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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket Number FV96–351A]

RIN Number: 0581–AB48

Amendments to the Perishable Agricultural Commodities Act (PACA)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is revising the Regulations (other than Rules of Practice) Under the Perishable Agricultural Commodities Act (PACA) in order to implement legislative changes signed into law by President Clinton. Specifically, the legislative changes phase retailers and grocery wholesalers out of license fee payments over a 3-year period; establish that retailers and grocery wholesalers making an initial application during the 3-year period pay no fee for the renewal of the license for subsequent years; establish a one-time administrative fee for new retailers and grocery wholesalers entering the program after the 3-year phase-out period; and increase license fees from $400 to $550 annually for all other licensees.

EFFECTIVE DATE: September 15, 1997.

FOR FURTHER INFORMATION CONTACT: James R. Frazier, Chief, PACA Branch, Room 2095-So. Bldg., Fruit and Vegetable Division, AMS, USDA, 1400 Independence Avenue, S.W., Washington, DC 20250, Phone (202) 720–2272.

SUPPLEMENTARY INFORMATION:

Background

The PACA establishes a code of fair trading practices covering the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. The PACA protects growers, shippers, distributors, and retailers dealing in those commodities by prohibiting unfair and fraudulent practices. In this way, the law fosters an efficient nationwide distribution system for fresh and frozen fruits and vegetables, benefiting the whole marketing chain from farmer to consumer. USDA's Agricultural Marketing Service (AMS) administers and enforces the PACA.

The PACA was amended by the Perishable Agricultural Commodities Act Amendments of 1995 (P.L. 104–48). The regulations implementing the PACA (other than the Rules of Practice) are published in the Code of Federal Regulations at Title 7, Part 46 (7 CFR part 46). On September 10, 1996, the proposed revisions to the PACA regulations implementing P.L. 104–48 were published in the **Federal Register**. The finalized regulatory revisions became effective on April 30, 1997, with the exception of § 46.6, License Fees.

During the comment period on the proposal, the Food Marketing Institute (FMI), Food Distributors International (FDI), and the National Grocers Association (NGA), objected to the proposed revisions to § 46.6. They wrote that the proposed rule requiring that certain retailers and grocery wholesalers pay renewal fees was incorrect. They referred to section 499c(b)(3) of the statute designated, ''One-Time Fee for Retailers and Grocery Wholesalers that are Dealers'', which specifies the fees to be paid by a retailer or a grocery wholesaler making an initial application during the phase-out period and after such period ends. The commentors emphasized the statutory language at the end of section 499c(b)(3) which states: ''* * * a retailer or grocery wholesaler paying a fee under this paragraph shall not be required to pay any fee for renewal of the license for subsequent years.''

Our interpretation of the statutory language, as well as our understanding of the agreement between the various industry groups which preceded the final legislation, was that all retailers and grocery wholesalers would pay a license renewal fee during the 3-year phase-out period. After the end of the phase-out period, no renewal fee would be required. This interpretation treats all retailers and grocery wholesalers equally and does not discriminate against those who had complied with the licensing requirements prior to the law's enactment on November 15, 1995.

Since the commentors' interpretation of the legislative amendment was substantially different from our view but appeared plausible, we separated § 46.6 from the rest of the proposed regulations, and addressed the issue independently by reopening that part of the proposed rule in order to allow other interested parties to comment. Since the publication of the reopening of the comment period on March 31, 1997, we have collected renewal fees from retailers and grocery wholesalers which had received initial licenses during the phase-out period. However, in that document, we stated that in the event a determination is made that the law excludes those entities from paying renewal fees during the 3-year phase-out period, the collected renewal fees would be refunded with interest.

Comments

USDA received 17 comments on this reopened part of the proposed rule from 9 industry trade associations, 7 retailers, one grocery wholesaler, and one comment, signed by Congressman Thomas Ewing, Chairman of the House of Representatives' Subcommittee on Risk Management and Specialty Crops and Congressman John Boehner. Three of these comments were postmarked after the comment period ended on April 30, 1997, and are, therefore, not addressed in this rule.

