Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Document No. AMS–FV–08–0098]

RIN # 0581–AC92

Perishable Agricultural Commodities Act: Increase in License Fees

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture (USDA) is proposing to amend the regulations under the Perishable Agricultural Commodities Act (PACA or Act) to increase license fees. Current annual license fees of $550 would increase to $995. Fees for branch locations would increase from $200 for branch locations in excess of nine to $600 for each branch location. The maximum amount a licensee would pay per year would increase from $4,000 to $8,000. Additionally, the regulations would be amended to remove the provisions to phase out license fees by retailers and grocery wholesalers and the provisions to phase in triennial license renewal for retailers and grocery wholesalers as these processes have already occurred. We also propose to eliminate the multi-year license renewal option for commission merchants, brokers, and dealers.

DATES: Written or electronic comments received by May 10, 2010 will be considered prior to issuance of a final rule.

ADDRESSES: You may submit written or electronic comments to:

(1) PACA License Fee Comments, AMS, F&V Programs, PACA Branch, 1400 Independence Avenue, SW., Room 2095–S, Washington, DC 20250–0242.

(2) *Fax:* 202–690–4413.

(3) E-mail comments to *Pacalicensefee@ams.usda.gov.*

(4) *Internet: http://www.regulations.gov.*

Instructions: All comments will become a matter of public record and should be identified as "PACA License Fee Comments". Comments will be available for public inspection from the Agricultural Marketing Service at the above address or over the Agency's Web site at *http://www.ams.usda.gov/paca.* Web site questions can be addressed to the PACA Webmaster, *christine.tipton@ams.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Jeffrey F. Davis, Assistant Director, National License Center, PACA Branch, Fruit and Vegetable Programs (703) 331–4575.

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

The Perishable Agricultural Commodities Act (PACA or Act) of 1930 establishes a code of fair trade 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 trade 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 Branch proactively works for the fruit and vegetable industry promoting interstate and foreign commerce through dispute resolution, licensing, and outreach programs facilitating fair trade practices. The PACA enforces Federal regulations outside the civil court system by upholding contract requirements. The PACA also mandates full and prompt payment, removes unscrupulous individuals from the trade when needed, and provides expert advice on trust protection.

The PACA Amendments of 1995 [1] increased the annual license fee from $400 to $550 (up to a maximum annual fee of $4000) for all licensees except retailers and grocery wholesalers.[2] The 1995 Amendments granted USDA the authority to increase fees through rulemaking after November 14, 1998 provided that the PACA program's operating reserves fall below 25 percent of PACA's projected annual program costs.[3] Because of the loss of revenue to the Agency caused by the amendment's requirement that fees for retailers and grocery wholesalers be phased out, PACA program budget projections for FY 2000 and 2001 indicated the program's assets would have fallen below the required 25 percent of projected expenditures in FY 2001. However, on June 20, 2000 President Clinton signed Public Law 106–224 which included $30.45 million to be deposited into USDA's PACA reserve fund on October 1, 2000, in order to maintain PACA license and complaint filing fees at their 1995 levels.[4] The one-time appropriation (expected to last a few years) has lasted almost 11 years through concentrated cost-cutting measures, including office restructuring and staff reductions. In FY 2006, the PACA Branch restructured its regional offices and consolidated nationwide licensing functions into one office, resulting in over $1 million in annual savings. In January, 2000, the PACA Branch operated with 116 employees. As a result of gains in technology and office consolidations this program now employs approximately 80 full time staff members in three regional offices and Washington, DC. The 2007 U.S. Department of Commerce Bureau of Economic Analysis report indicates the total retail value of fruits and vegetables for at-home and away-from-home consumption was $80–$95 billion. The PACA Branch operating expenses in FY 2008 were $10.6 million, constituting a sound value in cost-efficiency and productivity dedicated to the service of the fruit and vegetable industry.

During the last quarter of FY 2010, or possibly the first quarter of FY 2011, the PACA Branch operating fund will fall below 25 percent of projected annual program costs. Without a fee increase in FY 2011, the program will exhaust its reserves by the second quarter of FY 2011, and would soon need to begin reducing its level of services to the industry. We propose to increase the current base annual license fee for commission merchants, brokers, and dealers from $550 to $995. We also propose to increase the current $200 additional fee for branch locations in

[1] Public Law 104–48, 109 Stat. 427(1995).

[2] 7 U.S.C. 499c(b)(2).

