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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket Number FV96–351]

RIN 0581–AB41

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 grant USDA the authority to adjust future license fees through ''notice and comment'' rulemaking; eliminate the requirement of filing notice of intent to preserve trust benefits with USDA in the PACA trust; require USDA to receive a written complaint before initiating an investigation; require additional USDA investigation notification procedures; increase administrative penalties; establish civil penalties as an alternative to revocation or suspension of license; continue current filing fees for formal and informal reparation complaints; explicitly address the status of collateral fees and expenses; clarify misbranding prohibitions; and amend the provisions of PACA regarding the determination of responsibly connected individuals.

EFFECTIVE DATE: April 30, 1997.

FOR FURTHER INFORMATION CONTACT: James R. Frazier, Chief, PACA Branch, Room 2095—So. Bldg., Fruit and Vegetable Division, AMS, USDA, 1400 Independence Avenue, SW., 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). A proposed rule to amend the regulations to implement Public Law 104–48 was published in the **Federal Register** on September 10, 1996. Comments on the proposed rule were to be submitted by November 12, 1996. Twelve comments were received from four trade associations representing growers and shippers, three trade groups representing retailers and grocery wholesalers, three law firms, one association representing the frozen food industry, and one fruit and vegetable broker.

Of the twelve comments received, three addressed the collection of renewal fees paid by grocery wholesalers and retailers licensed by USDA after enactment of Public Law 104–48. The three commentors write that USDA is incorrectly proposing that first-time licensed retailers and grocery wholesalers pay renewal fees. They refer to section 499(c)(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 emphasize the statutory language at the end of section 499(c)(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.'' Since the commentors' interpretation of the legislative amendment is substantially different from USDA's view but appears to be plausible, USDA is separating section 46.6 *License Fees* from the rest of the proposed regulations, and is addressing the issue independently from this final rule to allow other interested parties to comment. In the meantime, USDA will continue to assess license renewal fees as provided in 7 CFR Part 46.6. Should USDA, after notice and comment, conclude that the law excludes certain categories of licensees from the requirement to pay regular renewal fees during the three-year phase-out period, all such fees paid by those firms or individuals shall be refunded with interest.

Aside from removing section 46.6 from the final rule, other changes have been made to the regulations. The definition of ''grocery wholesaler'' has been edited to make it more concise; however, the meaning of the term has not been substantively changed. In addition, the regulatory language in section 46.45 as proposed goes beyond the explicit language provided in section 2(5) of the PACA; section 46.45 has been corrected to comply with the statute. A change to the proposed definition of ''good faith,'' and a few other minor editorial changes have been incorporated into the final rule for clarity. The provisions of the proposed rule are otherwise adopted for the reasons given in the proposal and in this document.

Comments

One commentor objects to the five percent limit on wholesale sales that a retailer may have in a year and still be considered a retailer under the proposed definition of a ''retailer'' in section 46.2(j). The commentor suggests that USDA increase the limit but offered no limit alternative.

We disagree with the commentor's assertion that the five percent limit be increased to allow for additional wholesale transactions. The statute defines a retailer as a person who is a dealer engaged in the business of selling any perishable agricultural commodity at retail. A retailer is not subject to a license under PACA until the invoice

cost of its produce purchases exceeds $230,000 in a calendar year. A question may obviously be raised regarding how much non-retail business a firm may do and still be considered a retailer under the PACA. USDA realizes that a retailer may occasionally engage in a wholesale transaction by making a sale to another business, and USDA believes that when such wholesale transactions comprise a very small portion of a retailer's business, that business should continue to be classified, for purposes of the PACA, as a retailer. When wholesale transactions exceed five percent, however, they constitute a substantial business activity, and it would no longer be appropriate to consider firms with such levels of wholesale business as being retailers. For this reason, we are not changing the final rule based on the above comment.

One comment received suggests that the definition of ''dealer'' in the regulations does not accurately reflect the term as defined in the statute. The commentor stated that the regulations, as proposed, would define a ''retailer'' as a ''dealer,'' and a ''dealer'' would be defined to include a ''retailer,'' resulting in total circularity. USDA believes that this analysis is not correct. Both the statute and the proposed regulations define ''retailer'' as a dealer engaged in the business of selling any perishable agricultural commodity at retail. That is to say, ''retailers'' are a subset of the broader category of ''dealers.'' This distinction is important because, unlike other types of dealers, retailers must meet the $230,000 threshold before they are subject to the PACA. This is the meaning of the term ''retailer'' as provided in the proposed rule. In addition, the definition of ''dealer'' in the regulations was not addressed in the proposed rule. For this reason, we are not changing the final rule based on the above comment.