We received comments supporting the proposed regulations (*i.e.*, to charge all retailers and grocery wholesalers a renewal fee during the 3-year phase-out period) from the American Farm Bureau Federation, United Fresh Fruit and Vegetable Association, Florida Fruit and Vegetable Association, and Western Growers Association. They reiterated their support for the proposed regulations as originally proposed, and urge that we adopt them without change. They argue that any change is without basis because there is no support in the statute nor in the legislative history to indicate that Congress chose to treat retailers and grocery wholesalers that were licensed after November 15, 1995, any more favorably than those licensed prior to that date. They point out that by changing the proposed regulations, retailers and grocery wholesalers would

pay different license fees based solely upon whether they were licensed under the PACA before or after November 15, 1995.

Two of these commentors state that the retail and grocery wholesale industries are incorrectly relying upon the ''plain meaning'' of the 1995 PACA Amendments; an assertion which the Supreme Court has repeatedly ruled that alone is not the sole consideration in implementing a statute. The commentors support their argument by quoting a Supreme Court decision in part: ''The plain meaning of legislation should be conclusive, except in ''rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'' In such cases, the intention of the drafters, rather than the strict language, controls.'' (*United States* v. *Ron Pair Enterprises, Inc.*,) 489 U.S. 235, 242 (1989), quoting, *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, #571 (1982).

The two commentors also argue that the correct reading of the Public Law 104–48 is clearly delineated in the House of Representatives Report accompanying H.R. 1103, the bill that became the 1995 PACA Amendments (H.R. Rep. No. 104–207, 104th Cong., 1st Sess.). They emphasize the report language which stated that the legislation ''* * * phases retailers and grocery wholesalers out of license fee payments in three years, [and] establishes a one-time administrative fee for new retailers and grocery wholesalers entering the program *after the three-year phase-out.* * * *'' [emphasis added]. They point to other report language which states: ''During the phase-out period, new retailer and grocery wholesale applicants will pay the specified fee established under the phase-out year.'' They maintain that the language in the House Report clearly describes two periods of time: the phase-out period from November 15, 1995, to November 15, 1998, when new retailers and grocery wholesalers will pay the specified fee established for the phase out year; and the period after November 15, 1998, when no fee will be required.

We received 11 comments objecting to our original proposal that all licensees pay renewal fees during the 3-year phase-out of retailers and grocery wholesalers. However, several of these comments were nearly identical. In addition to a comment from Congressman Thomas W. Ewing, Chairman of the Subcommittee on Risk Management and Specialty Crops, which was co-signed by Congressman John Boehner, we received comments from FMI, FDI, and NGA which reiterated their original objections to our proposal.

The commentors contend that the statute explicitly provides that any retailer or grocery wholesaler making an initial application during those years pays just one time and that no renewal fee is required for any subsequent year. Each of their arguments centers around the statutory language in section 499c(b)(3), ''One-Time Fee for Retailers and Grocery Wholesalers that are Dealers'', which states: ''In either case, a retailer or grocery wholesaler paying a fee under this paragraph shall not be required to pay any fee for renewal of the license for subsequent years.''

One of the commentors contends that by creating a statutory subsection for a ''one-time fee'' separate from section 499c(b)(4), the law is clear, both in title and in substance, that first-time licensees after November 15, 1995, pay only one fee and that no renewal fee can be imposed. The commentor asserts that no other explanation exists for having a separate section for initial licenses. The commentor points out that the subsection contains only three sentences: the first applies to those who make an initial application during each 3-year phase-out period; the second applies to those who make an initial application after November 14, 1998; and the third sentence is explicit—''In either case, a retailer or grocery wholesaler paying a fee under this paragraph shall not be required to pay any fee for renewal of the license for subsequent years.''

Another commentor presents a similar analysis of the statutory language—that there are two classes of license applicants specifically identified in section 499c(b)(3): a retailer or grocery wholesaler making an initial application for a license during the 3-year period beginning on the date of enactment of the 1995 PACA amendments; and a retailer or grocery wholesaler making an initial application for a license after the end of the 3-year period. The commentor emphasizes that the statute goes on to remove the requirement for license renewal fees by providing that ''a retailer or grocery wholesaler paying a fee under this paragraph shall not be required to pay any fee for renewal of the license for subsequent years.'' The commentor states that the plain language of the phrase, ''[i]n either case,'' must refer to the two classes of license applicants noted in section 499c(b)(3), and as such, neither of these two classes of entities can be held liable for license renewal fees.

Both commentors insist that the statute is explicit, clear, and leaves no room for interpretation. Under the circumstances, the commentors demand that USDA implement the straight-forward statutory language, issue regulations which state that retailers and wholesalers who were licensed during the 3-year phase-out period shall not pay any renewal fees, and refund with interest license fees paid by affected licensees.

