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AGRICULTURAL MARKETING SERVICE
(AMS)

FAIR TRADE PRACTICES PROGRAM

PERISHABLE AGRICULTURAL
COMMODITIES ACT
(PACA) DIVISION

FRUIT & VEGETABLE

INDUSTRY PACA TRAINING

WORKBOOK



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Introduction

This Perishable Agricultural Commodities Act (PACA) training workbook was developed to assist members of the produce industry, Agricultural Marketing Service (AMS) employees, and anyone interested in having a better understanding of the PACA.

Some basic questions about the PACA spring immediately to mind: What is the PACA? How does it work? How does an inspection certificate relate to a produce contract? What does it prove? What are appeal inspections? What do they mean? What constitutes acceptance or rejection?

All of these questions, along with a few more, will be addressed in this workbook.

This workbook is composed of six lessons:

- 1. What is the PACA?
- 2. How does the PACA work?
- 3. How do USDA inspections figure in?
- 4. When have I accepted and how can I reject?
- 5. Misbranding and Misrepresentation
- 6. How to stay out of trouble.

This workbook may be used in conjunction with lectures or by itself. When you are finished with this workbook, you will have an overall understanding of the PACA Division and should be able to:

- State how to preserve and enforce PACA Trust rights.
- Explain how the terms of purchase and sale affect whether an inspection establishes a breach of contract.
- Interpret a USDA inspection certificate.
- Apply inspection results to USDA Grade Standards.
- Explain what constitutes a proper rejection of produce and state the consequences of acceptance.
- Define misbranding and explain how to correct misbranding.

A Profile of the Perishable Agricultural Commodities Act Division

DIVISION OBJECTIVE

The Perishable Agricultural Commodities Act (PACA) 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.

LEGISLATIVE AUTHORITY

This division is authorized by the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499t) (Act). The law authorizes the Department of Agriculture to resolve contract disputes and penalize those who violate the law.

DIVISION STRUCTURE

The PACA Division is headed by a division director who is assisted by a deputy director. Along with the director and deputy director, the division is administered by (1) the Dispute Resolution Branch, which is headed by a branch chief who oversees the processing and resolving of contract disputes; (2) the Investigative Enforcement Branch, which is headed by a branch chief who oversees the preparation and filing of administrative and court actions involving unfair trade practices, misbranding violations, and the statutory trust provisions of the Act; (3) the National License Center, which is headed by a chief who oversees the review and evaluation of license applications; and (4) three regional offices, each headed by a regional director, which deal directly with the industry with regard to contract disputes, licensing, trust and disciplinary matters.

The regional offices are located in Fort Worth, Texas; Fredericksburg, Virginia; and Tucson, Arizona. The Office of the Director, the Investigative Enforcement and Dispute Resolution Branches, and The National License Center are located in Washington, D.C.

DIVISION OPERATIONS

Firms and individuals operating subject to license under the Act must be licensed by USDA. AMS administers the licensing of these firms and individuals, and the license fees collected are used to fund the division. For most licensees, the annual license fee is \$995, plus \$600 for each branch or additional business facility. The maximum aggregate fee is \$8,000 annually. A \$100 fee for filing an informal complaint and a \$500 fee for filing a formal complaint were implemented in June of 2008.

The PACA Division works proactively with the industry to promote the fair trade practices of fresh and frozen fruits and vegetables in interstate and foreign commerce through dispute resolution, licensing, and outreach programs. PACA Division personnel work with industry members to resolve their contract disputes informally, and if those negotiations fail, the parties can request a formal determination of liability. The PACA also mandates full and prompt payment, removes unscrupulous individuals from the trade when needed, and provides expert

advice on trust protection.

PACA Division personnel review oral and written evidence and consult with the parties to settle contract disputes. When efforts at informal settlement are not successful, the parties can have the matter decided through a formal proceeding. These proceedings will either result in a reparation order requiring payment to the injured party or dismissal of the claim. If the order requires payment, and such payment is not made on or before the date fixed in the order, the liable firm's PACA license will automatically be suspended for non-payment, resulting in employment and licensing restrictions on responsible individuals in the firm.

PACA Division personnel also enforce the misbranding, unfair conduct and prompt payment provisions of the Act. The Act prohibits the misrepresentation or misbranding of fruits and vegetables. While the law does not require specific descriptive terms on packages containing fresh or frozen fruits and vegetables, it does require that any markings that do appear on the packages accurately represent the contents of the container. Violators of the misbranding provisions may settle their liability by paying a penalty. Repeated and flagrant violators may have their PACA license suspended. The misbranding program gives the industry and the consumer assurance that the descriptive terms used on labels accurately describe the product.

The Act's statutory trust provision requires traders to have sufficient assets on hand to meet their obligations to fruit and vegetable suppliers. Sellers of fruits and vegetables who have not been paid and who file proper notice have a priority claim on their produce buyers' produce-related assets. This is a valuable right if a buyer becomes insolvent.

BENEFITS TO SERVICE RECIPIENTS

The Perishable Agricultural Commodities Act (PACA) and the Produce Agency Act (7 U.S.C. 491 et seq.) are designed to protect producers, shippers, distributors, and retailers from loss due to unfair and fraudulent practices in the marketing of perishable agricultural commodities, and to prevent the unwarranted destruction or dumping of farm products.

The PACA establishes a dispute resolution mechanism, identifies unfair trade practices, and reduces civil actions imposed on an already overburdened court system. In addition, the PACA protects the industry from persons whose unwise business practices or unscrupulous actions would expose all segments of the industry to a great risk of financial loss, which would result in higher prices charged to the ultimate consumer.

PACA also imposes a statutory trust that attaches to perishable agricultural commodities received by regulated entities, products derived from the commodities, and any receivables or proceeds from the sale of the commodities. The trust helps ensure that produce suppliers, sellers, and agents will be paid in full for produce sold to individuals or firms licensed or subject to license under the PACA.

HISTORY OF THE PACA

Before the law was enacted in 1930, responsible industry members were too often victims of unfair, disruptive trade practices. Some dealers, for example, refused to pay for purchases or arbitrarily rejected shipments when the market declined. Some growers and shippers refused to honor their contracts when the market advanced. Finding it difficult to operate under such circumstances, reputable business persons took action by organizing industry trade associations.

These trade associations first sought to develop an industry-operated mechanism for resolving disputes over marketing contracts among industry members. This effort lasted several years, but failed. Industry leaders then sought legislation authorizing the USDA to enforce fair trading practices.

The result of these efforts was the enactment of the Perishable Agricultural Commodities Act, which establishes a federally mandated licensing system for the produce industry.

Since its inception, the PACA has fostered an efficient nationwide market for perishable agricultural commodities by promoting fair trading practices for those who buy and sell fresh and frozen fruits and vegetables. Today's produce industry and commerce are far different than in 1930, but the primary reasons for having a PACA remain. Fruits and vegetables are highly perishable products. Sellers have to move the product quickly and, in most cases, are unable to recover their property in case of a contract dispute. For this reason, the PACA remains a valuable asset to the produce industry.

The same areas of concern that prompted industry members in 1930 to ask the USDA to step in after their private efforts at self-policing failed still exist today. These concerns include:

- Failure of the seller to deliver the product sold or contracted to be sold.
- Rejection of the product by the buyer without reasonable cause.
- Failure of the buyer to pay the agreed-upon price in a prompt manner.
- Using false and misleading statements for fraudulent purposes.
- Refusing or failing to account correctly and in a timely manner for product that is handled on a consignment basis.
- Misrepresentation of the grade, quality, quantity, weight, kind, size, or origin of the commodities.

Amendments have kept the law up to date with changing marketing practices since 1930, but its basic purpose never changes—*to protect the rights of those who deal within the produce industry*. PACA protects growers as well as retailers, wholesalers, distributors, brokers, commission merchants, and shippers. It protects the smallest grower as well as the largest marketing firm.

F A Q

What is the Perishable Agricultural Commodities Act?

The Perishable Agricultural Commodities Act establishes a code of fair trading practices covering the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. It protects growers, shippers, distributors, and retailers dealing in those commodities by prohibiting unfair and fraudulent trading practices.

Why do members of the fruit and vegetable industry need more protection than members of other industries?

The fruit and vegetable industry is unique. Dealers handle a product that is very perishable. A 1- or 2-day delay in marketing can mean the difference between profit and loss. By spelling out the responsibilities of all parties, the PACA enables the product to be marketed promptly while still protecting the buyers' and sellers' rights in the event that a contract dispute arises.

How is the PACA enforced?

The law requires that anyone buying or selling commercial quantities of fresh or frozen fruits and vegetables in interstate or foreign commerce must maintain a valid PACA license. The license is the key to enforcement. A party found to have committed unfair trade practices may face a civil penalty, license suspension, or, in the most serious cases, license revocation.

How is a PACA license obtained?

Anyone with license questions or needing assistance in applying for a license may call PACA's toll-free number, 1-800-495-7222 or visit the official website at <https://www.ams.usda.gov/rules-regulations/paca> (subject to change without notice)

Is anyone exempt from the licensing requirements?

Yes, growers are exempt as long as they sell only products that they have grown. Retailers and frozen food brokers representing sellers are exempt until they purchase or negotiate the sales of \$230,000 or more worth of fruits and vegetables in a calendar year. Truckers who are contract carriers only do not need a license.

How is the PACA division financed?

PACA license and complaint filing fees finance the administration of the division. Congress provides no regular funding to the PACA division.

What responsibilities do I have as a PACA licensee?

The law requires that produce traders comply with the terms of their contracts. Sellers must ship the quantity and quality of produce specified. Buyers must accept shipments that meet contract specifications and pay promptly after acceptance. Prompt payment means payment within 10 days unless the buyer and seller, prior to the sale, agree in writing to extend the payment time.

What can I do if I have a dispute with a supplier or purchaser over a business transaction?

The PACA Division offers informal and formal dispute resolution services to members of the produce industry. A trader can file a claim for damages with the PACA against a licensee that has failed to abide by the law. A written complaint, accompanied by a \$100 filing fee, must be

filed within 9 months from the date payment was due or when damages were suffered. As part of the informal dispute resolution process, the PACA Division offers mediation services to help traders reach mutually agreeable settlements. Mediation is an effective way to resolve disputes, since it places the resolution of the dispute directly in the hands of the interested parties by providing a forum where both parties can air their differences in a neutral atmosphere.

If the parties are unable to reach an informal resolution, the complainant may file a formal complaint. The formal complaint is handled under an administrative procedure, and a Judicial Officer for the Secretary of Agriculture can issue an award plus interest based on the evidence in the case. The case is handled similar to how a lawsuit is handled in a court of law. Although there is a \$500 filing fee for a formal complaint, the complainant can recover the filing fee if an order is issued in its favor.

If a licensee fails to satisfy a PACA award, the USDA will suspend the firm's license and restrict it from operating in the industry for up to 2 years.

What are some unfair trade practices that usually result in claims being filed?

- Rejecting without reasonable cause produce bought or contracted to be handled on consignment.
- Failure to pay promptly the agreed price for produce that complies with the contract terms.
- Discarding, dumping, or destroying without reasonable cause any product received for sale on behalf of another firm.
- Failure to deliver the contracted produce in a timely manner and at the price and quality level specified in the purchase agreement.
- Failure or refusal to account truly and correctly or to make full payment promptly for produce shipped on consignment or on joint account.

Can I recover money from a firm that has gone out of business or has filed for bankruptcy protection?

Yes. Under the PACA trust provisions, a buyer's produce-related assets are to be held for the benefit of unpaid produce suppliers that have preserved their trust rights. Produce-related assets are defined as any produce inventory, products derived from that produce, as well as cash or accounts receivable generated from the resale of produce.

What must a seller do to preserve their trust rights?

Although the trust automatically goes into effect at the time the buyer receives the goods, sellers must properly preserve their rights by meeting the notification requirements.

What are the notification requirements?

There is no set form. However, the trust notice given to the debtor must be in writing and state that it has "The intent to preserve trust benefits under the PACA." The notice must contain sufficient detail to allow the debtor to identify the transaction subject to the trust and must be given to the debtor within 30 days from the date payment was past due or the date the seller received notice that payment was dishonored. For more information about the PACA Trust, see the "How the PACA Trust Works" section of this workbook.

PACA licensees also have an alternative method to preserve their trust rights. This alternative method allows licensees to include on their invoices or other billing document the following

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.

How long are a seller's rights preserved?

Trust claimants who preserve their trust rights by providing proper notice remain beneficiaries until paid.

How is payment from trust assets enforced?

The trust is a self-help tool. Beneficiaries may file in the U.S. District Court to enforce payment from the trust immediately following a buyer's failure to pay promptly. In cases where the debtor is bankrupt, trust beneficiaries should file their claims for payment with the bankruptcy court.

Can you make other terms for payment under the trust?

If payment is to be made at a time other than that specified in PACA prompt payment regulations (usually 10 days from the date of acceptance), the agreed payment terms cannot exceed 30 days from the date of acceptance to qualify for trust protection. The agreement must be in writing, entered into prior to the transaction, and the terms must be reflected on the invoice and all other billing documents.

What is a disciplinary action under the PACA?

The USDA may penalize a licensee who repeatedly and flagrantly violates the Act. A disciplinary action may result in a suspension or revocation of the firm's PACA license and publication of the facts. In lieu of suspension or revocation, the Secretary of Agriculture may assess a civil penalty of up to \$2,000 for each violation or for each day the violation continues. Companies that operate without a valid PACA license are subject to fines of up to \$1,200 for each offense and \$350 for each day the offense continues. Court injunctions can be issued against those who persist in operating without a license.

How does the USDA decide if a PACA license should be suspended or revoked as the result of a disciplinary proceeding?

The USDA considers the seriousness and nature of the violation(s) along with the number of violations by the firm and the number of times the firm has been warned about such violations. Revocation of the license is the most severe penalty that can be imposed.

How does a PACA license suspension or revocation restrict a firm and/or its principals?

