATH.

ARATA-STEINMEYER BROKERAGE Co.,
SPECIALTY FOOD BROKER,
St. Louis, Mo., June 21, 1978.

Hon. FREDERICK W. RICHMOND,
*Chairman, House Agriculture Subcommittee on Domestic Marketing, U.S. House
of Representatives, Washington, D.C.*

DEAR SIR: We ask your support of H.R. 4647 which will increase the frozen food broker exemption from \$100,000 to \$200,000 per year. Our volume in pounds has not increased nearly as much as the dollar volume caused by inflation.

The possibility of the small broker having to pay the PACA license on less than \$200,000. Places one more burden on the little business man.

Respectfully,

ARATA-STEINMEYER BROKERAGE Co.
HERBERT A. STEINMEYER,
Owner.

SINSEL-DEAN INC.,
FOOD BROKERS,
Denver, Colo., June 23, 1978.

Atten.: House Agriculture Subcommittee on Domestic Marketing.
Re: H.R. 4647 Perishable Agricultural Commodities Act.

Hon. FREDERICK W. RICHMOND,
Chairman, U.S. House of Representatives, Washington, D.C.

We ask your attention to the license fee and exemption for frozen food brokers on this act and strongly urge you to support the proposed increased exemption from \$100,000 for brokers to \$200,000.

The produce price index for fresh and dried fruits and vegetable has increased over 100 percent since the \$100,000 exemption level was set in 1969. At the same time our broker commission rate has not changed during this period.

ROBERT D. SINSEL.

LYON BROKERAGE Co., INC.,
Minneapolis, Minn., June 27, 1978.

Hon. FREDERICK W. RICHMOND,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RICHMOND: It is my understanding that the House Agriculture Subcommittee on Domestic Marketing will hold hearings on July 25, 1978, to determine whether to increase the Perishable Agricultural Commodities Act license fee and the exemption for frozen food brokers.

Through April, 1978, the Producer Price Index for fresh and dried fruits and vegetables has increased over 100 percent since the \$100,000 exemption level for frozen food brokers was set back in 1969. The Consumer Price Index for fruits and vegetables increased 94 percent from April 1969 to April 1978.

I respectfully request that you support increasing the \$100,000 frozen food broker exemption to \$200,000 as provided in H.R. 4647. Such an action would help to offset the effects of inflation that has taken place since the exemption level was set back in 1969.

Kindest regards,

C. A. BARKER, President.

Miller Enterprises

331 CENTRAL AVENUE
CRESCENT CITY, FLORIDA 32012
TELEPHONE 904 - 698-1280

May 17, 1978



Rep. Frederick W. Richmond
House of Representatives
Washington, D.C. 20515

Re: H.R. 4647, Perishable
Agricultural Commodities Act

Dear Congressman,

Food Retailers must have PACA licenses when annual invoice costs of fresh and frozen fruits and vegetables exceed \$100,000. The \$100,000 exemption for food retailers has not been increased since 1969. The United States Department of Agriculture maintains the current \$100 PACA license fee is insufficient for the program to operate on a self-sustaining basis, but does not recommend a change in the retailer exemption to account for inflation.

Food retailers have always maintained that retail grocers buying from PACA licensed wholesalers and cooperatives should not be covered. The close business relationship actually results in an unnecessary pyramid of license fees. Because of USDA opposition retail grocers remain covered unless exempted by the \$100,000 limit. From 1959 through April 1978 the Wholesale Price Index has increased 92 percent from 110 to 211. The retail exemption should be increased to at least \$200,000 just to compensate for inflation. Failure to increase the retailer exemption to \$200,000 causes excess government regulation.

To illustrate the point, prior to 1962 when the first \$90,000 exemption for retailers was implemented, approximately 3,528 retailers had PACA licenses. Congress expected a \$90,000 exemption to require only 1,200 retailers to have a PACA license and \$100,000 to cover 1,125. In 1976, 3,173 food retailers still must have a PACA license, 2,000 over the 1962 estimates. Inflation has caused overregulation of food retailers under PACA.

I submit the following:

1. It is unfair to have to have a \$100 PACA license when we purchase products from a PACA licensed wholesaler or cooperative.
2. There is a need to increase the PACA retail exemption from \$100,000 to at least \$200,000 to compensate for inflation; and
3. The maximum PACA license fee should be kept as low as possible, no more than \$150.

I urge you to support H.R. 4647 which overcomes some of the above mentioned objections.

Sincerely,

George C. Miller, Jr.
George C. Miller, Jr.



National Food Brokers Association

The NFBA Building, 1916 M Street, N.W., Washington, D.C. 20036 202-331-9120

JUN 5 1978

June 2, 1978

Representative Frederick W. Richmond
Chairman, House Agriculture Subcommittee
on Domestic Marketing
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Richmond:

The National Food Brokers Association is a national non-profit trade association representing over 2,400 food broker firms who serve as independent local sales agents for the majority of the nation's manufacturers of food, grocery, and related products. Frozen food brokers are vitally interested in legislation to amend the Perishable Agricultural Commodities Act, namely H.S. 4647 and H.R. 4777. NFBA is concerned that a long overdue increase in the current frozen food broker exemption of \$100,000 for annual negotiated sales of frozen fruits and vegetables to \$200,000 be made, as provided in H.R. 4647.

In 1969 the frozen food broker exemption was raised from \$90,000 to \$100,000 to compensate for inflation based upon the Wholesale Price Index for fresh and dried fruits and vegetables. From 1969 until April 1978 the Finished Goods Price Index for fresh and dried fruits and vegetables increased from 110.0 to 227.3 or over 100 percent. The United States Department of Agriculture recently proposed increasing the frozen food broker exemption based on the cost of living. However, even the Consumer Price Index for fruits and vegetables has increased 94 percent from April 1969's 108.9 to April 1978's 210.9.