Two commentors express concern that the regulations should define ''collateral fees'' and outline the responsibilities governing their use. One of the commentors, Food Distributors International (FDI), a trade association formerly known as National-American Wholesale Grocers' Association (NAWGA)—and its foodservice partner organization—International Foodservice Distributors Association (IFDA), includes a petition dated April 26, 1994, to USDA requesting that a notice and comment proceeding be undertaken in order to formulate a statement of general policy regarding the disclosure to customers of promotional allowances, rebates, and collateral fees. FDI expressed concern that USDA left its petition unanswered.

At the time FDI submitted its petition, a USDA investigation was underway involving an association member which allegedly failed to disclose promotional allowances and rebates, which it termed collateral fees in its cost-plus contracts. During this same period, efforts were also underway to amend or repeal the statute. USDA concluded at the time that any policy statement would be inappropriate.

Since then, a definition of the term ''collateral fees and expenses'' has been added to the statute. USDA therefore believes that no further definition of the term is warranted. Moreover, the amendment to section 2(4) of the PACA, which states that ''* * * the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, shall not be considered unlawful'' under the PACA, codifies USDA's longstanding position on the lawfulness of such fees under the PACA. It is the failure to disclose collateral fees and expenses that constitutes a violation of section 2(4) of the PACA. The ''policy statement'' or additional clarification sought by FDI appears in this final rule at section 46.2(hh), the definition of ''good faith,'' that requires the disclosure of such fees when they affect a material term of the agreement. Since the issues raised by the two commentors have been addressed, both in the statutory amendment and in this notice and comment rulemaking process, we are making no change to the final rule.

Two other commentors expressed their concern that the proposed regulations do not specify the method of disclosing collateral fees and expenses between the parties to a transaction. We agree that the regulations should specify the method for disclosing collateral fees and expenses. Therefore, we are changing section 46.2(hh) to reflect that a party to a transaction disclose *in writing* the existence of any collateral fees and expenses to all other parties to the transaction where the collateral fees and expenses affect a material term of the agreement.

Five commentors raised objections to USDA's definition of ''good faith'' in the proposed regulations. One of the commentors stated that the definition goes far beyond the statutory language by including as an element of ''good faith,'' the requirement that a party to a transaction disclose the existence of collateral fees to all other parties where the collateral fees and expenses affect a material term of the agreement. The other four commentors stated that USDA not only was exceeding its authority under the PACA, but also was going beyond the definition of ''good faith'' as provided in Uniform Commercial Code (UCC) section 2–103(b), by adding that the principal of good faith requires affirmative disclosure.

USDA disagrees with the commentors' objections. The PACA amendments provide that the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, is not, in itself, unlawful. The term ''good faith'' is new to the PACA and is not defined in the statute. It was left, then, to USDA to provide the interpretation of the term as it is used in the PACA. Although USDA is not bound by the use of the term ''good faith'' as it appears in other broad, general contexts, the definition of ''good faith'' found in the UCC provides the foundation for the definition in the proposed regulations. USDA, with its definition of ''good faith'' in the regulations, clarifies what that term means in the PACA as it relates to the offer, solicitation, payment, or receipt of collateral fees and expenses. The definition puts all regulated entities on notice of what action needs to be taken so that the receipt of payments or credits of collateral fees and expenses complies with the prohibition against false and misleading statements in section 2(4) of the PACA. The proposed definition does not impose any additional obligation on regulated entities that is not already imposed under section 2(4). For these reasons, no change to the final rule is being made based on the five comments.