In their joint comment, Congressmen Ewing and Boehner state that the law requires that retailers and grocery wholesalers applying for a license during the first three years following enactment of P.L. 104–48 pay only the fee in effect for that year, and nothing in any subsequent year. With respect to these initial applicants, the Congressmen insist that subparagraph 3 of section 3(b) clearly states that the 3-year phase-out period is just that—a single period—and that whether the initial application is made in year 1, 2, or 3 of the phase-out period, the fee to be paid is a one-time event. They state that had Congress intended for retail and grocery wholesale applicants to pay the applicable fee in each year of the phase-out period, they would have written the first sentence of subparagraph 3 to state ''* * * the license fee required under paragraphs (A), (B) and (C) * * *'' rather than ''* * * the license fee required under subparagraph (A), (B) or (C) * * *'' They also stated that if Congress had intended initial applicants to pay a fee in each of the phase-out years, it would have never included the last sentence of subparagraph 3. The congressmen point out that USDA's interpretation of this paragraph, as reflected in the proposed rule, has the effect of ignoring this sentence, which does not differentiate between pre- or post-phase-out period when it states that a retailer or wholesaler shall not be required to pay any fee for renewal in subsequent years.

Based on full consideration of the comments received during the initial and reopened comment periods, USDA has determined that a change to the proposed revisions to § 46.6 is appropriate in order to harmonize the implementing regulation with the statutory language. Therefore, in the final rule, USDA is amending the regulatory language in § 46.6 to reflect that retailers and grocery wholesalers making an initial application during the 3-year phase-out period beginning on November 15, 1995, shall not be required to pay any fee for renewal of their licenses in subsequent years.

Executive Orders 12866 and 12988

This final rule is issued under the Perishable Agricultural Commodities

Act (7 U.S.C. 499 *et seq.*), as amended. USDA is issuing this final rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. The final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USDA has considered the economic impact of this rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than $5,000,000. The PACA requires that wholesalers, processors, food service companies, grocery wholesalers, and truckers be considered dealers and subject to a license when they buy or sell more than 2,000 pounds of fresh and/or frozen fruits and vegetables in any given day. A retailer is considered to be a dealer and subject to license when the invoice cost of its perishable agricultural commodities exceeds $230,000 in a calendar year. Brokers negotiating the sale of frozen fruits and vegetables on behalf of the seller are also exempt from licensing when the invoice value of the transactions is below $230,000 in any calendar year.

There are approximately 15,700 PACA licensees. Separating licensees by the nature of business, there are approximately 6,000 wholesalers, 4,750 retailers, 2,100 brokers, 1,200 processors, 550 commission merchants, 450 food service businesses, 150 grocery wholesalers, and 50 truckers licensed under PACA. The license is effective for 1 year unless suspended or revoked by USDA for valid reasons [7 CFR 46.9 (a)–(h)], and must be renewed annually by the licensee. Many of the licensees may be classified as small entities.

Approximately 650 to 700 retailers and grocery wholesalers who made an initial license application after November 15, 1995, and subsequently paid a fee to renew their license, will be affected by this rule. The renewal fees collected by USDA from each of the affected retailers and grocery wholesalers ($300, plus $150 for each branch in excess of nine) will be refunded with interest.

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

Paperwork Reduction Act

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

List of Subjects in 7 CFR Part 46

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

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

PART 46—[AMENDED]

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

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

2. Section 46.6 is revised to read as follows:

§ 46.6 License fees.

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

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

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

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

(4) Any retailer or grocery wholesaler making an initial license application during the 3-year phase-out period shall pay no fee for renewal of the license for subsequent years.

(5) A retailer or grocery wholesaler that holds a license as of November 15, 1995, shall pay the license fee required in paragraphs (a) (1), (2), and (3) of this section for the renewal of the license during the phase-out period.

(6) No license fee will be required after November 14, 1998 for making an initial application for, or for renewal of a license by a retailer or grocery wholesaler. However, a retailer or grocery wholesaler making an initial application for a license after November 14, 1998, shall pay a $100 administrative processing fee.

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

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

Dated: August 8, 1997.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 97–21523 Filed 8–13–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 97–023–2]

Pink Bollworm Regulated Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the pink bollworm regulations by removing all or portions of previously regulated areas in Clay, Crittenden, and Mississippi Counties in Arkansas; Dunklin, New Madrid, and Pemiscot Counties in Missouri; and Dyer and Lauderdale Counties in