[3] *Id.*

[4] Sec. 203, Public Law 106–224.

excess of nine to $600 for each branch location starting from the first branch. We further propose to increase the current aggregate fee maximum from $4,000 to $8,000. We propose that the fee increase become effective October 1, 2010. The proposed funding increase, provided that there is no significant increase in multi-year license renewals prior to its effective date, is expected to allow the PACA Branch to maintain its current level of services until FY 2015.

Financial Impact/Costs

The PACA is enforced through a licensing system and is user-fee financed through a license fee. The PACA requires commission merchants, wholesale dealers, grower's agents, food processors, and brokers buying or selling fruits and/or vegetables in interstate or foreign commerce to be licensed. Those who engage in practices prohibited by the PACA may have their licenses suspended or revoked by USDA [7 CFR 46.9(a)–(h)]. Currently, licensees may choose to renew their licenses on an annual, biennial, or triennial basis.

Wholesalers, processors, food service companies, and grocery wholesalers are considered to be dealers and subject to license when they buy or sell more than 2,000 pounds of fresh and/or frozen fruits and vegetables in any given day. Dealers whose fruit and vegetable purchases or sales do not exceed the 2,000 pound threshold are exempt from the license requirement. A retailer is considered to be a dealer and subject to license when purchases exceed the 2,000 pound threshold and the invoice cost of its perishable agricultural commodities exceeds $230,000 in a calendar year.

Although license fees account for the majority of PACA's funding, the program also collects about 4.4% of its revenue from fees charged to firms that submit disputes to the PACA Branch for resolution. Reparation complaint fees (informal and formal) are expected to account for $360,000 in revenue per year through FY 2015.

The initial increase in receipts from fees collected following the enactment of the 1995 Amendments allowed the PACA fund to build up operating reserves. Those reserves peaked at $7.48 million in July, 1998, creating revenue as investment income for subsequent years. In FY 2008, the program generated $6.35 million in license fees, $360,000 in complaint fees, and $419,000 in investment income for revenues totaling $7.13 million. During FY 2011 the operating reserve will be exhausted, generating no investment income. Projections indicate that the program must generate approximately $11.425 million per year by FY 2011 and $13.04 million by FY 2015 for the program to continue to maintain the current level of service to the industry. This equates to a $4.865 million per year increase in annual program revenues beginning with FY 2011, up to $6.48 million by FY 2015. Because over 95 percent of the program's revenue is generated through the collection of license fees, a majority of these funds would have to be raised through an increase in license fees.

When USDA proposed revisions to the PACA regulations implementing the 1995 Amendments (61 FR 47674, September 10, 1996), it noted that the next fee increase would need to be significant due to the phase out of the requirement that retailers pay license fees. The following table (based on the number of active, paying PACA licensees as of October 1, 2008) outlines how the proposed fee increase affects the PACA program's budget through FY 2015:

Fiscal year	Balance start of fiscal year	License and complaint fee revenue	Investment revenue	Total available funds	Projected costs	Months of operating reserve
2009	$11,785,000	$6,662,000	$102,000	$18,447,000	$10,732,000	8.4
2010	7,545,000	6,580,000	20,000	14,125,000	11,059,000	3.4
2011	3,065,000	12,399,000	0	15,464,000	11,425,000	4.4
2012	4,038,000	12,399,000	0	16,437,000	11,808,000	4.9
2013	4,628,000	12,399,000	0	17,027,000	12,205,000	4.9
2014	4,822,000	12,399,000	0	17,221,000	12,615,000	4.5
2015	4,606,000	12,399,000	0	17,005,000	13,040,000	3.8

The proposed increase in fees would result in estimated revenue of $12.4 million per year. AMS expects the PACA program will have adequate financing until FY 2015 (based on the current number of licensees and economic factors), when the reserve is again projected to fall below 25 percent.

Under § 46.9(k) of the regulations (9 CFR 46.9(k)), commission merchants, brokers, and dealers have been given the option since December 1, 1998 of renewing their licenses on an annual, biennial, and triennial basis. Currently, 17 percent hold the two-year or three-year licenses. The above revenue projections assume that there is no significant increase in multi-year renewals before the proposed fee increase becomes effective. A significant increase in such renewals could produce a shortfall in projected revenue for FY 2011 and FY 2012 that might necessitate a curtailment of services, or even an additional fee increase. Accordingly, an amendment terminating the option to renew on a biennial or triennial basis, which would become effective thirty days after publication of the final rule is proposed. This amendment will not apply to retailers and grocery wholesalers, who will continue to be licensed on a triennial basis.

Currently, Section 46.6 of the regulations (9 CFR 46.6) sets out the procedure followed to phase out retailers and grocery wholesalers from the requirement to pay license fees and Section 46.9(k) (9 CFR 46.9(k)) contains the procedure followed to phase in the triennial license renewal for those entities. Both the phase-in and phase-out processes have been completed. Therefore, these provisions are no longer needed and we propose to remove them from the regulations.

