DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket Number FV97–355]

Revision to Part 46, Regulations Under 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 or Act) to establish that electronic transmissions are ''ordinary and usual billing or invoice statements'' within the meaning of the PACA.

EFFECTIVE DATE: December 15, 1997.

FOR FURTHER INFORMATION CONTACT: Charles W. Parrott, Assistant Chief, PACA Branch, Room 2095-So. Bldg., Fruit and Vegetable Division, AMS, USDA, 1400 Independence Avenue, S.W.,Washington, D.C. 20250, Phone (202) 720–4180.

SUPPLEMENTARY INFORMATION: This regulation is issued under authority of section 15 of the PACA (7 U.S.C. 499o).

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. It protects growers, shippers, distributors, and retailers dealing in those commodities by prohibiting unfair and fraudulent trade practices. Thus, the law fosters an efficient nationwide distribution system for fresh and frozen fruits and vegetables, benefitting the whole marketing chain from farmer to consumer. The PACA provides for a forum to adjudicate commercial disputes in which USDA may award damages against a licensee who fails to meet contractual obligations in violation of the Act. The law also imposes a statutory trust on perishable agricultural commodities received but not yet paid for, products derived from those commodities, and any receivables or proceeds due from the sale of those commodities or products thereof for the benefit of unpaid suppliers or sellers. USDA's Agricultural Marketing Service (AMS) administers and enforces the PACA.

The PACA Amendments of 1995, among other things, eliminated the requirement for unpaid produce suppliers to file trust notices with USDA in order to preserve their trust rights under the statutory trust provision of the Act. Additionally, the amendments to the PACA allow unpaid sellers of fresh and frozen fruits and vegetables to preserve trust benefits by adding language to ''ordinary and usual billing or invoice statements'' that advises the buyer of the creditor's intention to preserve trust benefits. This addition of language indicating the intent to preserve trust benefits to bills or invoices eliminates the need for a trust creditor to provide any additional notice to the debtor of the creditor's intention to preserve trust benefits. However, the Act does not explicitly declare that information transmitted in the course of electronic transactions would constitute ''ordinary and usual billing or invoice statements''.

On January 15, 1997, the United Fresh Fruit and Vegetable Association (UFFVA), a produce industry trade association based in Alexandria, Virginia, petitioned AMS to adopt regulations under the PACA to recognize the use of Electronic Data Interchange. Ten other produce industry organizations joined the UFFVA on the petition. The petitioners sought clarification as to whether EDI transactions are considered by AMS to be ''ordinary and usual billing or invoice statements'' within the meaning of the 1995 PACA amendments. USDA agreed with petitioners that a revision to the regulations would eliminate any uncertainty in this regard and would ensure that licensees can use reasonable technological advances while still receiving appropriate trust protection under the PACA.

Therefore, USDA proposed a change in the PACA regulations to achieve this end. The proposal was published in the **Federal Register** on June 20, 1997 (62 FR 33574). The proposal contained a definition for the term ''ordinary and usual billing or invoice statements'' to be added in section 46.46(a) as follows:

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

The proposed definition specifies that ''ordinary and usual billing or invoice statements'' as used in the PACA and ''invoice or other billing statement'' as used in section 46.46(f)(3) include both paper documentation and electronic transmissions customarily used between a seller and a buyer for billing or invoicing purposes. This change to the regulations is very similar to the change suggested in the UFFVA petition. The 30-day comment period on the proposed rule closed on July 21, 1997.

Comments

USDA received comments on the proposed rule from the American Frozen Food Institute (AFFI), McLean, Virginia; Western Growers Association, Newport Beach, California; Driscoll's Strawberry Associates, Inc., Watsonville, California; and The Nunes Company, Inc., Salinas, California. All of the commentors supported USDA's proposal to amend the regulations to establish that electronic transmissions are ''ordinary and usual billing or invoice statements'' within the meaning of the PACA.

In its favorable comment, AFFI suggested that in order to clarify and strengthen the proposal, USDA should confirm in the final rule that including a statement on an electronic invoice or other billing document that the sale is subject to the provisions of the PACA statutory trust will satisfy the notice requirements under the statute. AFFI is concerned that the statement preserving trust benefits may not be recognized as a standard data field on an electronic document, and therefore may not be received or read by the party to which the information is being disclosed. However, as we stated in the preamble to the proposed rule, both parties to an electronic transaction must agree to the format of the information to be transmitted and received in an electronic transmission. USDA believes that this agreement is the proper forum for ensuring that the buyer receives notice of trust preservation from the seller in the electronic transmission. The PACA requires that the seller give notice to the buyer in order to preserve its trust benefits. Therefore, a seller engaged in electronic transactions must ensure in the agreement with its buyer that the buyer is receiving the trust statement as part of the electronic transmission. Otherwise, the seller is responsible for finding other means of giving notice to the buyer in order to qualify for PACA trust protection. Under these circumstances, USDA is making no change to the final rule based on this comment.

Executive Orders 12866 and 12988

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended

to have retroactive effect. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USDA has considered the economic impact of this final rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than $5,000,000. The PACA requires all businesses that operate subject to its provisions maintain a license issued by USDA. There are approximately 15,700 PACA licensees, many of which may be classified as small entities.

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

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

Paperwork Reduction Act

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements covered by this rule were approved by OMB on October 31, 1996, and expires 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. In § 46.46, a new paragraph (a)(5) is added to read as follows:

§ 46.46 Statutory trust.

* * * * *

(a) * * *

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

Dated: November 7, 1997.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 97–29926 Filed 11–13–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 927

[Docket Nos. AO–99–A7; FV96–927–1]

Winter Pears Grown in Oregon, Washington, and California; Order Amending the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the marketing agreement and order (order) for winter pears grown in Oregon, Washington, and California. The amendments remove the State of California from the order and make related changes to provisions concerning the production area, districts, and establishment and membership of the Committee. Another amendment allows the use of telecopiers or other electronic means in Committee voting procedures. The amendments will improve the administration, operation and functioning of the order.

EFFECTIVE DATE: November 17, 1997.

FOR FURTHER INFORMATION CONTACT: Kathleen M. Finn, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523–S, Washington, D.C. 20250–0200; telephone: (202) 720–2491, or FAX (202) 720–5698; or Teresa Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 1220 S.W. Third Avenue, room 369, Portland, OR 97204–2807; telephone (509) 326–2724 or FAX (509) 326–7440. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax (202) 720–5698.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on June 24, 1996, and published in the June 26, 1996, issue of the **Federal Register** (61 FR 33047). Recommended Decision and Opportunity to File Written Exceptions issued on June 9, 1997, and published in the **Federal Register** on June 16, 1997 (62 FR 32548). Secretary's Decision and Referendum Order issued July 22, 1997, and published in the **Federal Register** on July 28, 1997 (62 FR 40310).

Preliminary Statement

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.