



## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 46**

**[Document Number AMS-FV-15-0045]**

**RIN 0581-AD50**

### **Perishable Agricultural Commodities Act (PACA): Guidance on Growers' Trust Protection Eligibility and Clarification of "Written Notification"**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The U. S. Department of Agriculture (USDA), Agricultural Marketing Service (AMS), is amending the regulations under the Perishable Agricultural Commodities Act (PACA or Act) to enhance clarity and improve the administration and enforcement of the PACA. The revisions will provide greater direction to the industry as to how growers and other principals that employ selling agents may preserve their PACA trust rights. The revisions will also clarify the definition of "written notification" as the term is used in 6(b) of the PACA, and the jurisdiction of USDA to investigate alleged PACA violations.

**DATES:** Effective Date: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Travis Hubbs, Chief, Investigative Enforcement Branch, 202-720-6873, or [PACAinvestigations@ams.usda.gov](mailto:PACAinvestigations@ams.usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

#### **Background of Growers' Trust Protection**

Congress examined the sufficiency of the PACA fifty years after its inception and determined that prevalent financing practices in the perishable agricultural commodities industry were placing the industry in jeopardy. Particularly, Congress focused on the increase in the number of buyers who failed to pay, or were slow in paying their suppliers, and the impact of such payment practices on small suppliers who could not withstand a significant loss or delay in receipt of monies owed. Congress was also concerned by the common practice of produce buyers granting liens on their inventories to their lenders, which covered all proceeds and receivables from the sales of perishable agricultural commodities, while produce suppliers remained unpaid. This practice elevated the lenders to a secured creditor position in the case of the buyer's insolvency, while the sellers of perishable agricultural commodities remained unsecured creditors with little or no legal protection or means of recovery in a suit for damages.

Deeming this situation a "burden on commerce," Congress amended the PACA in 1984 (Pub. L. 98-273) to include a statutory trust provision, which provides increased credit security in the absence of prompt payment for perishable agricultural commodities.

Pursuant to this 1984 amendment, perishable agricultural commodities, inventories of food or other derivative products, and any receivables or proceeds from the sale of such commodities or products are to be held in a non-segregated floating trust for the benefit of unpaid sellers. This trust is created by operation of law upon the purchase of such goods, and the produce buyer is the statutory trustee for the benefit of the produce seller.

The trust is a non-segregated "floating trust" made up of all of a buyer's commodity-related assets, under which there may be a commingling of trust assets. There is no need to identify specific trust assets through each step of the accrual and disposal process. Since commingling is

contemplated, all trust assets would be subject to the claims of unpaid sellers, suppliers and agents to the extent of the amount owed them. As each supplier gives ownership, possession, or control of perishable agricultural commodities to a buyer, and preserves its trust rights, that supplier becomes a participant in the trust. Consequently, trust participants remain trust beneficiaries until they have been paid in full.

Since 1984, the District Courts of the United States have had jurisdiction to entertain actions by trust beneficiaries to enforce payment from the trust (7 U.S.C. 499e(c)(5)). Therefore, in the event of a business failure, produce creditors may enforce their trust rights by filing a trust action against the buyer in federal district court. In the event of a bankruptcy by a produce buyer, that is, the produce “debtor,” the debtor’s trust assets are not property of the bankruptcy estate and are not available for distribution to secured lenders and other creditors until all valid PACA trust claims have been satisfied.

Because of the PACA trust provisions, unpaid sellers, including those outside the United States, have recovered hundreds of millions of dollars that most likely would not otherwise have been collected. The PACA trust provisions protect not only growers, but also other firms trading in fruits and vegetables since each buyer in the marketing chain becomes a seller in its own turn and can preserve its own trust eligibility accordingly. Because each creditor that buys produce can preserve trust rights for the benefit of its own suppliers, any money recovered from a buyer that goes out of business is passed back through preceding sellers until ultimately the grower also realizes the financial benefits of the trust provisions. This is particularly important in the produce industry due to the highly perishable nature of the commodities as well as the many hands such commodities customarily pass through to the end customer.

In 1995, Congress amended the PACA (Pub. L.104-48), changing several requirements of the PACA trust. Changes included no longer requiring sellers or suppliers to file notices of intent to preserve trust benefits with USDA, and allowing PACA licensees to have their invoices or other billing documents serve as the trust notice. The PACA offers two approaches to unpaid sellers, suppliers, and agents to preserve trust protection. One option allows PACA licensees to declare at the time of sale that the produce is sold subject to the PACA trust, providing protection in the event that payment is late or the payment instrument is not honored. This option allows PACA licensees to protect their trust rights by including specified language on their invoices or other billing statements (7 U.S.C. 499e(c)(4)). The second option for PACA licensees to preserve their trust rights, and the sole method for all non-licensed sellers, requires the seller to provide a separate, independent notice to the buyer of its intent to preserve its trust benefits. The notice must include sufficient details to identify each transaction covered by the trust (7 U.S.C. 499e(c)(3)).