One commentor suggested that a new term, ''purchaser's agent,'' and an associated definition be added to the regulations to draw distinctions among various types of broker operations. USDA believes that this term and definition would be redundant. The existing regulations distinguish between two types of broker operations. In the first type of operation, outlined in section 46.27(a), the broker acts as a neutral third party, conveying offers, counter offers, and acceptances between the parties. Once the contract is formed, and a confirmation is issued by the broker to the parties in the transaction, the broker's duties are usually fulfilled. The second type of broker operation, commonly referred to as a ''buying'' broker, is outlined in section 46.27(b) of the existing regulations. A buying broker negotiates purchases at shipping point, terminal markets, or intermediate points, on behalf of the buyer on the buyer's instructions and authorization. Generally, a purchase is made in the buyer's name and the seller directly invoices the buyer. Given authorization from the buyer, the broker may purchase the product in his or her own name, make the loading and shipping

arrangements, and directly bill the buyer for the cost of the product plus a brokerage fee and any other agreed upon service charges. Since the regulations already include ''buying brokers,'' we believe that adding an additional term and definition of a ''purchaser's agent'' as described by the commentor would be confusing since such a definition would also apply to a buying broker operation.

In addition, USDA believes that the commentor's concerns are addressed in the proposed revision to section 46.28 which requires that a broker identify on the confirmation or memorandum of sale the party who engaged the broker in the transaction. As we stated in the preamble to the proposed rule, this change is intended to recognize that a broker may not be a neutral party when he or she is engaged by, and thus, may have a closer relationship with, one of the parties to the contract. Under the above circumstances, we are making no change to the final rule based on this comment.

A commentor opposed as unfair the proposed revision to section 46.27 which states that the broker is not the proper party to whom notice of a breach or of a rejection should be directed. In response, we note that the proposed language does not specify that the broker to a transaction is not to be notified of a breach or of a rejection. We merely point out that the broker is *not* to be the primary party to whom such notice should be given. Under usual circumstances, a broker negotiates a contract as a third party and once a contract is formed has no authority to modify that contract. Since time is critical when dealing in perishable agricultural commodities, the parties to the contract, that is, the seller and the purchaser, should be in direct communication regarding any breach or rejection. If, however, a party does notify the broker of a breach or rejection, the broker must notify the other party to the contract. We are making no change to the final rule based on this comment.

The same commentor also opposed the proposed revision to section 46.28 which establishes the presumption that a broker is acting on behalf of the buyer if the confirmation or memorandum of sale fails to disclose the party who engaged the broker in the transaction. The commentor stated that the presumption is not logical, and furthermore, there is no basis for this change in the 1995 PACA amendments or in the PACA Industry Advisory Committee Reports. The commentor further argues that if any presumption is to be made, it should be presumed that the broker acts on behalf of the seller since any payment to the broker by necessity reduces the net return to the seller, thus, the seller pays the brokerage.

The House of Representatives Agriculture Committee suggested that USDA revise the regulations which cover the duties and responsibilities of fruit and vegetable brokers to accurately reflect the increased role of brokers as agents of purchasers. The proposed revision to the regulation reflects the reality that increasingly the broker is engaged by the buyer to locate product or products and facilitate their purchase. As we stated in the preamble to the proposed rule, this change is intended to recognize that a broker may not be a neutral party when he or she is engaged by, and thus, may have a closer relationship with, one of the parties to the contract. The presumption, of course, would no longer apply in those instances when the broker identifies in the confirmation or memorandum of sale or other document the party on whose behalf it is negotiating. Even when there is no such declaration, the presumption that the broker was acting on behalf of the buyer, may be rebutted by proof that the broker was engaged by the shipper or other entity. For this reason, we are making no change to the final rule based on this comment.

We received two comments addressing the proposed revision to the paragraph of section 46.45 regarding the misrepresentation and/or misbranding of produce. The commentors stated that in some instances the first licensed handler may not be in a position to determine that the produce at issue was misbranded or misrepresented. They requested that the rule be modified to allow the first licensed handler of misbranded or misrepresented produce the opportunity to provide evidence of lack of knowledge of a misbranding violation to prevent any instances where the first licensed handler could be put in a competitive disadvantage in the marketplace.

The statute states that it is unlawful for any person to misrepresent product that is received, shipped, sold, or offered to be sold in interstate or foreign commerce. The statute and the proposed regulation state that a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of the PACA by reason of the conduct of another party if the person did not know of the violation or lacked the ability to correct the violation. The law assigns misbranding liability to the first licensed entity in the transaction to ensure that some licensed entity will be accountable. Hence, the first licensee handling the product is responsible for identifying any misbranding problem with the product in question, and for ensuring that the produce is brought into compliance before being shipped, sold, or offered for sale to another party.