Executive Orders 12866 and 12988

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

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is not intended to have retroactive effect. This proposed 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. 601–612), the Agricultural Marketing Service has considered the economic impact of this proposed rule on small entities, and accordingly has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000. The PACA is enforced through a licensing system and is user-fee financed primarily through a license fee. USDA's Agricultural Marketing Service administers and enforces the PACA.

As of October 1, 2008 there were 14,418 PACA licensees, a majority of which may be classified as small entities. Retailers and grocery wholesalers represent 4,125 licensees. Internally, PACA refers to retailers and grocery wholesalers as "non-paying" licensees, and all other licensees as "paying". Since November 1998, retailers and grocery wholesalers pay a $100 application processing fee. Their PACA license is effective for three years, renewed at no cost. Retailers accounted for about 35% of program revenue before their fees were phased out by Congress. Today, retailers account for 28.5% of all PACA licensees. However, since only new applicants pay a processing fee, retailers contribute little to PACA's annual operating revenue. The proposed fee increase will have no impact on operating costs of retailers and grocery wholesalers. Therefore, retailers and grocery wholesalers will not be unduly burdened by the proposed rule.

Wholesalers, processors, food service companies, commission merchants, dealers, brokers, and truckers are considered to be 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. This group represents the remaining 10,293 active, "paying" PACA licensees and is the only group impacted by the proposed fee increase.

While the annual revenues of this group of agricultural service firms is unknown, we estimated a significant percentage of these firms have annual receipts less than $7,000,000. Therefore, the businesses are "small businesses" within the meaning of that term in the RFA. A large number of these small agricultural service firms would be impacted by this proposed PACA fee increase. While the maximum amount of the proposed PACA license fee is to be $8,000, this increase will impact a small number of larger firms with multiple branches. Currently, only 56 licensees (or 0.0039%) of all PACA licensees would pay the $8,000 maximum. The fee structure in the proposal was designed so firms would only see the annual fee increase from $550 per year to the proposed $995 per year. This $445 fee increase is believed to be a minor increase in operating costs to these firms and is more than offset by the protection provided to these firms under the PACA. Larger firms operating at multiple branch locations would face larger fee increases. As the renewal of PACA licenses has become highly automated and renewal notices are sent to all licensees well before the renewal date, elimination of the option biennial or triennial licenses should not impose a substantial burden upon small businesses holding such licenses.

All fruit and vegetable traders that handle less than 2,000 pounds of fresh and/or frozen fruits and vegetables are exempt from the PACA license requirement and would not be subject to this proposed fee increase. These firms would be considered very small and handle a relatively minor volume of total fresh and/or frozen fruits and/or vegetables marketed.

On February 24, 2009 the USDA Fruit and Vegetable Industry Advisory Committee unanimously recommended to the Secretary of Agriculture their approval of the proposed license fee increase.

Paperwork Reduction Act

In accordance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements are currently approved under OMB number 0581–0031. The forms covered under this information collection require the minimum information necessary to effectively carry out the requirements of the order, and their use is necessary to fulfill the intent of the PACA as expressed in the order, and the rules and regulations issued under the order.

E-Government Act Compliance

AMS is committed to complying with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. License application forms are available on our PACA Web site at *http://www.ams.usda.gov/PACA* and can be printed, completed, and faxed. Currently, forms are transmitted by fax machine and postal delivery. The PACA Branch is working towards furthering its availability of online forms.

List of Subjects in 7 CFR Part 46

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

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

PART 46—[AMENDED]

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

Authority: 7 U.S.C. 499a–499t.

2. In § 46.6, paragraphs (a) and (b) are revised to read as follows:

§ 46.6 License fees.

(a) Retailers and grocery wholesalers making an initial application for license 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 $995 plus $600 for each branch or additional business facility. In no case shall the aggregate annual fees paid by any such applicant exceed $8,000.

* * * * *

3. In § 46.9, paragraph (k) is revised and paragraph (l) is removed to read as follows:

§ 46.9 Termination, suspension, revocation, cancellation of licenses; notices; renewal.

* * * * *

(k) Only a commission merchant, broker, or dealer holding a multi-year license, prior to phase-out of this option, will receive a refund if business operations cease or a change in legal status occurs that requires issuance of a new license prior to the next license renewal date. If a refund is due, it will be issued for any remaining full-year portion of advance fee paid, minus a $100 processing fee.

Dated: March 5, 2010.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

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