Following the suspension or revocation of a firm's PACA license, the firm and its responsibly connected individuals are automatically subject to licensing and employment restrictions that prohibit those individuals and firms from working or operating in the produce industry for a certain period of time. A person is considered to be responsibly connected if he/she is a partner in a partnership, a member or manager in a limited liability company, or an officer, director, or holder of more than 10 percent of the stock of a corporation or association involved in marketing produce.

During a license suspension, the firm cannot conduct business in the produce industry. Furthermore, none of the persons responsibly connected with the firm can engage in business under any other PACA license or be employed by another licensee for two years unless the employing firm posts a bond and obtains USDA approval. The term “employment” means any affiliation with the business operations of a licensee, with or without compensation, including ownership or self-employment.

In the case of repeated and flagrant violations of the PACA, a license may be revoked and the firm’s responsibly connected persons must stop operating subject to the PACA for 1 year. After 1 year, the principals may be employed by another PACA licensee with the USDA’s approval.

After 2 years, the firm may apply for a new license by furnishing a surety bond in an amount considered satisfactory by the USDA to assure that the firm’s business will be conducted according to the Act. The responsibly connected persons may at this time be employed by another PACA licensee without furnishing a surety bond.

What are some of the common PACA violations that prompt the USDA to take a disciplinary action?

- Failure to pay for shipments of produce purchased
- Slow payment.
- Failure to render accurate accountings and pay promptly the net proceeds due for produce handled for or on behalf of shippers or growers.
- Flagrant misbranding or misrepresentation of produce shipped in interstate or foreign commerce.
- Making false or misleading statements for a fraudulent purpose, including altering or otherwise falsifying official USDA inspection certificates.
- Refusing to produce for examination by an agent of the USDA records in connection with a complaint alleging a violation of the PACA.
- Employing a restricted person after receiving notice from the USDA that such employment is prohibited.

This law puts strict regulations on the produce industry. Does the PACA receive resistance from the industry?

The industry developed and sponsored this law, and the majority of industry members continue to support the PACA. The Act has been amended several times over the years to keep pace with changing trade practices. The most recent revisions occurred in 1995. Each time, the law has been strengthened.

Where can I get more information about the PACA Division?

You can visit our website at <http://www.ams.usda.gov/paca> for more information about the PACA Division.

You can find information about licensing, resolving commercial disputes, mediation, PACA publications, a digest of recent disciplinary decisions, an office directory, and a free internet training program. The training program covers the basic information you need to know to operate within the PACA. After reviewing each lesson, you will take an online test. The tests are scored automatically, so you will get immediate feedback.

Licensing

To maintain a valid PACA license, members of the fruit and vegetable industry must abide by the fair trading practices established by the PACA. A trader's license may be suspended or revoked for failing to comply with the law. Therefore, the license is the key to ensuring that traders meet their contractual obligations and exhibit fair trading practices.

Who needs a license?

In general, a person who buys or sells more than 2,000 pounds of fresh or frozen fruits and vegetables in any given day must be licensed under the PACA. Jobbers, distributors, and other wholesalers fit into this category. In addition:

- A person or firm who negotiates the sale of fruits and vegetables on behalf of another person is required to be licensed on the first transaction. Individuals or firms who operate in this capacity include commission merchants, brokers, and growers' agents. However, a broker who handles only frozen fruits and vegetables is not subject to PACA licensing requirements until the invoice value of the total negotiated sales exceeds \$230,000 in a calendar year.
- A person or firm selling at retail is required to have a PACA license once the invoice cost of fresh and frozen fruit and vegetable purchases exceeds \$230,000 in a calendar year.

Is licensing mandatory?

Yes, if operating subject to the PACA.

Who is exempt from having a license?

- Growers if they sell only products of their own raising.
- Retailers buying fresh or frozen fruits and vegetables solely for sale at retail whose purchases do not exceed \$230,000 in any calendar year.
- Processors who buy fruits and vegetables (other than potatoes) for canning and/or processing within the same State where grown, whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless the product is frozen or packed in ice, or consists of cherries in brine.

What are the benefits of having a license?

First, if operating subject to PACA, you are abiding by the law; and second, the license provides some assurance to those with whom you do business that you will adhere to the fair trading practices set forth in the PACA.

What are the penalties for operating without a license?

Not more than \$1,200 for each offense and not more than \$350 per day for each day the offense continues. However, any person or firm violating this provision may, upon a showing satisfactory to the USDA that such violation was not willful but was due to inadvertence, be permitted to settle its liability by paying the fees due for the period of violation, and an additional sum not in excess of \$250.

How can I obtain a license application?

Telephone 1-800-495-7222 or download an application from the [PACA website](#).

How much are the license fees?

Currently, the license fee is \$995 per year, plus \$600 for each branch or additional business facility. However, the license fees paid by an applicant or existing licensee cannot exceed \$8,000 annually. Retailers and grocery wholesalers making an initial application for licensing must pay a one-time administrative fee of \$100, but are not required to pay any fee for renewal of that license in subsequent years.

Who is “responsibly connected” to a licensee?

Any person affiliated as an individual owner, partner in a partnership, or officer, director or holder of more than 10 percent of the outstanding stock of a corporation or association is responsibly connected to a license. In addition, any member of a limited liability company (LLC) and/or any other person authorized by the members to conduct business on behalf of the LLC may be considered responsibly connected with the LLC.

Individuals may be deemed not responsibly connected if they demonstrate that they were not actively involved in the conduct that resulted in a violation of the Act and that they were only nominally a partner, officer, director, or shareholder of a violating licensee or other entity subject to license.

Are there any restrictions or special requirements for obtaining a PACA license?

Possibly, if anyone employed by the applicant has been responsibly connected with any firm

- Whose license has been revoked, or is currently under suspension;
- Who has been found after notice and opportunity for hearing to have committed any flagrant and repeated violation of the PACA; or
- Against whom there is an unpaid reparation award which has been issued within the past 2 years, subject to the right to appeal.

If any of the above conditions exist, the applicant should furnish the full legal name of the person, the name of the firm involved, and the details of such connection, including the dates thereof.

The applicant’s ability to obtain a PACA license may also be restricted if anyone responsibly connected to the applicant has:

- Been responsibly connected with any firm whose license has been suspended or revoked, or a firm that was found to have committed repeated and flagrant violations of the PACA;
- Been responsibly connected with any firm against which there is an unpaid reparation award under the Act;
- Within 3 years of application been adjudicated or discharged as bankrupt or was responsibly connected with a firm adjudicated or discharged as bankrupt; or
- Been convicted of one or more felonies in any State or Federal court.

If any of the above conditions exist, the applicant should furnish the full legal name of the person, the name of the firm involved, and the details of such connection, including the dates thereof. In the case of a bankruptcy, the applicant should also furnish (1) a copy of the petition in bankruptcy, including the schedule of creditors, the date of adjudication and certificate of

discharge; and (2) the estimated value of produce that will be handled by the new business during an average operating month, percentage of business that will be handled on consignment or joint account, and amount of credit that will be incurred during an average operating month.

In the case of a felony conviction, the applicant should furnish (1) the name and date of birth of the party convicted; (2) alias, if any; (3) location of court and date convicted; (4) nature of felony; (5) sentence imposed; (6) where and length of time served; and (7) if paroled, date parole terminated.

What are the conditions under which a license may be denied?

The Secretary may refuse to issue a license to an applicant if he or she finds that the applicant (i.e., owner in an individual ownership, general partner in a partnership, officer or holder of more than 10 percent of stock in a corporation) has:

- Within 3 years prior to the date of the application been adjudicated or discharged as bankrupt; or
- Was a general partner of a partnership or officer or holder of more than 10 percent of the stock of a corporation adjudicated or discharged as bankrupt; and
- The Secretary finds that the circumstances of the bankruptcy warrant the refusal.

The Secretary may, however, issue a license in this circumstance if the applicant furnishes a bond in an amount satisfactory to assure that the business of the applicant will be conducted in accordance with the PACA.

An application for license may also be withheld for up to 30 days to allow for an investigation to determine:

- Whether anyone responsibly connected with the applicant has engaged in any practice of the character prohibited by PACA or was convicted of a felony in any State or Federal court, or
- Whether the application contains any materially false or misleading statements or involves any misrepresentation, concealment, or withholding of facts with respect to any violation of the Act by anyone responsibly connected with the applicant.

What are the effects of a suspension and/or revocation?

A firm whose license has been suspended or revoked may not conduct business subject to license under the PACA, and any individual responsibly connected to the firm is restricted from obtaining a PACA license and from employment in the produce industry with another PACA licensee for a certain period of time.

What are employment restrictions?

Except with the approval of the USDA, no licensee shall employ any person, or any person who has been responsibly connected with any individual, partnership, corporation, or association:

- Whose license has been revoked or is currently suspended; or
- Who has been found to have committed any flagrant or repeated violation of Section 2 of the PACA; or
- Against whom there is an unpaid reparation award issued within 2 years, subject to the right of appeal.

The term “employment” means any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

NOTE: An additional year may be added to the employment restriction period if it is determined that a responsibly connected individual was unlawfully employed.

How does bankruptcy affect licensing?

If an individual or company files bankruptcy, or if a partner in a partnership files a bankruptcy action, the PACA license will terminate upon the issuance of an order by the court reorganizing or discharging the debt. If operations subject to PACA are to continue, a new license application must be submitted and a surety bond may be required.

What are bonding requirements?

While all commission merchants, dealers, and brokers are not required to be bonded under the PACA, there are special circumstances where bonds are required for licensing and for employment of particular individuals. Bonds are required under the following circumstances:

- A firm that employs a person responsibly connected to a licensee who failed to pay a reparation order issued against it within the past 2 years is required to furnish a bond in an amount set by the USDA and held by the USDA for 4 years.
- A person whose license has been revoked for repeated or flagrant violations cannot be employed by, or affiliated in any way with, any other licensee for a period of 1 year following the revocation. After 1 year, and prior to the end of the second year, another licensee may employ the person if the employer furnishes a 4-year bond in an amount set by USDA. No bond is required for employment after 2 years.
- After a 2-year period, a person or firm that had its license suspended or revoked may only obtain a license by furnishing a bond. After 3 years, a license may be obtained without a bond.
- When a person or firm applies for a license within 3 years following a bankruptcy adjudication or discharge, a satisfactory surety bond may be required.

What license information is public?

The information appearing on a license application or certificate is public with the exception of the Social Security numbers, home addresses, and percentages of stock held by the people whose names appear on the application or certificate. That information is protected under the Privacy Act and is exempted from the Freedom of Information Act.

How does a PACA license relate to Trust protection?

Anyone licensed or subject to license under the PACA is subject to the provisions of the law, including the maintenance of trust assets and collection under the trust. Also, licensees need not file a separate notice to preserve trust benefits if they include a prescribed statement on their invoice.

NOTE: You can find out if an individual or firm is currently licensed on the PACA Division’s website at <http://apps.ams.usda.gov/pacasearch/>

The PACA License Application

OMB Approved - 0581-0031

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

APPLICATION FOR LICENSE
 (Under the Perishable Agricultural Commodities Act, 1930)

*For questions call (800) 495-7222 ext 1
 or email: PACALicense@ams.usda.gov
 PACA Website:
http://www.ams.usda.gov/paca_*

The information requested on this form is required under the Perishable Agricultural Commodities Act (7 CFR 46.4) for the issuance of a license. The information contained in this form will be used by Federal, State, local, or foreign agencies when relevant to civil, criminal, or regulatory investigations or procedures. Failure to provide the information required will result in delay or suspension of the processing of this form.

ALL QUESTIONS MUST BE ANSWERED OR APPLICATION WILL BE RETURNED.

1a. Name of Business (Full Legal Name of Business registered under EIN)		1b. If Sole Proprietor, enter Owners Full Name							
2. Federal Employer Identification Number (EIN)		3. Web Site							
4a. Physical Business Address (Post Office Box NOT ACCEPTABLE)									
Street Address									
City		State	Zip Code+4						
Primary Number (With Area Code)		Fax Number (With Area Code)	Primary E-Mail Address						
Secondary Number (With Area Code)		Fax Number (With Area Code)	Secondary E-Mail Address						
4b. Mailing Address (Mark an "X" here if same as Business Address): <input type="checkbox"/>									
Street Address (Post Office Box Number)		Attention:							
City		State	Zip Code+4						
5a. Does the business have any branch locations other than your physical business address? How many? _____									
5b. Does the business have additional trade names? Yes <input type="checkbox"/> No <input type="checkbox"/>									
5c. Please list Trade Names and/or Branch Locations Below. (Attach a separate page for additional entries)									
Trade Name	City	State							
6a. Legal Structure (see page 4 for explanations) (CHECK ONE BOX ONLY) <ul style="list-style-type: none"> <input type="checkbox"/> Sole Proprietor <input type="checkbox"/> Corporation (see 6b) <input type="checkbox"/> Limited Liability Company (LLC) (see 6b and 6c) <input type="checkbox"/> Partnership <input type="checkbox"/> Limited Partnership <input type="checkbox"/> Limited Liability Partnership (LLP) <input type="checkbox"/> Association <input type="checkbox"/> Trust <input type="checkbox"/> Estate 	6b. Complete only if you checked Corporation or LLC <table border="1" style="width: 100%; border-collapse: collapse; margin: 5px 0;"> <tr> <td style="width: 30%;">State</td> <td colspan="3">Date of Incorporation/Organization</td> </tr> <tr> <td> </td> <td>Month</td> <td>Day</td> <td>Year</td> </tr> </table> 6c. Complete only if you checked LLC. These items MUST be submitted with application. <ul style="list-style-type: none"> <input type="checkbox"/> Articles of Organization is included with application <input type="checkbox"/> Operating Agreement is included with application 	State	Date of Incorporation/Organization				Month	Day	Year
State	Date of Incorporation/Organization								
	Month	Day	Year						
7. Types of Fruits and Vegetables Handled by Applicant (CHECK ONE BOX ONLY) <ul style="list-style-type: none"> <input type="checkbox"/> Fresh <input type="checkbox"/> Frozen <input type="checkbox"/> Fresh and Frozen 		8. Primary Nature of Business: (see page 4 for explanations) (CHECK ONE BOX ONLY) <ul style="list-style-type: none"> <li style="width: 33%;"><input type="checkbox"/> Broker <li style="width: 33%;"><input type="checkbox"/> Processor <li style="width: 33%;"><input type="checkbox"/> Retailer <li style="width: 33%;"><input type="checkbox"/> Commission Merchant <li style="width: 33%;"><input type="checkbox"/> Shipper <li style="width: 33%;"><input type="checkbox"/> Grocery Wholesaler <li style="width: 33%;"><input type="checkbox"/> Food Service <li style="width: 33%;"><input type="checkbox"/> Trucker <li style="width: 33%;"><input type="checkbox"/> Grower <li style="width: 33%;"><input type="checkbox"/> Wholesaler <li style="width: 33%;"><input type="checkbox"/> Growers' Agent 							

9. List below the required information for Individual Owner; All Partners; All Members and/or Managers of LLCs; All Officers (Including Titles), Directors, and/or Stockholders holding more than 10 percent of outstanding voting stock. If any person listed is a minor, furnish the name of His/Her guardian. If any person listed is a trust, furnish the name of the trustee. If any person listed is an estate, furnish the name of the Executor/Executrix.