A comment was received suggesting that the definition of ''reasonable time'' in the regulations be revised so that acceptance occurs when the seller transfers custody and control to the buyer. The commentor stated that receivers are currently at no risk and may have an incentive to delay calls for inspections on products that were within grade at arrival but deteriorate between arrival time and the time of inspection, outside of the custody and control of the seller. Although this issue was not addressed in the proposed rule or the amended statute, USDA disagrees with the commentor's reasoning that a receiver has an incentive to delay a call for an inspection given the current definition of ''reasonable time'' in the regulations. In order to reject product shipped by truck, the regulations at section 46.2(cc) now require the receiver to call for an inspection within eight hours after being notified of the product's arrival and availability for inspection. If the receiver delays calling for the inspection, and the inspection that is finally performed reflects deterioration of the produce that exceeds normal deterioration, the receiver may be held liable for the full contract price of the product as the receiver has no proof of the condition of the product when it was first delivered. Given that the shipper of product in an FOB sale is responsible for loading or shipping product in suitable shipping condition, USDA believes that the eight hour window a receiver has to apply for an inspection is reasonable. Furthermore, this comment raises an issue which was not addressed in the proposed rule, and, therefore goes beyond the scope of this rulemaking.

One commentor suggested that the regulations be expanded to include provisions to allow USDA to implement procedures to prevent the dissipation of assets. This comment raises an issue which was not addressed in the proposed rule, and, therefore goes beyond the scope of this rulemaking.

One commentor suggested that USDA use its rulemaking authority to eliminate license fees for food service distributors. Since USDA has no authority to exempt by regulation any segment of the industry from paying license fees, we are making no changes to the final rule based on this comment.

Another commentor recommended that USDA use its rulemaking authority and initiate multi-year licensing. The amended statute directs the Secretary to take into account savings to the program when determining an appropriate interval for the renewal of licenses. USDA is currently studying the administrative implications of such changes and is not yet prepared to initiate a multi-year licensing program. We are therefore making no changes to this final rule based on the above comment.

In preparing to finalize the proposed rule, USDA determined that changes to the regulatory language in section 46.2(ii) and section 46.45 are needed.

USDA determined that the definition of ''grocery wholesaler'' in section 46.2(ii) of the proposed rule could be more succinctly stated without altering the meaning. USDA concluded that numbered paragraphs and some of the wording were unnecessary to state the criteria that a dealer must meet in order to be considered a ''grocery wholesaler.'' USDA believes that the definition in the final rule is clearer and more straightforward, while it does not change the substance of the definition.

USDA noticed that the regulatory language in section 46.45 of the proposed rule goes beyond the explicit language of the amended statute. In part, the proposed rule states the following: ''* * * a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of the Act by reason of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.'' However, the amendment to Section 2(5) of the PACA provides that ''* * * a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.'' The proposed regulation inadvertently broadened the scope of the statutory language. Therefore, a change in the final rule was required to conform the regulatory language with the statutory language. Section 46.45 has been amended to read as follows: ''* * * a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of section 2(5) of the Act by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.''

In the final rule, USDA has deleted the superfluous phrase ''the term'' which appeared at the beginning of each definition in section 46.2 in the proposed rule.

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 proposed 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 [46.9 (a)–(h)], and must be renewed annually by the licensee. Many of the licensees may be classified as small entities.

A compliance guide which highlights the 1995 PACA legislation, and a general compliance guide entitled ''PACA Fact Finder'' which explains the rights and responsibilities of firms operating subject to the provisions of the PACA, are available to all licensees, including small businesses. Beginning in April 1997, USDA will send information regarding the PACA to all licensees when processing annual license renewals.

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 recordkeeping 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 § 46.2, paragraph (j) is revised and two new paragraphs (hh) and (ii) are added to read as follows:

§ 46.2 Definitions.

* * * * *

(j) *Retailer* is a dealer engaged in the business of selling any perishable agricultural commodity at retail; *Provided*, That occasional sales at wholesale shall not be deemed to remove a dealer from the category of retailer if less than 5 percent of annual gross sales is derived from wholesale transactions.

* * * * *

(hh) *Good faith* means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. The principle of good faith requires that a party to a transaction disclose in writing the existence of any

collateral fees and expenses to all other parties to the transaction where the collateral fees and expenses affect a material term of the agreement.

