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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

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RIN 0581–AC92

Perishable Agricultural Commodities Act: Increase in License Fees

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is amending the regulations issued under the Perishable Agricultural Commodities Act (PACA or Act) to increase license fees. Specifically, annual license fees of $550 are increased to $995. Fees for branch locations are increased from $200 for branch locations in excess of nine, to $600 for each branch location. The maximum amount a licensee will pay per year has increased from $4,000 to $8,000. Additionally, the regulations have been 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 been completed. Finally, the regulations have been amended to eliminate the multi-year license renewal option for commission merchants, brokers, and dealers.

DATES: *Effective Date:* This rule is effective September 23, 2010, except for the amendment to § 46.6(b), which is effective on October 1, 2010.

FOR FURTHER INFORMATION CONTACT: Jeffrey F. Davis, Office of the Chief, PACA Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2098–A South Bldg., Washington, DC 20250–0242. (202) 205–7847. E-mail—*jeffrey.davis4@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule 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 $4,000) 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 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. Therefore, USDA is increasing the current base annual license fee for commission merchants, brokers, and dealers from $550 to $995. USDA is also increasing the current $200 additional fee for branch locations in excess of nine, to $600 for each branch location starting from the first branch. USDA is also increasing the current aggregate fee maximum from $4,000 to $8,000. The new fees are effective October 1, 2010. The license fee increase will allow the PACA Branch to maintain its current level of services through FY 2015.

USDA is also amending the regulations by removing sections of 46.6(a) and 46.9(1) of the regulations (7 CFR 46.6 and 46.9(1)) that phased out license fees for retailers and grocery wholesalers and that phased in triennial

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

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

[3] *Id.*

[4] Sec. 203, Pub. L. 106–224.

license renewal for retailers and grocery wholesalers. And USDA is removing the multi-year license renewal option for commission merchants, dealers, and brokers in section 46.9(k) of the regulations (7 CFR 46.9(k)).

Comments

A proposed rule to amend PACA regulations was published in the **Federal Register** on March 11, 2010 (75 FR 11472). The proposal sought to amend Title 7, Part 46 to increase license fees. The comment period closed on May 10, 2010. We received timely comments from Western Growers Association (WGA), Newport Beach, California; Produce Marketing Association (PMA), Newark, Delaware; Washington State Potato Commission (WSPC), Moses Lake, Washington; and three individuals.

The WGA and PMA strongly supported the PACA Branch and the proposal. The PMA and the 3,000 companies it represents—from grower-shippers and supermarket retailers to foodservice operators and importers—supports the proposed fee increases as outlined in the proposed rule. The WGA and its 2,500 members strongly support the proposed fee increase, but requested branch fees be waived on the first and second branch locations. The WGA felt reducing the current exemption from nine branches down to zero was too dramatic a change.

In its unfavorable comment, Matt Harris, Director of Trade for the WSPC requested further economic analysis to identify the true impact to small business. The WPSC feels an 81% increase in fees is uncalled for. The WPSC cited 45 potato handlers in Washington State who need up to 12 different licenses and audits totaling $9,125 yearly already; adding an additional $450 in PACA fees understates the incremental impact this federal increase means to the small business owner. In response, the PACA Branch has not raised license fees since 1995. The 1995 amendments preclude PACA from increasing fees until the funds on hand as of the end of the fiscal year in which the increase will take effect will be less than 25 percent of the projected budget. The PACA Branch achieved tremendous success over the past fifteen years minimizing costs and improving service to the fruit and vegetable industry. Through the PACA Branch's use of improved technology, strong centralized management, and aggressive cost-cutting methods (including the closing of two regional offices and consolidation of licensing functions), the one-time congressional appropriation of $30.45 million expected to last a few years has lasted for over ten years. These efforts delayed the need to request a license fee increase without curtailing services, another benefit to the fruit and vegetable industry. The criteria set forth in the statute have now been met, authorizing the fee increase. The amount of the increase is necessary to permit PACA to continue to provide services to the industry at current levels. Given the above discussion, the USDA is making no change to the final rule based on this comment.

In his unfavorable comment, one commenter indicated he feels the fee increase is unfair, discriminately excessive, and monopolistically disproportionate. He feels the fee increase should have been proposed gradually over ten years. The commenter also feels licensees who use PACA services should bear more of the financial burden to pay for the fee increase. As outlined previously, PACA may only by law, institute a fee increase under certain circumstances. By being PACA licensed, all PACA licensees enjoy the same benefit of the federal protection of the Act. Since 2001, over 20% of all licensees have filed an action with the PACA. Since 2004, PACA has resolved 7,660 complaints involving claims of over $155 million within four months 91% of the time. Currently 14,508 PACA licensees have a total of 5,365 branch locations. The increased branch fees will affect 1,102 licensees; 10.6% of the largest firms will bear the greatest burden of the fee increase. Based on this discussion, the USDA will be making no changes to the final rule based on this comment.

Another commenter requested that the fee remain the same for small entities. Small agricultural business firms are defined by the Small Business Administration (SBA) (13 CFR 121.601) as those whose annual receipts are less than $7,000,000. The majority of PACA licensees fall within this classification. The fee structure is designed so most firms would only see the annual license fee increase from $550 to $995. This $445 fee increase is believed to be a minor increase to operating costs for firms of all sizes. The USDA will be making no changes to the final rule based on this comment.

Another commenter suggested the license fees are passed on to the consumer, the cost of commodities are too expensive now, and PACA is a burden to the people. No direct complaint against the proposed rule was provided, so the USDA will be making no changes to the final rule based on this comment.

No comments were received on our proposal to remove sections of 46.6(a) of the regulations (7 CFR 46.6) that phased out license fees for retailers and grocery wholesalers, to remove section 46.9(1) (7 CFR 46.9(1)) that phased out triennial license renewal for retailers and grocery wholesalers, or to remove the multi-year license renewal option for commission merchants, dealers, and brokers in section 46.9(k) of the regulations (7 CFR 46.9(k)). Therefore, these changes are finalized as proposed.

Executive Orders 12866 and 12988

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures 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 final rule on small entities, and accordingly has prepared this 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 May 21, 2010 there were 14,508 PACA licensees, a majority of which may be classified as small entities. Retailers and grocery wholesalers represent 4,147 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 the 1995 Amendments to the Act. Today, retailers account for 28.6% of all PACA licensees. However, since only new applicants pay a processing fee, retailers contribute little to PACA's annual operating revenue. The 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 final rule.

Wholesalers, processors, food service companies, commission merchants, dealers, brokers, and truckers 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. This group represents the remaining 10,361 active, "paying" PACA licensees and is the only group impacted by the 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 will be impacted by the PACA license fee increase. While the maximum amount of the 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 final rule was designed so most firms would only see the annual fee increase from $550 per year to $995. 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 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 the 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 amended as follows:

PART 46—[AMENDED]

■ 1. The authority citation for part 46 is revised 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.

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■ 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: August 17, 2010.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–10–0051; NOP–10–04IR]

RIN 0581–AD04

National Organic Program; Amendment to the National List of Allowed and Prohibited Substances (Livestock)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List) to incorporate a recommendation submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) on April 29, 2010. Consistent with the recommendation from the NOSB, this interim rule revises the annotation of one substance on the National List, methionine, to extend its use in organic poultry production until October 1, 2012, at the following maximum levels of synthetic methionine per ton of feed: Laying chickens—4 pounds; broiler chickens—5 pounds; turkeys and all