

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 47

[Docket Number AMS-FV-06-0217; FV07-376]

RIN 0581-AC72

**Amendments to Rules of Practice Regulations Under the Perishable Agricultural
Commodities Act (PACA) to Increase Reparation Complaint Filing and Handling Fees.**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final Rule.

SUMMARY: The Department of Agriculture (USDA) is amending the Rules of Practice under the Perishable Agricultural Commodities Act (PACA) to increase from \$60 to \$100 the fee for filing an informal complaint; and to increase from \$300 to \$500 the fee for handling a formal complaint.

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: John Koller, Director, Dispute Resolution Section, 202-720-1442.

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

The Perishable Agricultural Commodities Act (PACA or Act) 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 program is financed by license and user fees and has an annual operating budget of approximately \$10 million. Currently, annual expenses exceed revenue by \$3 million, a disparity that is projected to increase each year by another 3 to 5 percent. Greater than half of the program's expenditures are payroll and related expenses, followed at a distant second by the cost of maintaining office space through rent, communications, and utility expenses. The PACA license and complaint filing fees have remained unchanged since 1995, in part due to a one-time Congressional appropriation of \$30.45 million deposited into the PACA reserve fund on October 1, 2000.

One of the most important functions of the Act is to require that PACA licensees fulfill their contractual obligations, and the Act provides a forum, before the Secretary, where firms that buy and sell fruits and vegetables can settle commercial disputes outside of the civil court system and recover damages for losses they have suffered. These cases are called "reparation cases." In 1995, Section 6 of the PACA (7 U.S.C. 499f) was amended to require a \$60 filing fee for filing an informal reparation complaint and a \$300 handling fee for filing a formal reparation complaint with USDA under the PACA. Section 6 of the PACA also authorized the Secretary of Agriculture to alter the filing and handling fees by rulemaking. During its January 2007 meeting, the Fruit and Vegetable Industry Advisory Committee (Committee) recommended to the

Secretary that the fee for filing an informal reparation complaint be increased to \$100, and the handling fee for filing a formal reparation complaint be increased to \$500. The Secretary accepted the Committee's recommendation. This final rule implements the recommendation by increasing from \$60 to \$100 the fee for filing an informal reparation complaint; and increasing from \$300 to \$500 the fee for handling a formal reparation complaint.

PACA Rules of Practice applicable to reparation complaint proceedings inform the industry of USDA's procedures and requirements for the handling of informal and formal complaints under the Act (7 CFR Part 47). Section 47.3(a) of the current Rules of Practice (7 CFR § 47.3(a)) requires that a \$60 filing fee accompany any written correspondence and related documents pertaining to the transaction(s) involved in the dispute before AMS can process and open an informal reparation complaint on behalf of the complainant.

When an informal reparation complaint is filed, AMS makes every effort to assist the parties in reaching a settlement of their dispute while gathering documents as part of its investigation. Mediation services are also offered to the parties throughout the informal handling of the complaint. If an informal settlement cannot be reached, however, the complainant is given the opportunity to file a formal reparation complaint. Section 47.6(c) of the current Rules of Practice (7 CFR § 47.6(c)) requires that a complainant filing a formal reparation complaint pay a \$300 handling fee to AMS to initiate formal complaint proceedings. Under formal complaint procedures, USDA's Judicial Officer issues a binding decision in the case.

In Fiscal Year 2007, there were 1575 informal reparation complaints and 347 formal reparation complaints filed with AMS under the PACA. Over 91 percent of the informal

complaints filed under the Act were resolved informally within 4 months. These complaints involved produce transactions valued at over \$18.4 million. USDA issued formal decision and orders in 347 cases involving award amounts totaling approximately \$5.8 million. The largest award issued by USDA in Fiscal Year 2007 ordered payment of over \$257,000 to a fruit and vegetable dealer.

In Fiscal Year 2006, AMS received 1483 informal reparation complaints of which 92 percent were resolved informally within a 4-month timeframe. In Fiscal Year 2006, informal settlements exceeded \$18.7 million. There were 300 formal reparation complaints filed under the Act that year.

AMS does not expect this final rule to raise a significant amount of revenue for the PACA program (estimated at \$144,000 annually), but by increasing the fees for filing informal and formal reparation complaints, AMS believes that the burden for financing the PACA program will be shifted more towards those who benefit directly from using PACA program services.

Comments

A proposed rule was published in the **Federal Register** on November 1, 2007 (72 FR 61820) seeking to amend the PACA Rules of Practice (7 CFR Part 47) to increase informal complaint filing fees from \$60 to \$100 and formal complaint handling fees from \$300 to \$500. Before the comment period ended on December 31, 2007, we received three timely comments on the proposed rule.

One negative comment was received via Email from Mr. Tom O'Brien, a Florida vegetable grower. Mr. O'Brien stated his belief that the PACA program is just another government

program losing money and already over charges for its services. While he would preserve the PACA as law, his advice would be to abolish the PACA Branch. His suggestion would leave an already overburdened court system as the produce industry's only forum in which to resolve commercial disputes. AMS believes that the PACA reparation program is generally well received within the produce industry since many produce traders rely on the program for assistance in resolving commercial disputes. Given the overall industry support of the program's commercial dispute resolution services, AMS is making no change to the final rule based on Mr. O'Brien's comment.