Recent court decisions have invalidated the trust claims of unpaid growers against their growers' agent because the growers did not file a trust notice directly with the growers' agent. Growers' agents sell and distribute produce for or on behalf of growers and may provide such services as financing, planting, harvesting, grading, packing, labor, seed, and containers. The growers have argued that it is not necessary to file a trust notice with their growers' agent because growers' agents are required to preserve the growers' rights as a trust beneficiary against the buyer (7 CFR 46.46(d)(2)). Some courts have ruled that while the growers' agent is required to preserve the growers' trust benefits with the buyer of the produce, the grower has the responsibility to preserve its trust benefits with the growers' agent. This action provides

guidance to growers to clarify their responsibilities in preserving their trust rights.

### **“Written Notification” Background**

The 1995 amendments to the PACA require written notification to USDA as a precursor to investigations of alleged violations of the PACA. In recent years, produce entities have challenged the USDA’s jurisdiction to conduct investigations based on their narrow reading of the definition of “written notification” stated in § 46.49 of the regulations (7 CFR 46.49). The amendment of § 46.49 (7 CFR 46.49) makes it clear that public filings such as bankruptcy petitions, civil trust actions, and judgments constitute written notification. Moreover, AMS clarifies that the filing of a written notification with USDA may be accomplished by a myriad of means including, but not limited to, delivery by regular or commercial mail service, hand delivery, or electronic means such as email, text, or facsimile message. Furthermore, a written notification published in any public forum including, but not limited to, a newspaper or internet website, will be considered filed with USDA upon its visual inspection by any office or official of USDA responsible for administering the Act. Clarification of the meaning of “written notification” ensures that PACA licensees and entities operating subject to the PACA understand the breadth of documentation that could trigger USDA’s authority to initiate an investigation of alleged PACA violations.

### **Notice of Proposed Rulemaking and Final Rule**

In order to enhance clarity and improve the administration and enforcement of the PACA, a proposed rule to amend PACA regulations was published in the **Federal Register** on December 14, 2016 [81 FR 90255]. The comment period initially closed on February 13, 2017. However, the comment period was extended an additional 30 days. The reopening of the comment period

was published in the **Federal Register** on February 17, 2017. The second comment period closed on March 15, 2017.

This final rule amends 7 CFR 46.46 by revising paragraphs (d) and (f)(1)(vi) to clarify that growers or other types of principals who employ agents to sell perishable agricultural commodities on their behalf are among the class of “suppliers or sellers” referenced in section 5(c) of the PACA (7 U.S.C. 499e(c)) and, as such, must preserve their trust benefits against their agents. The revision of paragraph (f)(1)(iv) will identify additional types of documents that can be used in a notice of intent to preserve trust benefits.

This final rule also amends 7 CFR 46.49 by revising it to clarify the meaning of “written notification” as the term is used in section 6(b) of the PACA (7 U.S.C. 499f(b)). Additionally, to reflect current industry practices and advancements in electronic communication, AMS revises § 46.49(d) (7 CFR 46.49(d)) to allow the Secretary to serve a notice or response, as it relates to paragraph (d), by any electronic means, such as registered e-mail, that provides proof of receipt to the electronic mail address or phone number of the subject of the investigation.

## **Comments**

AMS received timely filed comments from three parties. One commenter did not address the proposed amendments to the regulations.

The second commenter, a California agricultural trade association, strongly supported the revision to § 46.49 (7 CFR 46.49) stating, that “[t]his clarification now will insure that the industry . . . will understand the breadth of documentation that could trigger USDA's authority to initiate an investigation of alleged PACA violations.” This commenter generally supported the proposed amendment to § 46.46 (7 CFR 46.46) and recommended that “a mechanism for non-

licensed growers be instituted to allow for a simplified method and clear pathway which allows growers to preserve their PACA Trust rights.” This commenter also suggested the possibility of “a reduced license fee for growers based on their volume,” allowing them to obtain a PACA license “at a reduced rate that permits them to utilize the automatic method of preserving Trust rights by applying the necessary PACA language to their billing documents.”