*****The amount of stock held should total 100%.

(Attach a separate page for additional entries)

Name Last Name <i>(Print on First Line)</i> First Name and Middle Initial	EIN # For legal entities	Home Address First Line - <i>Number and Street</i> Second Line - <i>City, State, and ZIP Code</i> <i>(Post Office Box NOT ACCEPTABLE)</i>	Title <i>(including Director)</i>	Percentage of Stock or Ownership
Smith John A.		123 Main Street Anytown, DC 12345-7890	President	75%

10. Has the applicant or any person listed in Question 9 filed bankruptcy, been discharged as a bankrupt, or been an officer, director, shareholder, partner, member/manager (LLC), or owner of a firm that has filed bankruptcy or been discharged as bankrupt?

Yes No If Yes, identify the firm or individual (PACA license number, if possible), the name and address of the firm involved, and details about bankruptcy. Submit a copy of the bankruptcy petition, schedules, disclosure statements, and all other relevant documentation. (Attach a separate sheet for additional space)

11. Has any person listed in Question 9 been convicted of a felony in any State or Federal Court?

Yes No If Yes, furnish the name, date of birth, and alias (if any), of the individual(s). FOR ALL CONVICTIONS, provide the name and location of the court, date convicted, nature of the felony, sentence imposed, where served; if paroled, give date terminated or will terminate. (Attach a separate sheet for additional space)

12. Has any person currently employed by the applicant been the individual owner, partner, officer, director, or holder of more than 10 percent of the outstanding voting stock of a firm, association, or corporation, or a member/manager (LLC) whose PACA license is under suspension; been revoked; found to have committed any flagrant or repeated violation of the PACA, or against which there is an outstanding unpaid reparation award?

Yes No If Yes, furnish the full name of the person, name of the firm involved (PACA License number if possible), and details of such connection, including the dates thereof. (Attach a separate sheet for additional space)

13. Is the applicant currently operating at volumes requiring a PACA License? (See Page 4 for Nature of Business)
 Yes No If Yes, provide the date applicant first met that volume.

_____ Month Day Year

SCHEDULE A Applicants - Wholesalers, Brokers, Commission Merchants, Food Service, Growers, Grower's Agent, Processors, and Shippers

(A1) Current License Fees

Annual License Fee	\$	995.00
Branch Fee, if applicable: \$600.00 X _____ branches (maximum of 7,005)	\$	_____
TOTAL AMOUNT DUE FOR CURRENT FEES (A1)	\$	_____

(A2) Accrued fees for previous operations based on the date provided in question 13. (Maximum of 24 months)

October 1, 2010 to Present

Annual License Fee = \$82.92 per month X _____ months	\$	_____
Annual Branch Fee = \$50.00 per month X _____ months X _____ branches	\$	_____
TOTAL AMOUNT DUE FOR PREVIOUS OPERATIONS (A2)	\$	_____
TOTAL AMOUNT DUE FOR CURRENT (A1) & PREVIOUS OPERATIONS (A2)	\$	_____

SCHEDULE B Applicants - Retailers and Grocery Wholesalers ONLY (all others use Schedule A)
TOTAL AMOUNT DUE \$100

PAYMENT

TOTAL AMOUNT DUE \$ _____

CHECKS: Make payable to **USDA - PACA**

CREDIT CARDS: Type of Card:

VISA

MASTERCARD

DISCOVER

AMERICAN EXPRESS

Account Number: _____

Exp. Date: Mo: _____ Year _____

Card Holder's Name: _____

If Paying Fees by Credit Card, completed application can be faxed to (202) 260-8575

Application must be signed by the Owner, all Partners, all General Partners, Member/Manager (LLC) or a Corporate Officer.

CERTIFICATION STATEMENT

I (We) certify that the answers given to the foregoing questions are true to the best of my (our) knowledge. Applicant agrees not to loan or transfer possession of the license certificate to any person or firm whatsoever.

Signature(s):	Date:

RETURN COMPLETED APPLICATION AND FEES TO:
 USDA, PACA Division,
 National License Center
 1400 Independence Ave, SW
 Room# 1522- S
 Washington, DC 20250

DEFINITIONS AND TERMS

Dealer (includes wholesalers, jobbers, distributors, and growers who market produce grown by others) means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. A person who buys potatoes for canning or processing is a dealer whether the potatoes are purchased within the state or in interstate or foreign commerce.

Interstate or Foreign Commerce means all transactions involving fresh and frozen fruits and vegetables which move between states, and/or other countries and the U.S.

Wholesale or Jobbing Quantities means aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received.

Branch or Additional Business Facility means an office or outlet in a location other than that of the principal or main office of a firm, out of which or through which the firm purchases, sells, negotiates contracts, solicits, or handles consignments, or otherwise contracts in perishable agricultural commodities including seasonal, part-time and full-time operations.

NATURE OF BUSINESS: (See Question 5)

The following are definitions of the types of dealers, brokers and commission merchants that are required to have a PACA license.

Wholesaler, see Dealer (above)

Foodservice is a dealer that purchases and sells fresh and/or frozen fruits and vegetables in interstate or foreign commerce for distribution to restaurants, institutions, convenience stores, etc. These operations commonly also sell non-subject items as well.

Processor is a dealer that purchases fresh and/or frozen fruits and vegetables in interstate or foreign commerce for canning or processing or sells product in interstate or foreign commerce that has not had its kind or character changed (i.e., salad mixes, sliced fruit, vegetables, frozen or packed in ice or consists of cherries in brine, etc.). However, a processor is not subject if the purchasing and processing which changes the kind and character are both accomplished within the State where the produce is grown, even if the processed product is shipped out of the State.

Shipper is a dealer who operates at shipping point and is engaged in the business of purchasing produce from growers or others and distributing such produce in commerce by rail or other methods, or who handles such produce on joint account with others.

Tracker is a dealer that purchases and sells fresh and/or frozen fruits and vegetables in interstate or foreign commerce from its truck out as a retailer.

Retailer is a dealer when it purchases wholesale and jobbing quantities, but is only subject to a PACA license when the invoice cost of all purchases of produce (including frozen potato products such as French fries) exceeds \$210,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in the transaction or whether the transaction was interstate, intrastate or foreign commerce.

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.

Broker means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively. The 2000 pound quantity limitations do not apply to brokers. They are subject to PACA licensing with their first interstate or foreign commerce transaction. It is common in the industry to have fresh produce brokers and frozen produce brokers. Frozen produce brokers who negotiate contracts for frozen commodities exclusively for the vendor and the invoice value of the vendor's product does not exceed \$230,000 in a calendar year are *not* subject; however, frozen produce brokers that are negotiating contracts for the buyer are subject no matter the invoice price.

Commission Merchant means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another. For example, a person who receives a truckload of tomatoes, sells the product for a grower, charges a commission, and remits the net proceeds to the grower. The 2000 pound quantity limitations do not apply.

Grower is a business that grows its own fruits and vegetables and is not required to be licensed. However, a grower can be licensed on a voluntary basis and must comply with the PACA law while licensed.

Growers' Agent means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operation may include the planting, harvesting, grading, packing, and fumigating containers, supplies, or other services. The 2000 pound quantity limitations do not apply, because this type of business is considered a type of commission merchant.

LEGAL STRUCTURES: (See Question 6a)

Individually owned or Sole Proprietorship means one person has complete ownership and is fully responsible for all activities.

Corporation is authorized by state law to act as a single entity and is registered with the secretary/commission of a state. The corporation can have elected officers and directors, an appointed registered agent and shareholders. Shareholders can be individuals, other corporations, LLC, partnerships, etc.

Limited Liability Company or "LLC" is a form of a legal entity where the state law provides for a firm to be treated as a partnership for tax purposes, while receiving the benefits from personal liability usually associated with a corporation. LLC's are also registered with the secretary/commission of a state. **NOTE: LLC's are required to submit a copy of their Articles of Organization and Written Operating Agreement with the application.**

Partnership is a voluntary contract between two or more persons who agree to carry on any business or venture together, upon the terms of mutual participation in its profits and losses, this can be a verbal or written agreement. **NOTE: Any change in partners will require a new license.**

Limited Partnership is a partnership consisting of one or more general partners, jointly and severally responsible as ordinary partners, and by whom the business is conducted, and one or more special (limited) partners, contributing in cash payments a specific sum as capital, and who are not liable for the debts of the partnership beyond the funds contributed. Limited partnerships are required to be registered with the secretary/commission of a state. **NOTE: A change in any general partner will require a new license.**

Limited Liability Partnership or "LLP" is a form of a legal entity where the state law provides for a firm to be treated as a partnership for tax purposes, while its individual partners receive protection against personal liability of certain partners by liabilities. LLP's are also registered with the secretary/commission of a state.

Association is commonly referred to as a Cooperative Marketing Association; a body of persons united and sometimes acting together without a charter in the pursuit of some common enterprise; basically a large partnership, but differs from a partnership in that it is not bound by the acts of individual partners, but only by those of its manager(s) or trustee(s). **NOTE: While PACA exempts growers from the licensing requirements, cooperative marketing associations must be licensed, even if the produce being handled is that solely of its members.**

Trust is a right of property, real or personal, held by one party for the benefit of another; any arrangement whereby property is transferred with intention that it will be administered by a trustee for another's benefit.

Estate is the property, real or personal, which a person has a right or interest and descends by law to heirs at that person's death.

Note: The following statements are made in accordance with the Privacy Act of 1974 (U.S.C. 552a) and the Paperwork Reduction Act of 1995. The authority for requesting this information to be supplied on this form is the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a-499e) (499c, 499d). Furnishing the requested information is necessary for the administration of the Perishable Agricultural Commodities Act program.

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0581-0031. The time required to complete this information collection is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. 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 belief, 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 alternative 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, D.C. 20250-9410, or call (800) 795-3272 (voice) or (202) 720-6382 (TDD). USDA is an equal opportunity provider and employer.

PENALTY:

Any person who operates without a valid and effective license shall be liable to a penalty of not more than \$1,200 for each such offense and not more than \$350 for each day it continues.

Trade Term Definitions

Different and often conflicting interpretations of trade terms play a significant role in the commercial disputes that come before the PACA Division. Making sure that all the parties to a transaction are using the same terms, and that all the parties have a clear understanding of what those terms imply, is the best insurance against finding yourself involved in a commercial dispute. In this regard, some of the most commonly used terms and their definitions are set forth below:

“**FOB**” means that the commodity is placed “free on board” the carrier at shipping point in suitable shipping condition, and that the buyer assumes all risk of damage and delay in transit not caused by the seller. This means, for example, that if a load is wrecked or stolen in transit, the buyer must pay the invoice price to the seller and file a claim with the carrier to recover damages. Under FOB terms, the seller guarantees that the product, when loaded onto the carrier, is in “suitable shipping condition.”

“**Suitable Shipping Condition**,” or what is commonly referred to as the warranty of suitable shipping condition, is applicable only in FOB sales, and means that produce, at the time of shipment, is in a condition which, if *handled under normal transportation conditions*, will assure delivery at the contract destination without abnormal deterioration.

The underlined words in the above definition imply that since fruits and vegetables are perishable, some amount of deterioration is normal and can be expected. This means that it is possible that a product which grades U.S. No. 1 at shipping point could arrive at destination with total defects exceeding the limits established in the U.S. Grade Standards and still meet the terms of the FOB contract; for example, suppose a load of bell peppers shows 4 percent scars and 4 percent turning red at shipping point, for a total of 8 percent defects. The peppers would grade U.S. No. 1 at that time, since the U.S. Grade Standards allow 10 percent defects. After a normal 4- to 5-day trip across the country, an inspection at destination shows 4 percent scars, 6 percent turning red, and 1 percent decay. The peppers now have 11 percent defects and do not meet U.S. No. 1 standards. However, 11 percent defects would not show that the peppers were abnormally deteriorated, since there are only 3 percent additional condition defects since shipment.

The italicized words in the above definition imply that when transportation conditions are not normal, the warranty of suitable shipping condition is not applicable. *For example*, suppose a load arrives late and a USDA inspection made at destination shows considerable condition problems in the product, along with high temperatures. Following the standard that abnormal transportation voids the warranty of suitable shipping condition, the buyer would pay the shipper in full and take up the matter of damages with the carrier.