(ii) *Grocery wholesaler* is a dealer primarily engaged in the full-line wholesale distribution and resale of grocery and related nonfood items (such as perishable agricultural commodities, dry groceries, general merchandise, meat, poultry, and seafood, and health and beauty care items) to retailers. This term does not include persons primarily engaged in the wholesale distribution and resale of perishable agricultural commodities rather than other grocery and related nonfood items. Specifically, for an entity to be considered a grocery wholesaler, 50 percent or more of its annual gross sales must be from the full-line distribution and resale of grocery and related nonfood items, and it cannot have more than 50 percent of its sales in perishable agricultural commodities. ''Full line'' means that an entity must be supplying the retailer with a wide range of products such as the grocery and related nonfood items specified.

3. In § 46.9, paragraph (i) is revised to read as follows:

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

* * * * *

(i) Under section 4(a) of the Act, at least 30 days prior to the anniversary date of a valid and effective license, the Director shall mail a notice to the licensee at the last known address advising that the license will automatically terminate on its anniversary date unless an application for renewal is filed supplying all information requested on a form to be supplied by the Division, and unless the renewal fee (if any is applicable) is paid on or before such date. If the renewal application is not filed and/or the renewal fee (if required) is not paid by the anniversary date, the licensee may obtain a renewal of that license at any time within 30 days by submitting the required renewal application and/or paying the renewal fee (if required), plus $50. Within 60 days after the termination date of a valid and effective license, the former licensee shall be notified of such termination, unless a new license has been obtained in the meantime.

4. Section 46.10 is revised to read as follows:

§ 46.10 Nonlicensed person; liability; penalty.

Any commission merchant, dealer, or broker who violates the Act by engaging in business subject to the Act without a license may settle its liability, if such violation is found by the Director not to have been willful but due to inadvertence, by submitting the required application and paying the amount of fees that it would have paid had it obtained and maintained a license during the period that it engaged in business subject to the Act, plus an additional sum not in excess of two hundred and fifty dollars ($250) as may be determined by the Director.

5. § 46.17 is revised to read as follows:

§ 46.17 Inspection of records.

(a) Each licensee shall, during ordinary business hours, promptly upon request, permit any duly authorized representative of USDA to enter its place of business and inspect such accounts, records, and memoranda as may be material:

(1) In the investigation of complaints under the Act, including any petition, written notification, or complaint under section 6 of the Act,

(2) To the determination of ownership, control, packer, or State, country, or region of origin in connection with commodity inspections,

(3) To ascertain whether there is compliance with section 9 of the Act,

(4) In administering the licensing and bonding provisions of the Act,

(5) If the licensee has been determined in a formal disciplinary proceeding to have violated the prompt payment provision of section 2(4) of the Act, to determine whether, at the time of the inspection, there is compliance with that section.

(b) Any necessary facilities for such inspection shall be extended to such representative by the licensee, its agents, and employees.

6. In § 46.27, paragraph (a) is revised to read as follows:

§ 46.27 Types of broker operations.

(a) Brokers carry on their business operations in several different ways and are generally classified by their method of operation. The following are some of the broad groupings by method of operation. The usual operation of brokers consists of the negotiation of the purchase and sale of produce either of one commodity or of several commodities. A broker is usually engaged by only one of the parties, but in negotiating a contract the broker acts as a special agent of first one and then the other party in conveying offers, counter offers, and acceptances between the parties. Once the contract is formed, and the confirmation issued, the broker's duties are usually ended, and the broker is not the proper party to whom notice of breach or of rejection should be directed. However, a broker receiving notice has a duty to promptly convey the notice to the proper party. Frequently, brokers never see the produce they are quoting for sale or negotiating for purchase by the buyer, and they carry out their duties by conveying information received from the parties between the buyer and seller until a contract is effected. Generally, the seller of the produce invoices the buyer, however, when there is a specific agreement between the broker and its principal, the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller. Under other types of agreements, the seller ships the produce to pool buyers, and the broker as an accommodation to the seller invoices the buyers, collects, and remits to the seller. Also, there are times when the broker is authorized by the seller to act much like a commission merchant, being given blanket authority to dispose of the produce for the seller's account either by negotiation of sales to buyers not known to the seller or by placing the produce for sale on consignment with receivers in the terminal markets.