If legislation is considered this year to amend the Perishable Agricultural Commodities Act, NFBA believes that in fairness the frozen food broker exemption should be raised to at least \$200,000.

NFBA respectfully requests your support of increasing the frozen food broker exemption to at least \$200,000.

Sincerely,

Mark M. Singer
Mark M. Singer
President



National Food Brokers Association

The NFBA Building, 1916 M Street, N.W., Washington, D.C. 20036 202-331-9120

August 4, 1978

Representative Frederick Richmond
Chairman
House Agriculture Subcommittee on Domestic
Marketing, Consumer Relations, and Nutrition
Room 1301, Longworth House Office Building
Washington, D.C. 20515

AUG 7 1978

Dear Chairman Richmond:

Thank you for your letter of July 28 addressed to Mr. Charles Haywood regarding his testimony on H.R. 4773. I regret that recuperation from an operation prevented me from participating in these hearings.

Your subcommittee will be marking up this legislation. We would like to urge your strong support for the bill's provision to raise the exemption for frozen food brokers to \$200,000. Small businesses, like individuals, need relief from inflation. In 1976 the House Agriculture Committee voted to raise the exemption to \$150,000. Since that time the Producer Price Index has risen over 40%.

On behalf of frozen food brokers, the National Food Brokers Association respectfully urges your support for the \$200,000 exemption in the mark up of H.R. 4773 and H.R. 4777. Thank you for your support.

Sincerely,

Markus M. Singer

Mark M. Singer
President

MMS:Linda Smithson

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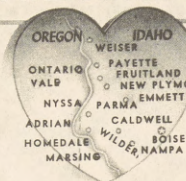
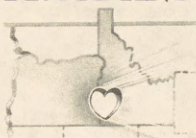
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IDAHO-OREGON FRUIT AND VEGETABLE ASSOCIATION, INC.

JUL 17 1978



PARMA, IDAHO 83660

Phone 722-5111

P.O. Box 307

July 12, 1978

about

The Honorable Thomas S. Foley
Chairman, House Agricultural Committee
U. S. House of Representatives
Room 1302, Longworth Bldg.
Washington, D. C. 20510

Re: License Fee Increase for Perishable Agricultural Commodities Act.

Dear Congressman Foley:

It is our understanding that the House Agriculture Committee will be considering the amendment of the P.A.C.A. Act the latter part of this month. In behalf of the 45 Fruit and Vegetable Shipping Members of our Association doing business in Western Idaho and Eastern Oregon, who annually market in excess of 12,500 loads of fresh fruits and vegetables, I would like to express to you their thoughts on this matter.

We would urge that your Committee give favorable consideration to recommending passage of H.R. 4777. This bill answers the critical problem facing the Perishable Agricultural Commodities Act -- namely financing. It, also, recognizes the inflationary factor by increasing the license fee exemption with a realistic figure. I am sure that practically the whole Fruit and Vegetable Industry, who support the P.A.C.A. with their license fee payments, are in accord with this proposal.

Insofar as the additional amendments proposed in HR 4773, it would be our suggestion that the Agricultural Committee consider these matters separately and not allow the controversies contained in these subjects to obstruct the passage of the necessary financial assistance needed to keep the P.A.C.A. offices operating. We recognize that it is a rather common practice to "attach" controversial subjects to bills that are of a mandatory nature, but it is urged that you do not permit this parliamentary move to be implemented in this instance. At this time this office takes no position as to the additional subjects proposed in H.R. 4773.

Would you please convey these thoughts to the other members of your committee?

Very truly yours,

E. D. Michaelson

E. D. Michaelson,
Manager.

STATEMENT
OF
HERSCHEL HEILIG - POTATO GROWER

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Mr. Chairman, members of the Committee, I am Herschel Heilig a commercial grower of potatoes in the State of Washington for the past twenty-five years.

In these years I watched an industry undergo dramatic changes with the tastes of the American public also changing. Twenty-five years ago 91% of the commercial growing potatoes were used as fresh or table stock and only 9% were processed. In today's marketplace, over 55% of the commercial grown potatoes are used for processing. During the same time the value of the crop has gone from 2.5 million dollars to over 1 billion in value, an increase of almost 400%. Yet, since its enactment 48 years ago, the Perishable Agricultural Commodities Act has remained virtually unchanged.

With increased potato production, the number of PACA licenses continues to decline which means few people are handling the billion dollar plus crop, and the producer is faced with a diminishing number of outlets for his crop....and in many cases, the producer is left with but one outlet to market through. It is under this condition the producer is forced many times to accept a price or other stipulations which returns less than the actual market value of the crop through the producers outlets. If the producer is to register a complaint with the PACA, which presently does not provide anonymity, the grower is subject to various forms of harassment and may just lose his outlet because the license holder will refuse to do business with the producer....even though the complaint is fully justified.

It has been stated in the past the granting of anonymity is a violation of one's constitutional rights.....but if the marketplace operates under these conditions and the producer is subject to this type harassment....then whose constitutional rights have been abridged.

With the speed of today's communications compared to 48 years ago when the PAC Act was enacted, anonymity may have been considered a luxury, but today is a necessity to preserve open competition in the marketplace.

Section #5 of H.R. 4773 addresses itself to what some might feel is an unneeded and unwanted addition to PACA. There are very few instances where a person or company when found to be in violation of a law or regulation does not undergo continued overseeing so the violation does not reoccur. I believe for PACA to "inspect" a violator for two years after the violation is not only desirable but very necessary. Failure to have such a check and balance system will not give the USDA the authority to prevent future violations as so often happens.