There are, however, three instances in which a buyer may claim damages for a breach of warranty by the seller despite the existence of abnormal transportation conditions. They are:

- When a seller loads product on a carrier with obviously faulty or inadequate equipment, or misloads the product in such a way as to block air flow;
- When the nature of the damage found at destination is such as could not have been caused by or aggravated by the faulty transportation service; or
- When the defects appearing at destination are so extensive and/or advanced that they would have been present even if transportation conditions had been normal. Example: A load of

Cantaloupes arrives 1 day late, but with good temperatures and showing 35 percent decay. The decay is too extensive to have been caused by the late delivery.

“Good Delivery” is the term used in FOB sales to describe the arrival of goods at the contract destination without abnormal deterioration, i.e., goods that are shipped in suitable shipping condition will make good delivery at the contract destination. For all commodities other than lettuce (for which specific good delivery standards exist) what is “normal” or abnormal deterioration is determined on a case-by-case basis.

“Delivered” means that the produce is to be delivered at the market specified in the contract, free of any transportation charges. In this case, the seller assumes all risks of loss and damage in transit not caused by the buyer. It also means that if potatoes, for example, are sold “U.S. No. 1 delivered Chicago,” the potatoes, upon delivery in Chicago, must meet all quality and condition requirements of the U.S. No. 1 grade, with no allowance for normal deterioration.

“Open” describes a sale, like any other sale, except that the price has not been settled. An open sale is either FOB or delivered, depending upon the agreement of the parties. The purchaser of produce on an open basis has all the benefits of the normal sales warranties, and may accept, or reject and claim damages if the seller breaches the contract. If the parties fail to agree upon a price, the purchaser of product on an open basis is liable to the seller for a reasonable price.

“Price After Sale” is not defined in either the Act or the Uniform Commercial Code (UCC); however, it has been interpreted as meaning that the parties will agree upon a price after the buyer completes its re-sales at destination.

NOTE: The PACA regulations do not place a duty to account upon a buyer who purchases on an “open” or “price after sale” basis. However, in cases where the parties fail to agree upon a price and a reasonable price must be determined, a properly prepared accounting showing timely re-sales of the product may be the best evidence of the reasonable value of the product. In the absence of a detailed accounting, USDA Market News prices generally determine what is “reasonable.”

“Consignment” is NOT a sale. It creates an agency relationship between the consignor and the consignee, where the produce continues to belong to the consignor until the consignee sells it on the consignor’s behalf. After such sale, the proceeds of the sale belong to the consignor, with the consignee allowed only to retain expenses of the resale and commission.

There is no FOB suitable condition warranty, no warranty of merchantability, nor any other “sale” warranty applicable to consigned goods. Consequently, a consignee cannot normally reject consigned goods. When a consignee receives goods that it does not believe can be sold, the consignee should consult with the owner of the goods to determine what the owner wants done with them. The same advice applies if the goods are salable, but in poor condition. In both cases, the consignee would be well advised to secure a Federal inspection in case any dispute arises in the future over how the goods were handled.

In the case of a consignment, the shippers choose the agent, and absent a showing of fraud or other hard evidence of violations of the PACA, the shipper must bear the risk of his agent not having done a good job selling the product.

Other Trade Terms

“FOB Acceptance” means that the buyer accepts the product at shipping point and has no right to reject the product. The buyer has recourse against the seller if the product is not in suitable shipping condition or for a material breach of contract. The term *“material breach”* generally means a breach of contract that is related to factors other than quality and condition, such as size, variety, label, etc.

“FOB Acceptance Final” has the same meaning as FOB acceptance except that suitable shipping condition is inapplicable and the buyer’s only recourse is for a material breach of contract. Use of this term must be clearly established given the harshness of the conditions it imposes.

“Purchase After Inspection” means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term, the buyer has no right of rejection and waives all warranties as to quality and condition, except warranties expressly made by the seller. NOTE: If this term is to apply, both parties must expressly agree to it.

“Shipping Point Inspection Final” means that the seller is required to obtain a Federal or Federal-State inspection, or a private inspection as has been mutually agreed upon, to show that product meets contract specifications, and the buyer has no recourse against the seller on account of quality, condition, and grade.

“Protection” is not defined under the PACA; however, the term is often used throughout the industry in two main contexts:

(1) **“Market Protection”** or **“Price Protection”** is understood as meaning that the buyer is protected against any market decline that might occur between the date of sale and the date the product is received. It should be noted that the shipper and receiver must clarify, prior to shipment, whether the decline is to be based on the shipping point market or the destination market.

(2) **“Protection,” “Full Protection,”** and **“Protection Against Loss”** usually have the same meaning, and should be distinguished from *“market protection”* or *“price protection.”* A protection agreement is a modification of the original sale contract that leaves the original sale price as the base line price for determining whether the buyer makes a profit, or is entitled to protection. The potential for profit remains after the conclusion of the protection agreement, and this potential can only be realized in the same manner as it is realized in any sale contract, namely by the buyer reselling at prices above the original price plus expenses. Therefore, when a buyer with protection fails to re-sell at such favorable prices and experiences a loss, the protection should only compensate the loss, and should not include a profit in the form of a commission or handling fee.

Since a protection agreement is intended to protect a buyer against any loss, a buyer who has paid freight must be credited with the freight paid. If the gross proceeds of the buyer’s resale exceed the FOB contract price plus freight, then the buyer gets to keep the excess as profit. On the other hand, if the gross proceeds of the resale are less than the buyer’s costs (FOB price plus freight), then the buyer deducts the freight expense from the gross proceeds and remits the balance, thus suffering no loss. If the gross proceeds are not enough to cover freight, then the seller who grants full protection must chip in and pay the remainder of the freight costs.

Rights and Responsibilities

Generally, the PACA requires that firms and individuals operating in the fruit and vegetable industry live up to the terms of their agreements. In order to do so, you should be familiar with the rights and responsibilities set forth below. The first part of this section describes rights and responsibilities generally applicable to all traders of fruits and vegetables. The second part of this section describes rights and responsibilities specific to individuals and firms operating in various capacities.

General Discussion of Express Versus Implied Warranties

Express Warranties are created when:

- The seller makes an affirmation of fact or promise that relates to goods, which then becomes part of the bargain.
- The seller provides a description of goods that is made part of the bargain.
- The seller provides a sample of goods that is made part of the bargain.

In each case, the seller's promise, description or sample creates a warranty that the goods will conform to the promise, description or sample.

NOTE: It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty; however, an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion of the goods does not create a warranty.

Implied Warranties may be present in a contract without any express agreement between the parties. For example, when a potato shipper sells a truckload of potatoes, a warranty that the potatoes will be merchantable is implied in the contract. This is called the "warranty of merchantability." For goods to be merchantable, they must at least:

- Pass without objection in the trade under the contract description;
- Be of fair quality within the description;
- Be fit for the ordinary purposes for which such goods are used;
- Be adequately contained, packaged, and labeled as the agreement may require; and
- Conform to the promise or affirmations of fact made on the container or label if any.

Unless excluded or modified, implied warranties may also arise from a "course of dealing" or "usage of trade."

- A "course of dealing" is a sequence of previous conduct between the parties to a particular transaction that establishes a common basis of understanding for interpreting their expressions and other conduct.
- A "usage of trade" is any practice or method of dealing done so regularly as to justify an expectation that it will be observed with respect to the transaction in question.

NOTE: To prove a course of dealing or usage of trade in a PACA complaint, the party claiming the existence of either must provide multiple examples showing actual instances where the claimed procedure was used.

Disclaimer or Modification of Warranties

To exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and, if it is in writing, must be conspicuous.

To exclude or modify any implied warranty of fitness, the exclusion must be in writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “there are no warranties that extend beyond the description on the face hereof.”

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language that calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.

When the buyer, before entering into the contract, has examined the goods, there is no implied warranty with respect to any defects that should have been revealed by the examination, e.g., size, shape, scars, mechanical damage.

An implied warranty can also be excluded or modified by a “course of dealing” or “usage of trade” as defined above.

NOTE: In free on board (FOB) sales, the warranty of suitable shipping condition is considered an express warranty.

Rights and Responsibilities of Specific Produce Traders

Growers’ Agents

- **Written Contract:** PACA requires, first and foremost, that the growers’ agent have a written contract with its growers. The contract should clearly define the duties and responsibilities of both parties, and the range of authority granted to the agent in the marketing of the growers’ product. If a contract with each grower is not practicable, the agent is required to describe its marketing policies in a written statement that must be mailed or delivered to the grower before or upon receipt of the first lot of produce to be handled for the grower.
- **Accounts and Records:** Once the terms are settled and the deal begins, the agent is obligated to prepare complete records to cover the disposition of the produce and the expenses incurred. Each grower’s product must be identified from the time it is harvested or delivered to the agent, through the steps of packing, shipping, and selling. Lot numbers are necessary to distinguish each grower’s product.
- **Pooling:** The agent and grower can agree that the grower’s product will be pooled with that of others for the purpose of selling it, with the returns to be based on the average return for the total pool. This provision must be specified in the written contract
- **Expenses:** Some record requirements can be waived by special agreement, especially those having to do with expenses. Usually this takes the form of a flat per-package or per-weight fee to cover harvesting, packing and selling charges. Once again, this agreement should be

reduced to writing so that both parties have a clear understanding. In the absence of such an agreement, the agent must detail its expenses in the accounting it issues to the grower, and its records must support those expenses.

- **Use of Other Sales Agents:** The grower's agent is not entitled to use the services of other agents, brokers, commission merchants or auction companies to sell the grower's product, without specific prior approval from the grower.
- **Price Adjustments:** Any price adjustments that the agent grants his customers must be supported with documentation (such as destination inspection certificates).
- **Agent's Liability:** The grower's agent can be held liable for any losses the grower suffers that are directly caused by the agent's negligence or failure to perform its duties. However, the agent is not responsible for non-payment by its customers unless it has guaranteed payment or been clearly negligent in extending credit.
- **Trust Protection:** The agent is required to preserve the grower's right to trust protection by filing a timely notice of intent to preserve trust benefits with its customers.

NOTE: The grower must also file a timely notice of intent to preserve trust benefits with its agent.

Commission Merchants/Consignees

- **Assigning Lot Numbers:** A commission merchant/consignee must be able to account for every package received on consignment. This is accomplished by assigning lot numbers to the consigned lot, and also to every other lot of similar product on hand during the sales period of the consigned lot. The lot numbers and consigned terms must be entered into the receiver's receiving records and onto the sales tickets issued on the sales of each lot. The use of brands, shippers' names or size identification does not satisfy this requirement.
- **Adjustments/Credits:** If the commission merchant/consignee finds it necessary to give a price adjustment or take back product refused by a customer, a credit memorandum must be prepared showing the lot number, the original sales ticket number and the reason for the adjustment or refusal.
- **Use of Other Sales Agents:** A commission merchant/consignee may not employ another person or firm, including auction companies, to dispose of the consigned produce without the specific prior authority of the consignor.
- **Prohibition of Sales Outside the Consignee's Market Area:** A commission merchant/consignee may not sell consigned produce outside the market area where it is located without obtaining the permission of the consignor.
- **Pooling:** Averaging or pooling of sales is not permissible unless the receiver obtains the specific written permission of the consignor prior to rendering the accounting.
- **Recordkeeping:** Complete and detailed records must be prepared and maintained showing the produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses that are deducted on the accounting.
- **Accounting:** The accounting rendered should consist of an accurate and itemized report of the sales, including the dates of sale and the quantities sold at each price, and the expenses charged against the shipment.

- **Commission Fees/Other Charges:** Before accepting produce on consignment, the parties should reach a definite agreement on the amount of commission or other charges that will be assessed by the commission merchant/consignee. In the absence of such an agreement, only the usual and customary commission and other charges are permissible.
- **Purchases by Consignees:** A commission merchant/consignee may not purchase produce received on consignment or sell the produce to any firm it has control over or is controlled by without the specific prior approval of the consignor. However, the commission merchant/consignee may clean up remnants of the shipment by purchasing them at the market price.
- **Carrier Claims:** Without prior consent of the owner of the produce, a commission merchant/consignee has no authority to file claims with carriers in its own name or any other name.

Brokers

- **General:** The function of a broker is to facilitate good faith negotiations between parties that lead to valid and binding contracts. It is the duty of the broker to fully inform the parties concerning all terms and conditions of the proposed contract.
- **Confirmation of Sale:** After the parties agree to the terms and the contract is affected, the broker should prepare in writing and deliver promptly to all parties, a confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties. The confirmation or memorandum of sale should also identify the party who engaged the broker to act in the negotiations. A copy of the confirmation or memorandum of sale should be retained by the broker as a part of its accounts and records. All parties should have the broker's confirmation in their hands before the product arrives at destination.
- **Broker's Liability for Payment:** Unless otherwise specifically agreed, the broker does not guarantee the performance of the contracting parties and is entitled to receive prompt payment of the brokerage fee whenever a valid and binding contract is negotiated.
- **Brokerage Fees:** Brokerage fees may be charged to only one of the parties unless there is a prior agreement between the parties to split the brokerage fee.
- **Use of Other Brokers:** A broker may not employ another broker or selling agent to negotiate the sale of the produce without the approval of its principal.
- **Collect and Remit Brokers:** A broker authorized to sell, invoice the buyer, collect and remit to its principal should render an itemized accounting to the principal promptly on receipt of payment, showing the true gross selling price, all brokerage fees deducted, and any other expenses incurred in connection with the sale of the shipment. Agreement to collect from the buyer and remit to the seller is not, however, a guarantee by the broker that the buyer will pay for the produce purchased. Such brokers must show their authorization on their confirmations. A collect and remit broker cannot pursue a PACA claim in its own name unless it first obtains an assignment of interest from its principal, the seller.
- **Buying Brokers:** A buying broker who negotiates a purchase in his own name under an agreement with his principal is responsible for payment of the purchase price to the seller.
- **Allowances:** A broker has no authority to grant allowances or adjust the seller's invoice

price to the buyer without the specific prior approval of its principal.