We do not adopt the suggestion for a reduced fee for growers based on the grower’s volume because it raises significant concerns with respect to implementation on the part of the agency. Adopting a PACA license fee structure based on a grower’s “volume” as the commenter suggested would require that growers disclose sales and financial information currently not requested or required of growers to obtain a PACA license, thereby placing an additional burden on the growers to supply confidential information. Similarly, it would subject growers to regular monitoring and verification of the growers’ sales information. As the commenter recognizes, the PACA stipulates that only PACA licensees can preserve their trust rights by including trust language on their invoices or other billing documents. Growers are currently not required to obtain a PACA license, but may choose to do so at the established fee, thus enabling them to include the statutory trust language on their billing documents. The statute currently does not provide for the creation of a separate fee structure for growers or a simplified method that allows unlicensed growers to preserve their trust rights as proposed by the commenter.

The third commenter, an attorney, did not comment on the proposed amendment of § 46.46 (7CFR 46.46) but strongly objected to the proposed revisions to § 46.49 (7 CFR 46.49), alleging that they unlawfully expand USDA’s authority, contrary to the PACA. The commenter raised four primary concerns with the revision, contending that:

1. The revision circumvents the clear statutory language of PACA. The commenter states that, with respect to initiating an investigation, “instead of merely acknowledging new types of triggering media, the proposed rule goes too far by removing the necessary middle man (i.e., an "interested person") required by Congress.” The commenter contends that the proposed revision circumvents the requirement that an interested person must file written notice with the USDA or with an employee of the USDA administering the Act.
2. The proposed revision renders portions of PACA meaningless, bypassing jurisdictional requirements. The commenter contends that the proposed revision circumvents the filing requirement, claiming, for instance, that, “[i]f an employee of the USDA administering PACA can merely look at a document and the same will be deemed filed, the meaning of the term “filing” is lost. Further, there would be no “interested person” making the filing subject to penalty for falsity,” and there would be no filing of a notice, no delivery to USDA, and no “written notification” to inform USDA of an alleged violation of the PACA.
3. The proposed revision frustrates PACA’s election of remedies provision under 7 U.S.C. 499e(5). The commenter reasons that “[t]he proposed amendment frustrates this election of remedies, in that it would allow the filing of a complaint or other similar legal document in a court of competent jurisdiction (e.g., U.S. District Court or U.S. Bankruptcy Court) to be deemed a filed written notification sufficient to initiate an investigation by the USDA as well.”

4. The proposed revision frustrates the purpose and practical application of 7 CFR 46.46(e)(3). The commenter asserts that the proposed revision would allow the USDA to ignore parties' decision not to notify or involve USDA in a private dispute and "to exceed its jurisdictional grant and insert itself into the private contractual affairs of businesses in the industry."

We disagree with the commenter's assertion that the revision unlawfully expands USDA's authority, contrary to the PACA. Congress established the PACA in 1930 to protect buyers and sellers of fresh and frozen fruits and vegetables, and the statute and the accompanying regulations have been amended over time to remain relevant to the industry that the PACA serves. The proposed revisions to § 46.49 (7 CFR 46.49) recognize the current realities of the information age that were not readily available when Congress last amended the PACA in 1995. The USDA cannot ignore public information that is relevant to the implementation of the PACA simply because Congress did not anticipate the expanding availability of digital information. Currently, information is much more likely to be generated, stored, and disseminated in electronic or digital format. The USDA has an obligation to properly enforce the PACA as Congress intended, protecting the buyers and sellers of perishable agricultural commodities. When electronic information is readily available to USDA, its hands should not be tied and the information ignored, when those it is tasked to protect could be negatively affected by that lack of action.

The 1995 amendments to the PACA require written notification as a precursor to the investigation of alleged violations of the PACA. The amendments were designed to protect against arbitrary or capricious investigations of licensees and unwarranted prosecutions; the

amendments ensured that a source *outside* the agency of the Department of Agriculture that administers the Act, including but not limited to “any other interested person who has knowledge of or information regarding a possible violation”, provided the impetus for investigation. The proposed revisions to § 46.49 (7 CFR 46.49) do not alter that proposition or erode those protections.

As stated, the proposed revisions are intended to address societal advances in information transmittal and communication, and technological evolution of the industry that the PACA serves. They in no way circumvent the requirement that a written notification be made by an “interested party” that is impartial, insofar as that party is not charged with administering the Act. Nor do they in any way reduce the reliability of the written notification; the submitters of a written notification, prior to the revisions, were not subject to penalty for unreliability or falsity (as is suggested by the third commenter), nor are they post-revisions.

It has always been the purview of the USDA to determine the reliability of any written notice and to decide whether an investigation based on that notice is reasonable and warranted.

