



**United States
Department of
Agriculture**

Agricultural
Marketing
Service

Fruit and Vegetable Programs-PACA Branch

**"Perishable Agricultural Commodities Act (PACA) -
Facilitating fair trade practices in the fruit and vegetable industry through education,
mediation, arbitration, licensing and enforcement"**

PACA Administrative Newsletter

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Are Your Customers Licensed by PACA?

Special Alerts:

- **National License Center moves to Manassas, VA** - New phone numbers on page 4
- **Manassas, VA regional office has new phone number** - See Office Directory on page 4

When you first contemplate selling to a new customer, what do you do? Check their credit rating in the produce trade publications? Ask for references? Ask for cash up front?

Do you check to see if the firm is licensed under the PACA? "No," you say? "Why should I?" you ask.

Well, let's first look at what it takes for a firm to obtain a PACA license. Of course, most people may know that a PACA license is required of a company that buys or sells fruits or vegetables in interstate commerce in wholesale quantities. Technically, PACA licenses are required for all commission merchants, dealers or brokers. But, that can include shippers, distributors, jobbers, and wholesalers on terminal markets like Los Angeles or Chicago. In addition, brokers that negotiate agreements between a buyer and seller and large retailers that purchase sufficient quantities of produce must have a PACA license.

If a firm you are considering doing business with doesn't have a PACA license, ask why. Just because a firm requires and applies for a license does not mean that it will automatically get one. Before an applicant is issued a license, it is scrutinized by the PACA Branch to make sure that it, or anyone connected with it, does not have any history of past problems, failures to pay, paying late for commodities, or other issues

that may jeopardize others operating in the produce industry. For example, say a person who is listed as an owner of a company applying for a license was an officer of another company whose license was suspended by PACA or revoked for violating the Act. PACA would review the circumstances behind the violations and the applicant may be denied a license or there may be special requirements, such as the posting of a bond, in order for it to obtain a

license. Similarly, if a person applying for a license was involved in a bankruptcy, or was convicted of a felony, special restrictions may apply before PACA grants a license.

Because licenses are important, many sellers will routinely check the PACA license status of a potential customer as part of their normal business practice. If the firm does not have a current license, the seller

will refuse to sell to the firm unless it obtains a license.

So, it may be worth taking a few minutes to find out if a firm you are thinking of doing business with is licensed under the PACA. There are several easy ways you can do this: Call the toll free number, 800-495-7222; check out the PACA Web site's license search engine at <http://www.ams.usda.gov/paca.htm>; or send an e-mail to the National License Center or any of the regional offices.



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PACA Enforcement Actions, Part 2: The Investigation

In Part 1 of this series, we talked about the purpose of the PACA disciplinary program and how enforcement investigations are initiated by USDA upon receipt of a written notification alleging violations of PACA.

In this issue, we will talk about the investigation phase of the disciplinary program.

The Investigation

Once a written notice is received alleging that someone is violating PACA, the allegations in the notice are reviewed by the regional director. If he/she believes that a violation may have occurred, a file is opened by the regional office and the case is assigned to an investigator. The case is then scheduled for an investigation.

Once the investigator arrives at the firm's place of business or other agreed-upon location, the purpose of the investigation is discussed with the owner(s) or representative. The investigator gives the firm's owner(s) or representative a letter that explains the nature of the allegations in regard to possible violations of PACA and requests the firm to produce certain business records.

Documents that may be requested depend on the type of violation that has been alleged, but may include accounts payable, accounts receivable, invoices or sales tickets, bills of lading, memoranda



of sale, receiving record, canceled checks, general ledger, etc. As the investigation proceeds, the investigator may request additional records establishing ownership, such as corporate, partnership or LLC records, income tax returns, bank resolutions and signature cards, loan documents, leases, credit applications, etc. If, during the course of the investigation, the firm or its representative does not make any of the requested records that are material to the investigation available to the investigator, the firm is placed on written notice that such refusal is a serious violation of PACA that may result in the suspension of its PACA license until the records are produced.

At the conclusion of the investigation, the investigator will make arrangements to meet with the firm's principal(s) and/or representative. At the meeting, the firm will be advised of the results of the investigation, be given an opportunity to review the records that were obtained and, if violations were found, an opportunity to explain the reasons for the noted violations.

If you have any questions on this topic or any other fair trade issue, please visit our Web site at <http://www.ams.usda.gov/fv/paca.htm> or contact any of our PACA Branch offices listed in our Office Directory on page 4.

In the Wake of Hurricane Katrina: Natural Disasters

For many produce firms in the Gulf Coast area, storms such as Katrina and Rita have dealt an unexpected blow that put many companies on the "slow track" for paying their produce bills, while others were put out of business. Even those firms with several generations of untarnished credit ratings were hard-pressed to weather the onslaught from concerned shippers looking for payment.

While the situation was understandably frustrating, shippers were within their rights under PACA regulations to request and expect payment within normal timeframes. In fact, many shippers who represent growers have an obligation to protect their growers by performing due diligence in trying to obtain payment on a produce shipment. The 9-month statutory time limit for the filing of PACA reparation complaints has not been extended. In cases where payments were not received in transactions subject to the PACA



trust, the hurricane emergency situation will not excuse trust claimants from the need to file timely trust notices, nor will it prevent them from losing their PACA trust protection post transaction because they entered into written agreements either for extensions of the original payment time, or for a material delay in the assertion of their PACA trust rights. Relief granted a commission merchant, dealer, or broker because of hurricane-related business injury involves a risk of the loss of PACA trust protection.