- **Brokers Who Also Act as Dealers:** Licensees who operate both as dealers and as brokers must disclose their status in each transaction to the parties with whom they are dealing. When licensees purchase or sell produce as dealers, they may not request or receive a brokerage fee.
- **Broker's Relationship to Contracting Parties:** Brokers should not negotiate transactions where they are controlled by or have control over any of the parties to the transaction other than their principal.

Shippers

- **General:** The responsibilities of shippers vary with their contracts with growers to purchase produce or handle produce on joint account, and their responsibilities to their customers depend on their contracts to sell, consign, or joint account produce with dealers on terminal markets.
- **Receiving Records:** Each shipper should prepare and maintain a record of all produce handled, including its own production. The record should be in the form of a book with numbered pages, showing the following for each lot:
 - ✓ Date Received
 - ✓ Whether purchased or received on joint account
 - ✓ Quantity
 - ✓ Quality
 - ✓ Kind of purchase
 - ✓ Purchase price or joint account cost
 - ✓ Name and address of the supplier

Receipts should be issued to growers and others for all produce received.

- **Disposition Records:** When shippers purchase produce from growers or others, their records should also show the following:
 - ✓ The disposition of the produce, i.e., whether sold or consigned
 - ✓ Date of shipment
 - ✓ Car number or truck license number
 - ✓ Name and address of carrier
 - ✓ Name and address of buyer, commission merchant, or auction
 - ✓ Other pertinent details of the transaction, e.g., sale terms, selling price, date of payment, etc.
- **Joint Account Transactions:** When shippers enter into joint account agreements with growers or receivers, the agreement between the parties should be reduced to a written contract clearly defining the terms of the agreement. The shipper should prepare and maintain records that show in detail the expenses that may properly be charged to the joint venture. At the conclusion of the transaction, a detailed and accurate accounting should be furnished promptly to the joint account partner.

Recordkeeping Requirements

Proper recordkeeping is an insurance policy against trouble. Basically, all PACA licensees are required to prepare and maintain for 2 years, the accounts, records and memoranda that fully and correctly disclose all transactions involved in their business. Most are records that any prudent merchant would normally prepare and maintain, such as invoices and/or sales tickets, credit memos, memoranda of sale, freight bills, and inspection certificates.

Failure to maintain adequate records may be costly in two ways. First, any licensee who fails to prepare and maintain such records is subject to penalties under the PACA, including license suspension. Second, a licensee may suffer financially if a dispute arises and it cannot offer records to support its position.

Both outcomes can be avoided by becoming familiar with the specific recordkeeping requirements set forth below.

Maintaining a Receiving Book. The PACA requires all licensees to keep a detailed receiving record that contains complete information about each shipment, including the name and address of the shipper, date received, carrier identification, contract terms, and lot numbers for shipments handled on a consignment basis.

Lot Numbers. A lot number should be assigned to:

- Each shipment of produce to be sold on consignment or joint account or for the account of another person or firm.
- Any purchased shipment in dispute between contracting parties to assist in proving damages.
- Each purchased shipment of similar produce on hand at the time a consigned, joint account, or disputed lot is being sold.
- Each purchased shipment that is reconditioned if the seller is to be charged with the shrinkage or loss.

The lot number should be entered into the receiving record and on all sales tickets identifying and segregating the sales from the various shipments on hand. The salesperson should enter the lot number on the sales tickets at the time of sale or by the produce dispatcher, not by bookkeepers or others after the sales have been made. No lot number should be repeated for 30 days after the last sale from the lot to which that number was previously assigned.

Sales Tickets. Sales tickets should bear printed serial numbers running consecutively and should be used in numerical order so far as practicable. No serial number should be repeated within a 90-day period.

Each sales ticket should show, in a legible manner, the date of sale, the purchaser's name (so far as practicable), and the kind, quantity, unit price, and total selling price of the produce. Lot numbers for produce being handled on consignment or on joint account should also appear on the sales ticket. In addition, sales tickets for all other lots of the same commodity on hand at the same time should also show a lot number. The original or a legible carbon copy of each sales

ticket, including those voided or unused, should be accounted for and filed or stored either by date of sale or in order by serial number for a period of 2 years.

Accounting for Dumped Produce. A clear and complete record should be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of the produce cannot be sold due to poor condition or is lost through resorting or reconditioning. If 5 percent or more of a shipment of produce received on joint account, on consignment, or handled for or on behalf of another person is dumped, a Federal inspection certificate, or other adequate evidence, should be obtained to prove that the produce was without commercial value, unless there is a specific agreement to the contrary between the parties. The certificate should be forwarded to the consignor or joint account partner with the accounting, and a copy should be retained in the receiver's records.

Rebates and/or Promotional Allowances. Licensees participating in promotional allowance and/or rebate programs must maintain records showing that the details of the program were disclosed on all paperwork prepared in connection with the applicable transactions, including invoices to customers, and accountings issued to growers.

Ownership. All PACA licensees must prepare and maintain records that fully and correctly disclose the true ownership and management of the business during the preceding 4 years. The records should include the number and location of all branches or additional business facilities operated by or for the licensee. In addition, corporate records should contain the corporate charter, record of stock subscription and stock issued, the amounts paid in stock and minutes of stockholders' and directors' meetings showing the election of directors and officers. Partnership records should contain a copy of the partnership agreement showing the type of partnership, the full names and addresses of all of the partners, including general, special or limited partners, the partnership interest of each individual, and any other pertinent records of the partnership.

Access to Records. While investigating a complaint under the PACA, a USDA representative may visit a licensee and ask that certain records be made available for examination. If the licensee will not produce the records, the firm's license may be suspended until the records are made available.

Consequences of Failing to Maintain Records. In most cases, when it is discovered that a PACA licensee is failing to prepare and/or maintain the required accounts, records, and memoranda, the licensee is notified in writing of the apparent violations and is given the opportunity to correct the identified deficiencies. If, after the licensee has been given sufficient opportunity to achieve compliance, the USDA finds that the licensee's records are still deficient, the USDA may publish the facts and circumstances and/or suspend the license of the offender for a period not to exceed 90 days.

Payment Requirements

Prompt payment is a very essential requirement of the PACA. It is an unfair trade practice to fail to make timely payment for fresh and frozen fruits and vegetables purchased in interstate and/or foreign commerce. It is one of the few Federal statutes that have a prompt pay requirement.

Prompt Pay Defined

“Full payment promptly,” for the purpose of determining violations of the PACA, means:

- Payment for produce purchased by buyers within 10 days from the date the produce was accepted;
- Payment of the net proceeds for produce received on consignment, or the pro-rata share of the net profit for produce received on joint account, within 10 days from the date of the final sale for each shipment, or within 20 days from the date the produce was received at destination, whichever comes first;
- Payment to brokers (buying brokers) within 10 days after the date the broker’s invoice is received by the principal (buyer);
- Payment by agents or brokers authorized to collect and remit within 5 days after the agent or broker receives payment from the buyer or receiver;
- Payment by growers’ agents within 30 days after receipt of the produce or within 5 days after the agent receives payment for the produce, whichever comes first (When the agent is handling an entire crop, subsequent payments should be made in 10-day intervals or within 5 days after the agent receives payment for the produce, whichever comes first, with the final payment to be made within 30 days from the date the last shipment of the season is received.);
- Payment by growers, growers’ agents, or shippers of deficits on consignments or joint account transactions, within 10 days after the day the accounting is received;
- Payment of proceeds received from a carrier claim, within 10 days after the proceeds are received; and
- Payment to the supplier-seller within 20 days from the date of acceptance for contracts based on terms other than those described herein.

Written Payment Agreements – Implications. Traders may agree to payment terms other than those set forth above; however, in order to be valid, the agreement must be reduced to writing prior to the transaction.

Penalties for Failure to Pay Promptly. When it is determined that a licensee has violated the Act by failing to make full payment promptly, the USDA may publish the facts and circumstances of the violation and/or, by order, suspend the license of the offender for a period not to exceed 90 days, unless the violation is repeated or flagrant, in which case the license may be revoked. In “failure to pay” cases, or what is loosely termed “no pay,” a civil penalty may be assessed in lieu of a license suspension if the licensee establishes that the indebtedness has been fully satisfied prior to the opening of the hearing, or if no hearing is held, by the time the answer is due.

NOTE: The substitution of one indebtedness for another, such as a promissory note, does not constitute payment in accordance with the PACA. In determining the amount of the civil penalty, due consideration will be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation.

Resolving Commercial Disputes

How to File a Reparation Complaint

If you have a problem getting payment from a buyer or believe that you have suffered damages resulting from unfair trading practices, you should call a PACA office to discuss the matter. PACA representatives provide unbiased assistance—whether this involves interpreting a contract term, analyzing an inspection result, or providing general advice regarding your rights and responsibilities. Frequently, timely guidance such as this is sufficient to avoid any further action on your part. There are instances, however, when disputes are not so easily settled. In those cases, you will need to file an informal complaint with a PACA office.

How to File an Informal Complaint. To ensure that your claim will be handled as quickly as possible you should ensure that your complaint meets the **Statutory Requirements**:

- The complaint must be filed within 9 months of the date on which payment became due, or on which the other party breached its contract with you.
- The contract and/or the shipment of product involved in your claim must have been made in the course of interstate or foreign commerce.
- The product involved must be a perishable agricultural commodity: a fresh or frozen fruit or vegetable.
- The party against which you are making a claim either must be licensed by the PACA Division or must be operating a business subject to the licensing provisions of the PACA.

Copies of the documents that establish the dollar amount of your claim, such as invoices, bills of lading, manifests, broker's memorandum or confirmation of sale, accounts of sales, or contract must be included with your letter of complaint.

Payment of the \$100 filing fee, which is required by law, must be received by the PACA Division before a claim can be opened. The filing fee may be paid by check, money order, or credit card. **NOTE: If the filing fee is not provided, the complaint documents will be returned with a request for the claim to be resubmitted with the \$100 fee before the case will be opened.** Checks or money orders should be made payable to "USDA-AMS."

Establishing Damages for a Breach of Warranty

Buyer's Damages Where Goods Are Accepted.

There are circumstances when a receiver will not want to reject damaged merchandise. The buyer who receives damaged product has the choice to reject it, or to accept it and handle it to establish its damages from the seller's breach of contract. The buyer cannot be required to return the product to the seller. The general measure of damages for a breach of warranty as to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show damages of a different amount. The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. A proper accounting should show a breakdown of sales of individual lots of produce with the number of containers sold at each price and the date on which sales of each lot took place.

The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by USDA Market News Service Reports. If applicable market prices are not available, the delivered (FOB plus freight) value of the goods may be used as a measure of the value as warranted.

Buyer's Damages Where Goods Are Rightfully Rejected.

Where a buyer rightfully rejects goods, the buyer may either "cover" or recover damages for non-delivery. "Cover" refers to the buyer's purchase of goods in substitution for that due from the seller. When such purchase is made in good faith and without unreasonable delay, the buyer may recover the difference between the cost of the cover purchase and the contract price

The Informal Complaint Worksheet

INFORMAL COMPLAINT TO BE FILED UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

Complaining Party:

Company Name: _____
 Address: _____

 PACA License No.: _____

Date: _____
 Contact Person: _____
 Phone No: _____
 Fax No: _____
 Email: _____

Complaint To Be Filed Against:

Company Name: _____
 Address: _____

 PACA License No.: _____

Contact Person: _____
 Phone No: _____
 Fax No: _____
 Email: _____

If there is a dispute, or the complaint does not involve unpaid invoices, please state your claim below. You may also attach a separate letter describing the dispute. Please be sure to include copies all relevant documents, such as invoices, passings, bills of ladings, and inspections. If a broker was involved, please provide name and address of the broker, along with copies of the confirmations of sale, and/or any other documents issued by the broker.

Please Provide Your Written Explanation Below:

Please use the table below to list the unpaid invoices. If you require more space, you may use a separate sheet of paper to list the invoices and amounts due.

<u>Invoice No.</u>	<u>Date Shipped</u>	<u>Invoice Amount</u>	<u>Amount Paid</u>	<u>Balance Due</u>
			Total Claim Amount:	

Documents and items required with this complaint:

- \$100 Filing Fee. Please make checks or money orders payable to "USDA-AMS"
- Copies of supporting transaction documents such as: Invoices, Revised Invoices, Passings, Account Statements, Credit Memorandums, Payment Term Agreements, Contracts, Bills of Lading, Confirmations of Sale, and Inspection Certificates

Please Note: Complaints received without the Filing Fee cannot be processed.

**INFORMAL COMPLAINT TO BE FILED UNDER
THE PERISHABLE AGRICULTURAL COMMODITIES ACT**

If you prefer, you may pay the filing fee with a credit card. If so, please provide the following information:

Check Type of Credit Card: ___ Visa ___ MasterCard ___ American Express ___ Discover

Indicate Credit Card Charge Amount: ___ Informal, \$100 ___ Formal, \$500 ___ Other, \$ _____

Account No: _____ Expiration Date: _____

Card Holder Name: _____ Card Holder Signature: _____
(Please Print as Shown on Card)

Daytime Phone No: _____ Contact Name: _____

USDA PACA Regional Offices:

www.ams.usda.gov/paca

U.S. Department of Agriculture
AMS, F&V Programs, PACA Division
Tucson Federal Building, Room 7 T
300 West Congress Street
Tucson, AZ 85701-1319
Telephone: 800-495-7222 (toll free) Ext. #5
Fax: 520-670-4798
States Served: AZ, CA, CO, ID, IA, KS, MN, MO,
MT, ND, NM, NE, NV OR, SD, UT, WA, WY, AK, HI

U.S. Department of Agriculture
AMS, F&V Programs, PACA Division
819 Taylor Street
Suite 8B02
Fort Worth, TX 76102-9727
Telephone: 800-495-7222 (toll free) Ext. #4
Fax: 817- 978-0786
States Served: AL, AR, FL, IL, IN, KY, LA,
MI, MS, OK, TN, TX, WI

U.S. Department of Agriculture
AMS, F&V Programs, PACA Division
100 Riverside Parkway, Suite 101
Fredericksburg, VA 22406
Telephone: 800-495-7222 (toll free) Ext. #3
Fax: 540-373-2690
States Served: CT, DC DE, GA, ME, MD, MA NC,
NH, NJ, NY, OH, PA, RI, PR, VI, Guam

Mediation of a Claim

The PACA Division offers mediation services to anyone wishing to file a complaint. Mediation is an effective way to resolve disputes, since it places the resolution of the dispute directly in the hands of the interested parties. It provides an outlet for settling differences outside of the legal system, strengthens business relationships, and provides a forum where both parties can air their differences in a neutral atmosphere. Mediation sessions can be held face to face or over the telephone. All PACA personnel who handle disputes are trained in mediation and can mediate your dispute upon request provided both parties are agreeable. There is no additional cost to mediate a dispute beyond the initial \$100 filing fee.