An Email comment was received from Jennifer Jambor, a staff attorney for Farmers' Legal Action Group, Inc. (FLAG), of Saint Paul, Minnesota, on behalf of the Farmworker Association of Florida, Inc., which represents more than 6,330 farmer worker families from predominately Mexican, Haitian, African American, Guatemalan, and Salvadorian communities. FLAG works with beginning fruit and vegetable farmers from these and other communities in Florida to assist them in understanding their legal rights under the PACA. Ms. Jambor urged that as USDA considers increasing the PACA filing fees, it also implement a provision waiving the filing fee for lower-income farmers who cannot afford to pay the fees to ensure that PACA services are available to all. It is important to point out that farmers that sell and ship produce of their own raising (regardless of their income level) are not required to be licensed and are therefore exempt from paying a license fee.

As stated in the proposed rule, Congress amended Section 6 of the PACA (7 U.S.C. 499f) in 1995 to require that complaint filing and handling fees be paid. While the statute authorizes the

Secretary to alter such fees, AMS does not believe that the Secretary has the statutory authority to waive the fees in total. We continue to believe that the proposed increase in the current filing and handling fees are insignificant as indicated in the proposed rule and therefore no change is being made to the final rule based on Ms. Jambor's comment.

A third comment was received from Thomas R. Oliveri, Director of Trade Practices and Commodity Services, Western Growers Association (WGA), Irvine, California. WGA is an agricultural trade association whose nearly 3,000 members grow, pack, and ship approximately 90 percent of the fresh vegetables and nearly 70 percent of the fresh fruits grown in California, which accounts for more than 50 percent of U.S. fresh produce production. In his comments, Mr. Oliveri states that WGA is a strong advocate of the PACA program and considers its forum for dispute resolution to be fundamental in expediting disputed contract matters outside of the court system. Mr. Oliveri also noted that the PACA program has undertaken endeavors to minimize program costs and stated WGA's belief that financing of the PACA program needs to be shared by all those who benefit directly from utilizing the program's services. Mr. Oliveri's comment on behalf of WGA was in support of the increase in filing and handling fees as outlined in the proposed rule.

Again, based upon the above comments, AMS is making no change to the final rule.

However, there is one change that will be made to the final rule. In the proposal, we proposed to revise the authority citation for Part 47, by adding reference to 5 U.S.C. 553 and 7 U.S.C. 499f, and by removing reference to 7 U.S.C. 499o. This was an error. The proposal should have sought to revise the authority citation to include 7 U.S.C. 499f, not substitute it for 7 U.S.C.

499o. The correct authority citation should include both 7 U.S.C. 499f and 7 U.S.C. 499o. Since the wording of the proposal contained an error, and correction of the error does not affect the substance of the regulations, public comment on this change is unnecessary. We revise the authority citation to read: 5 U.S.C. 553; 7 U.S.C. 499f; 7 U.S.C. 499o; 7 CFR 2.22(a)(1)(vii)(L), 2.79(a)(8)(xiii).

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

Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et. seq.), USDA has considered the economic impact of this final rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than \$6.5 million. The PACA requires

all businesses that operate subject to its provisions maintain a license issued by USDA. There are approximately 14,500 PACA licensees, a majority of which may be classified as small entities.

Over the past 4 years, the number of informal and formal reparation complaints filed with AMS under the PACA has gradually decreased. AMS believes that this decrease is due in part to enhanced PACA customer service focused on educating members of the produce industry of their rights and responsibilities under the PACA, as well as increased efforts to settle informal reparation complaints through mediation.

It is doubtful that any barrier to the use of USDA's PACA reparation procedure will be created by raising the filing and handling fees for informal and formal reparation complaints. Most complaints involve produce transactions valued in the thousands of dollars, making the increase from \$60 to \$100 for filing an informal reparation complaint insignificant by comparison. In addition, the handling fee for filing a formal reparation complaint is recoverable as part of the amount awarded by USDA if the complainant prevails in the case. AMS believes that those who wish to initiate formal proceedings in a reparation case will consider the increase in the formal reparation complaint handling fee from \$300 to \$500 to be insignificant as well.

Given the preceding discussion, AMS has determined that the provisions of the final rule would not have a 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 record keeping

requirements that are covered by this final rule were approved under OMB number 0581-0031 on December 7, 2007, and expire on December 31, 2010.

E-Government Act Compliance

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 47

Administrative practice and procedure, Agricultural commodities, Brokers.

For the reasons set forth in the preamble, AMS amends 7 CFR part 47 as follows:

PART 47--[AMENDED]

1. The authority citation for part 47 is revised to read as follows:

Authority: 5 U.S.C 553; 7 U.S.C. 499f; 7 U.S.C. 499o; 7 C.F.R 2.22(a)(1)(viii)(L), 2.79(a)(8)(xiii).

2. In § 47.3, paragraph (a)(4) is revised to read as follows.

§ 46.3 Institution of Proceedings.

(a) * * *

(4) The informal complaint shall be accompanied by a filing fee of \$100 as authorized by the Act.

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3. In § 47.6, paragraph (c) is revised to read as follows.

§ 47.6 Formal Complaints.

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(c) Service upon respondent; proof of service. Upon receipt by the Fruit and Vegetable Programs of the formal complaint, the accompanying papers and the \$500 handling fee authorized by the Act, a copy thereof shall be served by the Fruit and Vegetable Programs upon the respondent in accordance with § 47.4 of this part. If the complaint is not in the proper form, the Fruit and Vegetable Programs shall return it and inform the complainant of the deficiencies therein.

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Dated: May 27, 2008.

Lloyd C. Day
Administrator
Agricultural Marketing Service

[FR Doc. 2008-12130 Filed 05/29/2008 at 8:45 am; Publication Date: 05/30/2008]