Section 6(c) of the PACA (7 U.S.C. 499e(c)) concerns investigations of complaints and notifications listed in both paragraphs (a) and (b) of section 6 of the Act. This section states that: “[i]f there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) or a written notification made under subsection (b), the Secretary shall investigate such complaint or notification.” USDA will evaluate the information it receives and determine if an investigation is warranted. If the information is meaningless, meritless or unverifiable, USDA will not initiate an investigation.

Written allegations from an outside source (outside the PACA Division), are merely precursors

to a possible investigation under the PACA. It is USDA's responsibility to determine if violations against the PACA were committed, regardless of whether USDA receives an allegation directly from an interested party or from a competent source (e.g., State government documents, court filings, official bankruptcy records). When USDA receives notice of an allegation, the allegation must necessarily be examined, processed, and deliberated upon to assess whether reasonable grounds exist to investigate. There are intervening steps between the receipt of a written notice and an investigation.

The proposed amendment adds an alternative manner in which written notifications may be filed with USDA. The original method of filing contained in the regulations remains unchanged. Public records (court filings, news articles, etc.) that allege a violation of the PACA constitute written notification, and upon review by USDA, are deemed "filed" and may be sufficient to warrant the initiation of an investigation. The complaining party has to file or submit its complaint to some entity that has the authority to make its complaint public in order for USDA to be able to view it. An alleged violator of the PACA should not be able to avoid a possible administrative enforcement investigation simply because its accuser did not provide its written notification directly to USDA.

The third commenter states that the proposed revisions frustrate the PACA's election of remedies provision (7 U.S.C. 499e(5)) and the purpose and practical application of 7 CFR 46.46(e)(3). Those sections of the Act and regulations outline the remedies available to any private person or persons seeking to recover monetary damages resulting from any PACA violation(s), and eligibility of that person or persons to claim trust benefits under the Act. The proposed revisions to § 46.49 (7 CFR 46.49) pertain only to the authority of USDA to investigate

alleged PACA violation(s) for administrative enforcement purposes pursuant to section 6(b) of the Act. The proposed regulatory amendments neither implicate nor frustrate the intent or application of the election of remedies or trust provisions of the Act and regulations referenced by the commenter.

For the reasons outlined above, the proposed revisions to §§ 46.46 and 46.49 (7 CFR 46.46 and 46.49) remain unchanged in the final rule.

#### **Executive Orders 12866, 13563, and 13771**

This final rule has been reviewed under Executive Order 12866 supplemented by Executive Order 13563 and it has been determined that this final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, it was not reviewed by the Office of Management and Budget. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

#### **Executive Order 12988**

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 that must be exhausted prior to any judicial challenge to the provisions of this final rule.

#### **Executive Order 13175**

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, consultation and Coordination with Indian Tribal governments. The review reveals that

this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

### **Final 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 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. Accordingly, Agricultural Marketing Service (AMS) has prepared this final regulatory flexibility analysis.

Small agricultural service firms are defined by the Small Business Administration as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000 (13 CFR 121.201). There are approximately 14,500 firms licensed under the PACA, a majority of which could be classified as small entities. Historically, the produce industry has been an entry-level job market. There is a constant turnover involving the closing and opening of businesses. Produce firms generally start as small business entities.

AMS believes that these amendments to the PACA regulations will help all growers, sellers, and suppliers of produce, small or large, to protect their rights under the PACA trust, resulting in the potential recovery of millions of dollars in unpaid produce debt. Moreover, AMS believes that these regulatory amendments more accurately reflect the intent of Congress when it amended the PACA to require written notification as a precursor to investigations by the Secretary of Agriculture.

AMS believes this final rule increases the clarity of the PACA regulations and improves

AMS's enforcement of the PACA. AMS has determined that this rule will have no significant economic impact on a substantial number of small entities.

### **Paperwork Reduction Act**

In accordance with 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 that are covered by this final rule are currently approved under OMB number 0581-0031. No changes to those requirements are necessary as a result of this action. Should any changes become necessary, they will be submitted to OMB for approval.

### **E-Government Act Compliance**

USDA 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. Forms are available on the PACA website at <http://www.ams.usda.gov/rules-regulations/paca> and can be printed, completed, and submitted by email, facsimile, or postal delivery.