Steps in Handling Informal Claims

Upon receipt of the required documentation, a PACA representative will review the claim to determine whether there is proper basis for a claim and whether the dispute seems appropriate for mediation.

Once the claim is opened, the other party is contacted either regarding its willingness to mediate a resolution, or for its version of the dispute and supporting documentation. (If the complaint involves questions concerning the accuracy of an accounting, the matter may be scheduled for audit by a PACA representative without contacting the other party.)

If mediation is refused or deemed inappropriate, given the specifics of the claim, both parties will be given the opportunity to explain their position and respond to the other party's arguments. A PACA representative will then provide an analysis of the claim based on the statements and evidence submitted by the parties and the legal authority relevant to the subject matter.

Using the informal analysis as a basis, the PACA representative will again attempt to negotiate an informal settlement with the parties.

If an informal settlement cannot be reached, the complaining party ("complainant") is given the opportunity to file a formal claim. PACA representatives are available to mediate the claim at all stages up to the time the complete formal claim file is referred to the headquarters office.

Steps for Filing a Formal Complaint

The formal claim must be submitted in an original and two copies, along with the \$500 processing fee. The formal claim is then served upon the opposing party ("respondent"), who is given 20 days from the date of receipt of the claim to file an answer. Any report of investigation prepared by the USDA is also served upon the parties at this time. A bond in double the amount of the claim must accompany a formal claim filed by nonresidents of the United States.

Formal Complaint Sample

S A M P L E (SEE INSTRUCTIONS ON BACK)

UNITED STATES OF
AMERICA BEFORE THE
SECRETARY OF AGRICULTURE
P.A.C.A. DOCKET NO. _____ (Fill in the PACA file number)

(Correct Trade Name)) Complainant)
)
 v.) COMPLAINT
)
(Correct Trade Name)) Respondent)

Complainant above-named respectfully alleges:

- That complainant is (use one of a-d):
 - an individual
 - an individual, (name), doing business as _____
 - a partnership, composed of (give names of partners), doing business as _____
 - a corporation
whose post office address is _____.
- That complainant is informed and believes that respondent is (use one of a-d):
 - an individual
 - an individual, (name), doing business as _____
 - a partnership, composed of (give names of partners), doing business as _____
 - a corporation
whose post office address is _____.
- That respondent, at the time of the transaction(s) involved herein, was licensed, or was subject to license, under the Perishable Agricultural Commodities Act of 1930, as a dealer, commission merchant, and/or broker.
- That on or about the _____ day of _____, 20____, in the course of interstate (or foreign) commerce, complainant, by oral (or written) contract sold to the respondent _____ truckload(s) (or carload(s)) of _____ (kind of commodity), being a perishable agricultural commodity, at the agreed price of \$ _____ (if interest is noted on your invoices and you wish to pursue it, please report the interest rate noted on the invoice. Example: "at the agreed price of \$ _____ plus xx % interest per annum.")
- That said (kind of commodity) was inspected at point of shipment on or about the _____ day of _____, 20____, the report on which inspection is set forth in certificate attached hereto as Exhibit No. _____. (This paragraph may be omitted if no inspection was performed at shipping point.)
- That said contract was negotiated by _____, a broker, located at _____, who acted in negotiating such sale as agent for both complainant and respondent. (This language should be modified, if necessary, to conform to the facts in each individual case, or omitted entirely if no broker is involved.)
- That complainant shipped on _____ (date(s)), from loading point(s) in the State (or Country) of _____, in interstate (or foreign) commerce, to respondent (or state the name of the consignee if other than respondent), at

- _____ in the State of _____, the kind, quality, grade, and size of commodity called for in said contract of sale and in the manner agreed upon. (Modify this language, if necessary, to conform to the facts.)
8. That respondent accepted the _____ (kind of commodity) upon arrival at the contract destination. (If respondent accepted the commodity at an intermediate location, this may also be indicated here.)
 9. That respondent has failed, neglected, and refused to pay complainant the agreed purchase price of the (kind of commodity) (or has paid complainant only \$ _____, leaving a balance due of \$ _____, which it has since failed, neglected, and refused to pay.) (Modify to fit the nature of the contract, if other than a purchase and sale.)
 10. That the matters and actions set forth herein constitute a violation by respondent of section 2 of the Perishable Agricultural Commodities Act.
 11. That there is now due and owing complainant from respondent the sum of \$ _____ (if applicable, "...plus XX% interest"), no part of which has been paid.
 12. Complainant's exhibits, numbered 1 to _____, inclusive, are original, or true copies of original papers relating to the matters involved herein and are attached hereto as part of this complaint.

WHEREFORE, complainant prays that a copy of this complaint be served upon the above-named respondent and that he (it) be required to answer the charges herein stated in writing with such time as the Secretary may require; that, upon the record made, either with or without formal hearing, as provided in the Act or in the regulations, and by appropriate order, the complainant be awarded such amount of damages as he (it) may be entitled to receive according to the facts established, and that the Secretary also make such other and further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Dated this _____ day of _____, 20____.

(Correct Trade Name)
Complainant

(Signature)
Title: (Owner), (Partner), (President), etc.

(Name of person signing complaint), being first duly sworn, says that he (she) has read the foregoing complaint and knows the contents thereof and that the same is true, except as to matters therein stated on information and belief, and as to such matters he (she) believes it to be true, and that he (she) is duly authorized to sign the complaint on behalf of the complainant.

(Signature of Person Signing Complaint)

Subscribed and sworn to before me this _____ day of _____, 20____. (Signature of Notary Public)

(Notary Stamp or Seal)

SUGGESTIONS FOR PREPARING FORMAL COMPLAINTS UNDER THE PACA INVOLVING FAILURE TO MAKE PAYMENT

1. ***THE SAMPLE OUTLINE SHOULD NOT BE FILLED IN.*** It is intended merely as a guide. Choose only the wording that applies to your particular case. Paragraphs 3 and 10 may be copied as they appear on the outline. You do not need to use Paragraphs 5 and 6 unless a broker or shipping point inspection was involved, respectively. For reference, number each paragraph of your formal complaint.
2. An **original and 2 copies** of the formal complaint are needed. If more than one respondent is involved, an extra copy of the complaint must be submitted for each additional respondent.
3. The caption or heading of the complaint must show the correct trade name of both complainant and respondent.
4. Paragraphs 1 and 2 of the complaint must accurately describe your and respondent's legal makeup. For example, if a partnership, the name of each partner must be shown. The information on respondent appears in the accompanying letter from the USDA (Department). Copy this information into the heading and paragraph 2 of the complaint.
5. The complaint must contain the following basic allegations:
 - a. That the commodity in question is a fresh or frozen fruit or vegetable within the jurisdiction of the PACA (see outline, paragraph 4) as a perishable agricultural commodity.
 - b. That the transaction(s) involved interstate or foreign commerce (see outline, paragraph 4).
 - c. That you complied with the contract requirements (see outline, paragraph 7).
 - d. That respondent has violated Section 2 of the Act by failing to live up to its responsibilities (see outline, paragraph 10).
 - e. That this is the amount of damages you claim and how you computed this amount (see outline, paragraphs 9 and 11).
6. You can show interstate commerce by listing the point of shipment and the intended or contract destination. You can show foreign commerce by establishing the country of origin of the product. **It must be shown that the goods were either received or shipped in interstate and/or foreign commerce or that the contract was made with the understanding that the shipment would move in interstate or foreign commerce.**
7. Original or true copies of pertinent papers relating to the transaction should accompany the complaint as exhibits. Attach a ***COMPLETE SET OF NUMBERED EXHIBITS TO EACH COPY*** of the formal complaint.
8. Exhibits must be numbered and referred to, either individually or together, in a separate paragraph (see outline, paragraph 12).
9. The original and all copies of the formal complaint should be signed by a principal of the complaining firm, preferably the owner, a partner, or an officer. Persons other than those mentioned above may sign the complaint if they are duly authorized by the complainant to act on its behalf. However, the person signing the complaint should have firsthand knowledge of the transactions involved.

10. The original of the complaint should be *signed and sworn* to before a notary public. The name of the person who signed the complaint should appear in the verification statement. The notary's signature, seal (in those States requiring a seal), and commission expiration date should appear on ALL copies of the complaint.

11. In complaints involving \$30,000 or less, the Hearing Officer will consider the contentions submitted by complainant and respondent in the complaint and answer, sworn statements of fact and any report of investigation prepared by the USDA. Consequently, it is important that all papers relating to the transaction(s) be made part of the file, either by attachment to sworn statements and depositions or as separate exhibits.

12. Complaints involving more than \$30,000 will be decided without oral hearing unless requested by one of the parties.

13. Each party to the dispute is responsible for proving facts it claims to be true but which are in dispute.

14. Any payment received from respondent while the complaint is pending, or after decision by the Secretary, should be reported at once in writing.

15. If you wish to pursue accrued interest at the rate stated on your invoice(s), this declaration must be made in your formal complaint to be awarded. Please state the total amount owed for your invoices, and add a statement such as, "plus 18 percent annum." (Paragraph 11.) Do not calculate the actual amount of the interest, since interest accrues until the decision and order have been issued.

16. The Sample Outline is only a guide. ***DO NOT FILL IT IN!***

Default. Failure to file an answer within the time prescribed constitutes a waiver of hearing and an admission of the facts alleged in the claim and will result in the issuance of a default order requiring the respondent to pay the amount claimed in the formal claim.

Filing an Answer. The answer should be filed in triplicate and should include either:

- A precise statement of the facts that constitute the grounds of defense, including any set-off or counterclaim, and a specific admission, denial, or explanation of each of the allegations of the complaint, unless the respondent is without knowledge, in which case the answer should so state; or
- A statement that the respondent admits all of the allegations of the complaint; or
- A statement containing an admission of liability in an amount less than that alleged in the formal complaint, and a denial of liability for the remainder.

NOTE: If the answer includes a counterclaim, a \$500 handling fee is also required.

Admission of Liability. If the contents of the answer include an admission of liability for an amount less than the amount of the complaint, the USDA may issue an order requiring the respondent to pay the undisputed amount.

Oral Hearings Versus Documentary Procedure. When the amount of damages claimed, either in the complaint or counterclaim, exceeds \$30,000, either party may request an oral hearing. If an oral hearing is not requested, or when the amount of damages claimed is less than \$30,000, the matter will proceed pursuant to the documentary procedure provided in the Rules of Practice under the PACA. See 7 C.F.R. § 47.20.

Documentary Procedure — A Brief Overview

Under the documentary procedure, the pleadings of the parties, if verified (see following page), and any report of investigation prepared by the USDA are considered evidence in the proceeding. In addition, the parties are given the opportunity to file the following:

Complainant's Opening Statement. Within 20 days after service of respondent's answer, complainant may file a verified opening statement accompanied by any pertinent documents, which must be identified in the statement. If the answer is verified, complainant's evidence concerning the allegations of the answer should be included in the opening statement.

Respondent's Answering Statement. Within 20 days after service of complainant's opening statement, or service of notice by USDA that complainant has not filed an opening statement, respondent may file a verified answering statement accompanied by any pertinent documents, which must be identified in the statement.

Complainant's Statement in Reply. If the respondent files an answering statement, complainant may, within 20 days after service thereof upon complainant, file a verified statement in reply, accompanied by any pertinent documents, which must be identified in the statement.

Briefs. After the conclusion of the presentation of evidence, USDA will notify the parties that they may file briefs within 20 days after the receipt of such notice. The brief is for the purpose of discussing the evidence previously provided and to give the presiding officer guidance concerning the legal issues. The brief, even if sworn to, is not considered evidence under the documentary procedure, and new evidence may not be offered in the brief.

NOTE: When you make a claim or respond to a claim, your complaint, answer and statements should be sworn to and notarized if it is to carry any evidentiary weight.

Verification. Verification should be made under oath of any facts set forth in a pleading or statement by the person who signs the pleading or statement. Certification by a notary public alone, without a sworn affirmation from the individual attesting to the facts stated, is not sufficient. The form of verification used should be essentially as follows:

_____, being first duly sworn, says that he/she has read the foregoing document and knows the contents thereof and that the facts set forth therein are true, except as to matters therein stated on information and belief, and as to such matters he/she believes them to be true, and that he/she is authorized to sign the document. Subscribed and sworn to before me this day of _____.

_____(Notary Public)

After the time for filing briefs has expired, the examiner prepares a report in the form of a final order either awarding damages to the claimant or dismissing the complaint, as the circumstances may warrant.

Oral Hearing Procedure — A Brief Overview

Prior to scheduling the hearing, the parties are given the opportunity to file deposition and/or subpoena applications.

After the time for filing applications has expired and the depositions have been taken and/or the subpoenas have been served, the examiner will set a time and place for the hearing.

NOTE: Hearings are typically held near the place of business of the respondent.

Prior to the close of the hearing, or within 20 days thereafter, each party may file a claim for fees and expenses incurred in connection with the oral hearing.

A transcript of the testimony at the hearing is prepared and submitted, with exhibits attached, to the examiner for the preparation of a report.