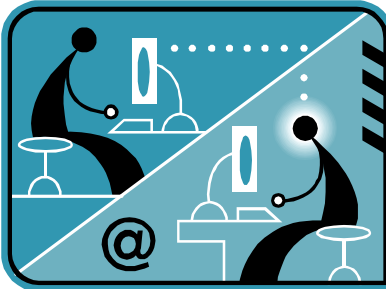
For further information about PACA trust provisions, including how to preserve your rights, you may refer to the July 2005 issue of the *PACA Administrative Newsletter* which may be found on the PACA Branch Web site, <http://www.ams.usda.gov/fv/paca.htm>, or by calling our toll-free number, 800-495-7222.

Trust Rights and Electronic Invoicing

It used to be that most produce transactions were confirmed and billed on paper purchase orders or invoices. Weekly statements or invoices were mailed to the buyer and payment was made.

More recently, however, larger numbers of companies are switching from paper-based invoicing to electronic billing and record-keeping systems. Utilization of Electronic Data

Interchange has caused concern for produce sellers as to whether they are still able to preserve their trust rights under PACA, when using electronic invoicing. Among other concerns raised are the effects on a seller's trust benefits when a buyer refuses to, or through oversight does not, accept, charge for, or otherwise hinder the acceptance of a seller's trust notice. For instance, there may be lack of available data space to enter the required trust notice language, or the user may



enter the required language but it is not received by the buyer.

To address these concerns, USDA's Agricultural Marketing Service (AMS) published an Advanced Notice of Proposed Rulemaking in the *Federal Register* on Jan. 30, 2006. The notice provided a 45-day period during which the public was able to submit comments as to the severity of the problem, technical barriers, cost, and how AMS might best be able to provide clarification and direction. The comment period ended on March 16. These comments will be reviewed and taken into consideration in determining whether a change in the PACA regulations is necessary. If USDA determines that a change in PACA regulations is warranted, the public will be given the opportunity to comment on the proposed regulation which will be published in the *Federal Register*.

Disclaimers to Contract Terms

Have you ever received an invoice or been faxed a purchase order that contained phrases such as "Excluding bruising and/or discoloration following bruising" or "Excluding abnormal discoloration"? What do these terms mean and how do they affect your responsibility as a buyer when you are involved in a dispute? An understanding of these terms could mean the difference between paying full invoice or something less.

Phrases such as the ones above are known as "disclaimers." They are used by sellers to prevent certain kinds of defects from causing a breach of contract for which they may otherwise be held liable. This may be due to adverse weather conditions in certain shipping areas that caused an abundance of particular defects to appear on some commodities. If these defects appear on a USDA inspection and both the seller and buyer agreed to the

exclusion with a disclaimer, the percentage of those defects are usually not counted when determining whether the shipper breached the contract.

Because disclaimers are not usual implied terms of a contract, and to avoid problems later, it should be made clear in writing if both parties agree to the special terms before the product is shipped. However, if the buyer never agreed to the exclusion, and the first time it is made aware of the exclusion is on an invoice received from the seller, the buyer should take immediate exception to the invoice with the seller or it could be construed that the buyer agreed with the terms of the disclaimer. This exception should be in writing and sent to the seller immediately.

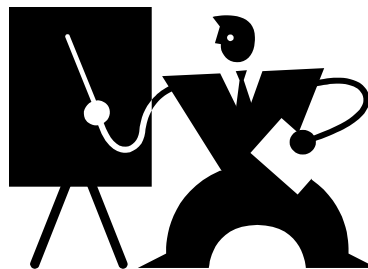
If you have questions on this topic, contact any one of the PACA offices shown on the Office Directory on page 4.

Coming Industry Training Seminars

Training seminars are held to inform you of your rights and responsibilities under PACA at the USDA Fresh Products Branch National Inspector's Development and Training Center in Fredericksburg, Va., in conjunction with courses in introductory and advanced produce inspection.

Here are the next scheduled dates for 2006:

- June 19-20 Introductory Class
- June 21-23 Advanced Class
- August 14-15 Introductory Class
- August 16-18 Advanced Class



For more information, call the United Fresh Fruit & Vegetable Association at 202-303-3400, or visit its Web site: www.uffva.org.



OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

Fruit and Vegetable Programs-PACA Branch

Our Web Address:
www.ams.usda.gov/fv/paca.htm

PACA Branch Office Directory

National Toll-Free Number:
800-495-7222

PACA On-Line Features

- PDF Fillable License Application
- PACA License Search Engine—Search for licensees by business name(s), principal(s), or branch/trade name.
- F.O.B. Good Delivery Guidelines

PACA in Person

- Have you ever wanted to sit down with a PACA specialist to discuss your rights and responsibilities under the law?
- Do you think that some people on your staff may benefit from a customized presentation by a PACA specialist?
- Were you ever involved in a PACA reparation case that did not come out the way you expected and you were not sure why?

If you have had these or other questions, you should be aware that when visiting your area, PACA specialists may be available to stop by, either to give a general talk about PACA or to discuss a specific topic of interest to your company.

If you are interested in learning more about this service, feel free to contact one of our regional offices.

The U. S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternate means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, S.W., Washington, DC 20250-9410 or call (800) 795-3272 (voice) or (202) 720-6382 (TDD). USDA is an equal opportunity provider and employer.

Washington, DC

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Washington DC 20250-0242

Bruce W. Summers, Chief 202-720-2272
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Toll Free: 877-622-4716

Tucson, Arizona

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Robert Parker, Regional Director 817-978-0777
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Manassas, Virginia

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**Past issues of the "PACA Administrative
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www.ams.usda.gov/fv/paca.htm**