* * * * *

7. In section 46.28, paragraph (a) is revised to read as follows:

§ 46.28 Duties of brokers.

(a) *General.* The function of a broker is to facilitate good faith negotiations between parties which lead to valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act, is subject to the penalties specified in the Act, and may be held liable for damages which accrue as a result of the violation. It shall be the duty of the broker to fully inform the parties concerning all proposed terms and conditions of the proposed contract. After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The confirmation or memorandum of sale shall also identify the party who engaged the broker to act in the negotiations. If the confirmation or memorandum of sale does not contain such information, the broker shall be presumed to have been engaged by the buyer. Brokers do not normally act as general agents of either party, and will not be presumed to have so acted.

Unless otherwise agreed and confirmed, the broker will be entitled to payment of brokerage fees from the party by whom it was engaged to act as broker. The broker shall retain a copy of such confirmations or memoranda as part of its accounts and records. The broker who does not prepare these documents and retain copies in its files is failing to prepare and maintain complete and correct records as required by the Act. The broker who does not deliver copies of these documents to all parties involved in the transaction is failing to perform its duties as a broker. A broker who issues a confirmation or memorandum of sale containing false or misleading statements shall be deemed to have committed a violation of section 2 of the Act. If the broker's records do not support its contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the Act for failing to perform its express or implied duties. The broker shall take into consideration the time of delivery of the shipment involved in the contract, and all other circumstances of the transaction, in selecting the proper method for transmitting the written confirmation or memorandum of sale to the parties. A buying broker is required to truly and correctly account to its principal in accordance with § 46.2(y)(3). The broker should advise the appropriate party promptly when any notice of rejection or breach is received, or of any other unforeseen development of which it is informed.

* * * * *

8. In § 46.45, the introductory text is revised to read as follows:

§ 46.45 Procedures in administering section 2(5) of the Act.

It is a violation of section 2(5) for a commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree, or maturity, or State, country, region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of section 2(5) of the Act by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

* * * * *

9. In § 46.46, paragraph (a) is removed, paragraphs (b) through (g) are redesignated as paragraphs (a) through (f), and newly designated paragraphs (c), (e)(2), and (f) are revised to read as follows:

§ 46.46 Statutory trust.

* * * * *

(c) *Trust benefits.* (1) When a seller, supplier or agent who has met the eligibility requirements of paragraphs (e) (1) and (2) of this section, transfers ownership, possession, or control of goods to a commission merchant, dealer, or broker, it automatically becomes eligible to participate in the trust. Participants who preserve their rights to benefits in accordance with paragraph (f) of this section remain beneficiaries until they are paid in full.

(2) Any licensee, or person subject to license, who has a fiduciary duty to collect funds resulting from the sale or consignment of produce, and remit such funds to its principal, also has the duty to preserve its principal's rights to trust benefits in accordance with paragraph (f) of this section. The responsibility for filing the notice to preserve the principal's rights is obligatory and cannot be avoided by the agent by means of a contract provision. Persons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: *Provided,* That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by the principal prior to the time affected transactions occur, must clearly state the principal's intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent's authority to act on the principal's behalf expires. In the event an agent having a fiduciary duty to collect funds resulting from the sale or consignment of produce and remit such funds to its principal fails to perform the duty of preserving its principal's rights to trust benefits, it may be held liable to the principal for damages. A principal employing a collect and remit agent must preserve its rights to trust benefits against such agent by filing appropriate notices with the agent.

(e) Prompt payment and eligibility for trust benefits.

* * * * *

(2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (a)(1) of this section.

* * * * *

(f) *Filing notice of intent to preserve trust benefits.* (1) Notice of intent to preserve benefits under the trust must be in writing, must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment:

(i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,

(ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),

(iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and

(iv) The amount past due and unpaid.

(2) Timely filing of a notice of intent to preserve benefits under the trust will be considered to have been made if written notice is given to the debtor within 30 calendar days:

(i) After expiration of the time prescribed by which payment must be made pursuant to regulation,

(ii) After expiration of such other time by which payment must be made as the parties have expressly agreed to in writing before entering into the transaction, but not longer than the time prescribed in paragraph (e)(2) of this section, or

(iii) After the time the supplier, seller or agent has received notice that a payment instrument promptly presented for payment has been dishonored. Failures to pay within the time periods set forth in paragraphs (f)(2)(i) and (ii) of this section constitute defaults.