The examiner prepares a report in the form of a final order either awarding damages to the claimant or dismissing the complaint, as the circumstances may warrant.

What Happens After an Order Is Issued

Reconsideration of Orders. A petition to reconsider an order must be filed with the hearing clerk within 20 days from the date of service of the order. The petition must state specifically the matters claimed to have been erroneously decided and the alleged errors. The filing of a petition automatically sets aside the order pending final action on the petition.

Right of Appeal. Either party adversely affected by a reparation order may, within 30 days from the date of the order, file an appeal in the U.S. District Court for the district where the hearing was held, if applicable, or, if the complaint was handled under the documentary procedure, the district where the respondent is located. Filing the following with the district court clerk perfects the appeal:

- A notice of appeal;
- A petition in duplicate citing the prior proceedings before the USDA and the grounds upon which the petitioner is relying to defeat the right of the opposing party to recover the damages claimed;
- Proof of service of the petition upon the opposing party; and
- A bond in double the amount of the reparation award conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, should the appellee prevail.

Unpaid Orders/Sanctions/License Suspension. Licensees are given 30 days from the date of the order to either make payment in full as required by the Order, or to file an appeal. Unless a licensee shows to the satisfaction of the USDA within 5 days from the expiration of the period allowed for compliance with the order, that it has either paid the award or filed an appeal, its

license will automatically be suspended. The suspension will remain in effect until the award is paid. (In the case of an appeal, if the appellee prevails or the appeal is dismissed, the automatic license suspension becomes effective 30 days from the date of judgment on appeal.)

Enforcement of Reparation Awards and Sanctions. If an Order (Award) goes unpaid and has not been appealed or petitioned within 30 days of the date of the Order, it becomes final. At the expiration of an additional 5 working days, the PACA license of the offending firm is automatically suspended, and the PACA Division publishes a press release to that effect. If the firm is not licensed under the PACA, it can neither obtain a license nor legally continue to operate in the produce industry. In either case, the responsibly connected individuals, owners, partners, limited liability company members, corporate officers, and holders of more than 10 percent of the stock become subject to employment sanctions. Another PACA licensee may employ a responsibly connected individual under sanction only after posting a satisfactory bond.

The winner of the award may, within 3 years of the date of the order, file in the nearest U.S. District Court to have the award reduced to a court judgment requiring payment. If the judgment is not satisfied, the offending firm will then be subject to the penalties available to that court, which can include attachment of assets (lien).

The PACA Division monitors and investigates the activities of such firms and individuals to assure that they abide by their sanctions. This is accomplished by contacting trade-members and conducting onsite investigations as warranted. If the PACA Division finds that firms or individuals are operating in violation of their sanctions, it will prepare a case for prosecution in the U.S. District Court to seek injunctive relief and monetary penalties. The PACA Division can also extend the sanction period against individuals who seek employment in the industry in violation of their sanctions. The PACA Division greatly appreciates and relies heavily on information provided by law-abiding trade members to assure compliance with sanctions.

More on PACA's Mediation Services

What is mediation? Mediation is a voluntary, confidential process in which a trained, impartial person helps people examine their disagreement, identify and consider options and carefully consider possible resolutions. A mediator has no decision making authority. Unlike a judge or an arbitrator, a mediator does not decide what is “right” or force a decision on either party.

What happens in mediation? The mediation process focuses on the problem, not the people or their positions. It provides a neutral setting with a trained PACA mediator who helps the parties work out a solution that meets the interests of both sides. Each party is given the opportunity to explain his/her point of view, what the dispute is about, what the issues are, and how he/she would like to see the situation resolved. After each side has presented information, the mediator clarifies the issues in neutral language that focuses on the issues, not the people involved. The process promotes calm and rational discussion in order to identify goals and construct a plan that will benefit all parties.

What are the benefits of mediation? The mediation process provides a non-threatening, informal procedure as an initial step in resolving conflicts. Mediation provides the following benefits:

- Participants control the outcome.
- Mediation is forward-looking.
- Mediation can preserve and strengthen business relationships.
- Mediation is creative.
- Mediation is confidential.
- Mediation can be fast.
- Mediation is likely to be successful.

Where are mediations held? Mediations can be conducted through a telephone conference call or in a face-to-face meeting held in a location acceptable to both parties.

How long does mediation take? Because mediation is a flexible process, it resolves disputes quickly and efficiently. Most mediation sessions are conducted within a few hours, but some may require several sessions, depending upon the complexity of the issues to be resolved.

What is the outcome of mediation? Participation in mediation is voluntary, and no one is forced to reach an agreement or to accept specific settlement terms. Mediators help the parties develop and agree upon a realistic, workable solution to their problem based on their needs and interests. If parties come to an agreement that is mutually acceptable, the agreement is written down in clear, specific language and all parties sign the agreement. However, if no agreement is reached, the parties “agree to disagree” and mediation is closed and all administrative and other remedies remain in place. The mediation process and discussion are confidential and may not be used for other purposes as defined by the courts.

How much does mediation cost? Other than the initial informal complaint filing fee (\$100), mediation is a free service provided by the PACA Division. There may be costs associated with mediation sessions, such as when outside experts are used by the mediating parties, or when other services are required to resolve a dispute, but generally there is no cost for the mediation service itself.

How do I request mediation? You may request mediation when you file a complaint under the PACA, or when you receive notice that a claim has been filed against you, or at any time thereafter, up to the time a formal complaint has been referred to the PACA Headquarters Office for a formal ruling.

How the PACA Trust Works

The PACA Division's dispute resolution and mediation services are important tools that produce businesses can utilize to resolve disputes that sometimes occur between trading partners. But what can a produce business do when it is owed money by a customer who has suddenly gone out of business or filed for bankruptcy protection?

When a supplier sells produce to a buyer, the supplier automatically becomes eligible to participate in the trust. The PACA trust provisions require that dealers maintain sufficient trust assets to satisfy their obligations to sellers of perishable agricultural commodities. In the case of a business failure, the debtor's trust assets are not available for general distribution to other creditors until all valid trust claims have been satisfied. Because of this, suppliers that file for trust protection have a far greater chance of recovering money owed them when a buyer goes out of business.

How to Preserve Trust Benefits. Two methods are available to PACA licensees for preserving their right to trust benefits:

- By a separate mailing of the trust notice to the buyer; or
- By giving notice to the debtor on the invoice. If the licensee uses this method, the following wording, exactly as shown, must appear on the face of the invoice:

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.

Unlicensed growers and small produce suppliers who want to preserve their trust right to trust benefits must provide a separate trust notice to the buyer or agent. A trust notice must be in writing, must include the statement that it is a notice of intent to preserve trust benefits and must include information that establishes for each shipment:

- The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable.
- The date of the transaction, commodity, invoice price, and terms of payment.
- The date of receipt of notice that a payment instrument has been dishonored (if appropriate).
- The amount past due and unpaid.

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, e.g., a grower's agent or a collect and remit broker, also has the duty to preserve its principal's right to trust benefits by filing a timely notice of intent to preserve trust benefits with the purchaser of the

produce. NOTE: The principal must also preserve its own right to trust benefits by filing a timely notice of intent to preserve trust benefits with its agent.

Time Restrictions on Filing. Notification, either on the invoice or by separate mailing of the trust notice, must be given within 30 days from the date payment was due, or from receiving notification that a timely submitted payment was dishonored.

Payment Terms. Terms for payment *cannot exceed 30 days* from the date of acceptance to qualify for trust protection. Payment terms other than the PACA prompt payment terms (usually 10 days) must be agreed upon by the parties, in writing, before entering into the transaction.

Trust Assets Include:

- Perishable agricultural commodities received in all transactions.
- All inventories of food or other products derived from such perishable agricultural commodities.
- All receivables or proceeds from the sale of such commodities and food or products derived therefrom.

Enforcing the Trust. If a seller has preserved its right to trust benefits under the PACA trust provisions, the buyer should be holding the proceeds from the resale of the seller's produce "in trust." If the buyer fails to remit timely payment to the seller, the seller can file an action in U.S. District Court seeking to enforce payment under the trust.

It is common for a trust enforcement action to seek a temporary restraining order freezing the bank accounts of a buyer until the trust creditor is paid. Many produce sellers have found this as a very effective tool to recover payment for produce. Attorneys that specialize in agricultural law, such as the PACA, advertise in produce industry publications. Sellers may also seek attorney referral through industry trade groups as well as their local bar association.

If a seller is notified that one of its customers has filed for bankruptcy protection, and the seller has properly preserved its right to trust benefits, the seller should give notice to the bankruptcy court that it is a priority creditor under the PACA trust provisions (7 U.S.C.499e(c)). Priority creditor status should be indicated on the "Proof of Claim" submitted to the clerk of the bankruptcy court. Under bankruptcy law provisions, trust creditors will have priority to be paid first from the PACA trust assets. Trust assets include any produce inventory, products derived from that produce, as well as cash or accounts receivable generated from the resale of produce.

Disciplinary Procedures and Consequences

USDA may penalize a licensee who repeatedly and flagrantly violates the Act. A disciplinary action may result in a suspension or revocation of the firm's PACA license. In lieu of suspension or revocation, the Secretary of Agriculture may assess a civil penalty of up to \$2,000 for each violation or for each day the violation continues. In addition, those who operate without a valid PACA license are subject to fines of up to \$1,200 for each offense and \$350 each day the offense continues. Court injunctions can be issued against those who persist in operating without a license.

Unfair Conduct. Some examples of unfair conduct include, but are not limited to, the following:

- Rejecting without reasonable cause produce bought or contracted to be handled on consignment.
- Failure to pay promptly the agreed purchase price of produce that complies with the contract terms.
- Discarding, dumping, or destroying without reasonable cause any produce received to be sold on behalf of another firm.
- Failure or refusal to account truly and correctly or to make full payment promptly for produce shipped on consignment or on joint account.
- Misbranding or misrepresentation of grade, quality, quantity, weight, state, or country of origin of fruits and vegetables.
- Alteration or forgery of an official USDA inspection certificate.
- Submitting an application for license containing false or misleading information.
- Failure to provide records upon demand to a duly authorized representative of the USDA.
- Employing any restricted individual without obtaining USDA approval and/or posting a bond.

Reporting Unfair Trade Practices. Any interested person, other than an employee of an agency of the USDA administering PACA, may file a written notification of any violation of the PACA by any commission merchant, dealer, or broker. Official certificates of the United States Government or States or Territories of the United States and trust notices may also constitute written notification for the purpose of conducting an investigation.

The identity of any person filing a written notification is confidential information. The identity of such person and any portion of the notification to the extent that it would indicate the identity of such person are specifically exempt from disclosure by the PACA Division under the Freedom of Information Act.

Investigation. If the USDA determines that there are sufficient grounds to initiate an investigation of a complaint made through written notification, the subject of the investigation will be given notice of the investigation and of the nature of the alleged violation(s) of the Act.

The law requires that not later than 180 days after providing the initial notification, the USDA will provide the subject of the investigation with notice of the status of the investigation, including whether USDA intends to issue a complaint, terminate the investigation, or continue or expand the investigation.

USDA will provide additional status reports at the request of the subject being investigated and will promptly notify the subject whenever the investigation is terminated.

Hearings. If an investigation substantiates the existence of violations of the PACA, USDA may choose to file a disciplinary complaint against the alleged violator firm. The firm will be served with the complaint and afforded the opportunity to request a hearing before a USDA administrative law judge.

Hearings are usually held near the alleged violator firm's place of business.

Sanctions. In determining the appropriate sanction, USDA considers the seriousness and the nature of the violation(s) along with the number of violations by the firm and the number of times that the firm has been warned about such violations. Revocation of the license is the most severe penalty that can be imposed. In this instance, the responsibly connected individuals are totally barred from doing business or being employed by PACA licensees for a 1-year period.

Effects of Sanctions on Responsibly Connected Individuals. When a firm has had its PACA license suspended or revoked, or has been found to have committed repeated and flagrant violations, the responsibly connected persons are automatically subject to employment and relicensing restrictions in the fruit and vegetable industry. The restrictions are mandated by law, and there is no authority to waive the relicensing and employment restrictions or to exempt any person from them.

A responsibly connected determination may be challenged by requesting a review by the PACA Division Director. The Director's determination can be appealed to an administrative law judge, and then to the judicial officer, who issues the agency's final order on the issue. USDA's final order can be challenged in the U.S. Court of Appeals.

FOB Good Arrival Guidelines

PACA marketing specialists use the following guidelines in the FOB Good Arrival Guidelines Table to interpret the tolerances allowable for various fresh fruits and vegetables trucked to locations that are 1 to 5 days away from the shipping point. The tolerances shown in the table are based on the U.S. Grade Standards for those commodities that have standards, and additionally, are based on judicial interpretations of the terms “FOB” and “suitable shipping condition” as defined in the PACA regulations. “Suitable Shipping Condition” means that the product meets contract terms at shipping point and will not deteriorate abnormally given normal transit time and conditions. The information in the table can be used by receivers at destination to determine whether the product was loaded in suitable shipping condition.

USING THE TABLE

The numbers listed in the “U.S. Grade Standards” and “Maximum % of Defects Allowed” columns of the table represent the maximum total percentage of damage (defects) allowable for the commodity to meet the terms of a free on board (FOB) sale at destination, the maximum percentage of serious damage allowable, and the maximum percentage of decay or very serious damage allowable.

Example: The series 15-8-3 means 15% total damage, including not more than 8% serious damage, including not more than 3% decay.

For those commodities showing only two numbers, like artichokes, there is no separate tolerance for defects causing serious damage. If the product is sold without a specified grade, the numbers represent the maximum percentage of condition defects allowable.

Where an asterisk (*) appears next to the commodity name, the U.S. Grade Standards specify special tolerances and types of defects, and should be consulted before making a judgment regarding whether the inspection results show a breach of contract. There are also several abbreviations used in the table: “stds” = U.S. Grade Standards, “vsd” = very serious damage, “int.” = internal, “ext.” = external and “sda” = sunken discolored areas.