### **List of Subjects in 7 CFR Part 46**

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping requirements. For the reasons set forth in the preamble, 7 CFR part 46 is amended as follows:

#### **PART 46-[AMEND]**

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

**Authority:** 7 U.S.C. 499a – 499t.

2. Amend § 46.46 by revising paragraphs (d) and (f)(1)(iv) to read as follows:

#### **§ 46.46 Statutory trust.**

\* \* \* \* \*

(d) *Trust maintenance.* (1) Licensees and persons subject to license are required to maintain trust assets in a manner so that the trust assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act (7 U.S.C. 499b). Growers, licensees, and persons subject to license may file trust actions against licensees and persons operating subject to license. Licensees and persons subject to license are bound by the trust provisions of the Act (7 U.S.C. 499(e)).

(2) Principals, including growers, who employ agents to sell perishable agricultural commodities on their behalf are “suppliers” and/or “sellers” as those words are used in section 5(c)(2) and (3) of the Act (7 U.S.C. 499e(c)(2) and (3)), and therefore must preserve their trust rights against their agents by filing a notice of intent to preserve trust rights with their agents as set forth in paragraph (f) of this section.

(3) Agents who sell perishable agricultural commodities on behalf of their principals must preserve their principals’ trust benefits against the buyers by filing a notice of intent to preserve trust rights with the buyers. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of section 2 of the Act (7 U.S.C. 499b).

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(iv) The amount past due and unpaid; except that if a supplier, seller or agent engages a commission merchant or growers' agent to sell or market their produce, the supplier, seller or agent that has not received a final accounting from the commission merchant or growers' agent shall only be required to provide information in sufficient detail to identify the transaction subject to the trust.

\* \* \* \* \*

3. Section 46.49 is revised to read as follows:

**§ 46.49 Written notifications and complaints.**

(a) Written notification, as used in section 6(b) of the Act (7 U.S.C. 499f (b)), means:

(1) Any written statement reporting or complaining of a violation of the Act made by any officer or agency of any State or Territory having jurisdiction over licensees or persons subject to license, or a person filing a complaint under section 6(a), or any other interested person who has knowledge of or information regarding a possible violation of the Act, other than an employee of an agency of USDA administering the Act;

(2) Any written notice of intent to preserve the benefits of, or any claim for payment from, the trust established under section 5 of the Act (7 U.S.C. 499e);

(3) Any official certificate(s) of the United States Government or States or Territories of the United States; or

(4) Any public legal filing or other published document describing or alleging a violation of the Act.

(b) Any written notification may be filed by delivering the written notification to any office of USDA or any official of USDA responsible for administering the Act. Any written notification

published in any public forum, including, but not limited to, a newspaper or an internet Web site shall be deemed filed upon visual inspection by any office of USDA or any official of USDA responsible for administering the Act. A written notification which is so filed, or any expansion of an investigation resulting from any indication of additional violations of the Act found as a consequence of an investigation based on written notification or complaint, also shall be deemed to constitute a complaint under section 13(a) of the Act (7 U.S.C. 499m(a)).

(c) Upon becoming aware of a complaint under section 6(a) or written notification under 6(b) of the Act (7 U.S.C. 499f (a) or (b)) by means described in paragraph (a) and (b) of this section, the Secretary will determine if reasonable grounds exist to conduct an investigation of such complaint or written notification for disciplinary action. If the investigation substantiates the existence of violations of the Act, a formal disciplinary complaint may be issued by the Secretary as described in section 6(c)(2) of the Act (7 U.S.C. 499f(c)(2)).

(d) Whenever an investigation, initiated as described in section 6(c) of the Act (7 U.S.C. 499f(c)(2)), is commenced, or expanded to include new violations of the Act, notice shall be given by the Secretary to the subject of the investigation within thirty (30) days of the commencement or expansion of the investigation. Within one hundred and eighty (180) days after giving initial notice, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under section 6(c)(2) of the Act (7 U.S.C. 499f(e)(2)), terminate the investigation, or continue or expand the investigation. Thereafter, the subject of the investigation may request in writing, no more frequently than every ninety (90) days, a status report from the Director of the PACA Division who shall respond to the written request within fourteen (14) days of receiving the

request. When an investigation is terminated, the Secretary shall, within fourteen (14) days, notify the subject of the termination of the investigation. In every case in which notice or response is required under this paragraph (d), such notice or response shall be accomplished by personal service; or by posting the notice or response by certified or registered mail, or commercial or private delivery service to the last known address of the subject of the investigation; or by sending the notice or response by any electronic means such as registered email, that provides proof of receipt to the electronic mail address or phone number of the subject of the investigation.

Dated: January 29, 2018.

Bruce Summers,  
Acting Administrator,  
Agricultural Marketing Service.

BILLING CODE 3410-02 P

[FR Doc. 2018-02066 Filed: 2/5/2018 8:45 am; Publication Date: 2/6/2018]