(3) Licensees may chose an alternate method of preserving trust benefits from the requirements described in paragraphs (f) (1) and (2) of this section. Licensees may use their invoice or other billing statement to preserve trust benefits. The alternative method requires that the licensee's invoice or other billing statement, given to the debtor, contain:

(i) The statement: ''The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.''; and

(ii) The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.

10. A new § 46.49 is added to read as follows:

§ 46.49 Written notifications and complaints.

(a) *Written notification,* as used in section 6(b) of the Act, means:

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

(2) Any written notice of intent to preserve the benefits of the trust established under section 5 of this Act; or

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

(b) Any written notification may be filed by delivering it to any office of USDA or any official thereof responsible for administering the Act. A written notification which is so filed, or any expansion of an investigation resulting from any indication of additional further violations of the Act found as a consequence of an investigation based on written notification or complaint, shall also be deemed to constitute a complaint under section 13(a) of this Act.

(c) Upon becoming aware of a complaint under Section 6(a) or 6(b) of this Act, the Secretary will determine if reasonable grounds exist for an investigation of such complaint for disciplinary action. If the investigation substantiates the existence of violations, a formal disciplinary complaint may be filed by the Secretary as described under Section 6(c)(2) of the Act.

(d) Whenever an investigation, initiated as a result of a written notification or complaint under Section 6(b) of the Act, is commenced, or expanded to include new violations, 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 this Act, 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 Chief of the PACA Branch who shall respond thereto 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 investigation of the termination. In every case in which notice or response is required under this subsection such notice or response shall be accomplished by personal service or by posting the notice or response by certified mail to the last known address of the subject of the investigation.

Dated: March 21, 1997.

Eric M. Forman,

Acting Director, Fruit and Vegetable Division.

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FARM CREDIT ADMINISTRATION

12 CFR Parts 620 and 630

RIN 3052–AB62

Disclosure to Shareholders; Disclosure to Investors in Systemwide and Consolidated Bank Debt Obligations of the Farm Credit System; Quarterly Report

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA or Agency) adopts final amendments to its regulations governing the preparation, filing, and distribution of Farm Credit System (FCS or System) bank and association reports to shareholders and investors. The rule implements a statutory amendment that supersedes the regulatory requirement that FCS institutions disseminate quarterly reports to shareholders.

The rule also imposes a new notice requirement designed to improve shareholder access to timely information and disclosure regarding adverse events affecting their institutions. Under the new regulations, FCS institutions must prepare and distribute a notice to shareholders when their permanent capital falls below the regulatory minimum standard.

To facilitate the presentation of financial statements by FCS institutions in a manner that conforms with generally accepted accounting principles (GAAP), the rule removes the requirement that banks must present their financial statements on a combined basis with their related associations.

The rule also makes other technical changes to FCA regulations governing disclosure to shareholders and investors.

DATES: The final rule shall become effective upon the expiration of 30 days after this publication during which either or both Houses of Congress are in session. Notice of the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

On August 28, 1996, the FCA proposed amendments to its regulations governing disclosure to shareholders and investors.[1] The rulemaking implements section 211 of the Farm Credit System Reform Act of 1996 (1996 Act),[2] addresses two regulatory petitions received by the Agency, and takes other related actions. To conform with the 1996 Act, the FCA proposed amending subpart C of part 620 to eliminate existing regulatory requirements for distribution of quarterly reports to shareholders. To improve shareholder access to timely information and disclosure regarding adverse events affecting their institutions, the FCA proposed a new requirement that System institutions provide notice to shareholders in the event of noncompliance with regulatory permanent capital requirements, followed by subsequent notices in situations of continued deterioration in permanent capital. The FCA also responded to petitions of System institutions by proposing to remove the requirement that banks present their

[1] *See* 61 FR 53331, October 11, 1996.

[2] Pub. L. 104–105, 110 Stat. 162 (Feb. 10, 1996). Section 211 of the 1996 Act provides that ''the requirements of the Farm Credit Administration governing the dissemination to stockholders of quarterly reports of System institutions may not be more burdensome or costly than the requirements applicable to national banks.'' Section 211 applies only to dissemination requirements and does not affect the requirement that FCS institutions continue to prepare and file quarterly reports with the FCA in accordance with the quarterly report filing and content requirements of part 620.