As previously stated, the guidelines below primarily apply to truck shipments; however, produce shipped by rail, where transit periods are substantially longer than 5 days, will be subject to the same maximums allowed for truck shipments, as will international ocean shipments, unless precedent has established, or adequate proof is presented, that foreign markets have come to expect and tolerate a higher percentage of defects.

Although the table below provides guidance concerning whether an FOB contract has been breached, many factors enter into the determination of whether a load of produce meets the terms of a particular contract. For example, if product is sold FOB acceptance final rather than merely FOB, an inspection showing a breach in one instance may not show a breach in the other. Some other considerations may be the timing of the inspection, air temperatures maintained by the carrier, whether or not transit time was normal, the location of the product when it was inspected, and how much of the load was inspected.

Free on Board (FOB) Good Arrival Guidelines Table

Please note that the information contained in the FOB Good Arrival Guidelines Table does not have the force of law and is subject to judicial review at any given time.

COMMODITY	U.S. GRADE STANDARDS	MAXIMUM % OF DEFECTS ALLOWED	OPTIMUM TRANSIT TEMP (F)†	CHILLING INJURY?
A				
Anise, Sweet	10-1	15-3	32-36‡	
Apples	10-5-1	15-8-3	30-32	
Apricots	10-5-1	15-8-3	32	
Artichokes	10-2	15-4	32	
Asparagus*	10-5-1	15-8-3	32	
Avocados	10-5-1	15-8-3	40-55	Yes
B				
Bananas	No Stds.		56-58	Yes
Beans, Fava	No Stds.	15-3	32‡	
Beans, Lima	10-5-1	15-8-3	41-43	
Beans, Snap*	13-5-1	18-8-3	40-45	Yes
Beets*	10-5-1	15-8-3	32	
Blackberries & Dewberries	10-5-1	15-8-3	31-32	
Blueberries*	12-6-2 (Destination)	15-8-3	31-32	
Broccoli*	10-2	15-4	32	
Brussels Sprouts*	10-2	15-4	32	
C				
Cabbage*	10-2	15-4	32	
Cantaloupes	12-6-2 (Destination)	15-8-5	36-41	Yes
Carrots, Bunched*	10-5-1	15-8-3	32	
Carrots, Topped*	10-5-2	15-8-4	32	
Carrots, Trimmed	10-5-1	15-8-3	32	

FOB Good Arrival Guidelines Table

Tops *				
Cauliflower*	10-5-1	15-8-3	32	
Celery*	10-2	15-4	32	
Cherries, Sweet (US #1)*	12-6-2 (Destination)	15-8-3	30-32	
Cherries, Sweet (Wash. #1)	24-6-2	30-8-3	32	
Com*	10-2	15-4	32	
Cranberries*	5-5 (Destination)	?	36-40	
Cucumbers*	10-1	15-3	50-55	Yes
E				
Eggplant	10-1	15-3	46-54	Yes
Endive, Escarole, Chicory	10-5-2	15-8-4	32	
G				
Garlic	10-2	15-4	32-34	
Grapes, American Type*	10-5-2	15-8-4	32	
Grapes, European Type*	12-4-1 (Destination)	15-6-3	31	
Grapes, Juice*	10-5-2	15-8-4	32	
Grapes, Muscadine*	10-5-2	15-8-4	34-36	
Grapefruit, Florida*	12-[7 vsd]-3 (Destination)	15-[8 vsd]- 5	50-60	Yes
Grapefruit, Texas*	See Stds.	15-[8 vsd]- 4	50-60	
Grapefruit, CA and AZ*	12-[7 vsd]-3 (Destination)	15-[8 vsd]- 5	58-60	
Greens, Beet*	10-5-1	15-8-3	32†	

FOB Good Arrival Guidelines Table

Greens, Broccoli & Collard	10-5-2	15-8-4	32†	
Greens, Dandelion*	10-5-2	15-8-4	32	
Greens, Mustard & Turnip*	10-5-2	15-8-4	32	
H				
Horse radish Root*	10-5-2	15-8-4	32	
K				
Kale	10-1	15-3	32	
Kiwifruit*	12-6-2 (Destination)	15-8-3	32	
L				
Lemons*	12-7-3 (Destination)	15-8-5	45-55	
Lettuce, Leaf	12-6-3	15-9-5	32	
Lettuce, Head (Iceberg)		15-9-5	32	
Limes*	10-5-3 (Destination)	15-8-5	48-50	Yes
M				
Mangoes	10-5-2	15-8-4	55	Yes
Melons, Honeydew	10-5-1	15-8-3	45-50	Yes
Mushrooms*	5-1	8-2	32	
N				
Nectarines*	12-6-2 (Destination)	15-8-3	31-32	
O				
Okra	10-5-1	15-8-3	45-50	
Onions, Grano/Granex*	10-2	15-4	32	

FOB Good Arrival Guidelines Table

Onions, Other Than*	5-2	8-4	32	
Onions, Green*	10-5-2	15-8-4	32	
Onions, Creole	10-2	15-4		
Oranges, Florida*	12-[7 vsd]-3 (Destination)	15-[8 vsd]-5	32-34	
Oranges, Texas	See Stds.	15-[8 vsd]-5	32-34	
Oranges, CA and AZ	12-7-3 (Destination)	15-8-5	38-48	Yes
P				
Parsley	5-1	8-3	32	
Parsnips	10-5-1	15-8-3	32	
Peas	10-5-1	15-8-3	32	
Peas, Snow	10-5-2	15-8-4	32	
Peaches*	14-7-2 (Destination)	17-8-4	31-32	
Pears, All Types*	10-5-1	15-8-3	32	
Peppers, Sweet and all others*	10-5-2	15-8-4	45-55	Yes
Pineapple*	See Stds.	15-8-4	50-55 (gm.) 45 (ripe)	Yes
Plums & Prunes (Italian)	See Stds.			
Plums, All Other Types*	12-6-2 (Destination)	15-8-3	32	
Potatoes, Seed	See Stds.			
Potatoes, Table*	10-[7 int., 7 ext]-2 (Destination)	14-[10 int., 10 ext]-3	50-60 early 40-50 late	Yes
R				
Radishes	10-1	15-3	32	

FOB Good Arrival Guidelines Table

Raspberries	10-5-1	15-8-3	32	
Rhubarb*	10-1	15-3	32	
Romaine	10-5-2	15-8-4	32	
S				
Shallots*	10-5-2	15-8-4	32	
Spinach, Plants	10-5-1	15-8-3	32	
Spinach, Leaves	10-1	15-3	32	
Spinach, Bunched	12-6-3	18-9-5	32	
Squash, Summer Types	10-5-1	15-8-3	41-50	Yes
Squash, Winter Types	10-2	15-4	50-55	
Strawberries	10-5-2	15-8-3	32	
Sweet Potatoes	10-5-2	15-8-4	55-60	Yes
T				
Tangerines, Florida*	12-[7 vsd]-3 (Destination)	15-[8 vsd]-5	40	
Tangerines, Other	12-[7 vsd]-3 (Destination)	15-[8 vsd]-5	40	
Tomatoes, Greenhouse	10-5-1	15-8-3		
Tomatoes, Fresh & Cherry	15-[10 SDA][10 other]-[5 vsd]-5 (Destination)	20-[15 SDA][15 other][8 vsd]-8	46-50 pink 55-70 gm.	Yes
Tomatoes on the Vine	10-5-2	15-8-4		
	Vines (separate tolerance)			
	10-5	15-8		

FOB Good Arrival Guidelines Table

Turnips*	10-5-1	15-8-3	32
W			
Watermelon*	10-5-2	15-8-4	50-60

* = Additional Tolerances Apply! = Additional Tolerances Apply!

† = Unless otherwise noted, all temperature data cited is from USDA's Agriculture Handbook Number 669, "Protecting Perishable Foods During Transport by Truck" (September 1995).

‡ = University of California – Davis, Produce Information, "Properties and Recommended Conditions for Storage of Fresh Fruits and Vegetables" - <http://postharvest.ucdavis.edu>.

USDA Inspection Services

The official USDA inspection certificate is a cornerstone of fair trading practices in the marketing of fruits and vegetables. This document certifies the quality and condition of goods shipped, supports breach of warranty claims, and substantiates (or disproves) the markings on consumer and commercial packages. It reflects the results of an inspection by an unbiased, professional third party and, as such, it is prima facie evidence (presumption of fact) in administrative and civil proceedings.

Who May Request an Inspection? An application for inspection may be made by any financially interested person or authorized agent. This includes dealers, commission merchants, common carriers, and brokers. Those who are merely negotiating for a purchase are not yet “financially interested.” A broker is financially interested only to the extent of the brokerage and expenses incident to the sale.

Value of Shipping Point vs. Receiving Point Inspections

Shipping point inspections:

- Prevent misbranding in the marketplace by ensuring that products meet the descriptions on the packaging; and
- Provide the shipper with a reliable means of monitoring the quality of the products being shipped.

Receiving point inspections:

- Serve as proof of the damages claimed by receivers;
- Can be good evidence to support a carrier claim;
- Can also be used on consignment shipments to show poor condition on arrival to justify possible slow or low sales of produce; and
- May be used to establish that produce dumped had no commercial value.

All sellers and buyers should understand the terms “appeal inspection,” “restricted inspection,” and “unrestricted inspection.”

- If a buyer or seller is dissatisfied with the results of the first inspection, it may request an “appeal inspection,” which is usually performed by two inspectors who examine twice the customary number of samples.
- A “restricted inspection” is typically performed while the commodity is still loaded on the car or truck, in which case, samples are taken from that part of the load accessible to the inspector.
- In an “unrestricted inspection,” samples are taken from the entire load. As such, unrestricted inspections are better evidence of the condition of a load than restricted inspections.

NOTE: A buyer relying on a restricted inspection to justify a rejection should realize that the seller has the option of later getting an unrestricted inspection which might prove that it did comply with the contract, in which case, the seller could hold the buyer responsible for any losses suffered.

Appeal Procedure. Any financially interested party or the PACA Division may request an appeal inspection when the results of the original inspection are in question. An appeal inspection will be performed when:

- The lot is positively identified as the lot previously certified by means of trailer license, car or van number, or approved Federal or Federal-State Positive Lot Identification;
- The lot is misbranded and is positively identified;
- The complaint concerns a permanent factor (such as quality, grade, size, or weight) that would not have changed since the previous inspection;
- The complaint concerns a condition factor that may change, but the time lapse, temperatures, perishability of product and degree and type of deterioration makes it apparent that the condition was present at the time of the previous inspection; or
- Under certain circumstances, where it is obvious that procedures have not been followed, improper sampling was obvious, or there seems to be a lapse of grader judgment, and there are no complaints, the Fresh Products Branch may request that an appeal be performed.

A request for an appeal inspection will be denied when:

- The complaint concerns a factor which may have undergone a change of condition since the original (previous) inspection;
- The shipping point inspection was restricted to “samples taken,” submitted samples or other portions of the load that are not identifiable;
- A large number of containers from the original (previous) manifest are not accessible for sampling or have been disposed of;
- A lot is not positively identified and misbranding is not involved;
- The shipping point certificate was a warehouse/platform inspection, or the only identity of the lot is through a manifest certificate issued by a person other than a USDA inspector; or
- An appeal inspection has already been made on the lot.

Note Sheet Versus Certificate. Each certificate is based on notes made at the time of the inspection. The inspector’s note sheet becomes a part of the permanent record of the inspection. The information shown on the note sheet is not publicly available, but it can be disclosed to any financially interested party upon written request. Requests for copies of note sheets should be forwarded in writing to the Federal Supervisor or their State Program counterpart.

Interpreting a Certificate. The results of an inspection cannot necessarily be taken at face value, and must instead be interpreted in connection with the terms of the applicable contract. *For example*, in the bell pepper example used in our discussion of suitable shipping condition, where an inspection of the peppers at destination disclosed a total of 11 percent defects, including 4 percent scars, 6 percent turning red, and 1 percent decay, we stated that the bell peppers were sold with no grade specified. This means that only the condition (non-permanent) factors, or 7 percent of the defects, would count against the contract. That level of defects clearly would not be sufficient to establish a breach of warranty. Nevertheless, the grade statement on the inspection certificate would read: “Fails to grade U.S. No. 1 account condition defects.”

In contracts that specify a grade (U.S. No. 1, U.S. Extra Fancy, etc.), the percentage of quality

(permanent) defects may not exceed the percentages specified in the U.S. Grade Standard. In this instance, a certificate stating that the produce fails to grade account quality defects would establish a breach of contract by the seller.

Temperatures. A buyer's ability to hold a shipper responsible for the deteriorated condition of a product at destination will often depend upon the buyer's ability to show that the product was held at proper temperatures pending the inspection. Therefore, the inclusion of pulp temperatures on an inspection certificate is essential if the certificate is intended for use as evidence in a contract dispute.

For example, a destination inspection on strawberries sold FOB showing temperatures in excess of 40°F would typically be viewed as evidence of improper handling sufficient to void the warranty of suitable shipping condition. Likewise, a foreign survey that is otherwise sufficient, i.e. percentages of specific defects are given, sufficient samples taken, etc., may be viewed as inadequate evidence of a breach of warranty if there was a delay between arrival and inspection and the surveyor fails to note the pulp temperature on the survey.

Interpreting Foreign Inspections or Survey Reports. Often, when product is shipped outside the United States, the receiver does not have access to a Government inspection service that uses Workbook standard procedures and terminology. This presents problems in interpretation. The receiver can still obtain useful inspection results, however, by specifying to the foreign inspection service or surveyor certain criteria:

- An adequate number of samples should be chosen at random.
- Pulp temperatures should be reported.
- Defects should be carefully described and reported in average percentage terms.
- The product should be accurately described, e.g., brand markings, type of container, etc.
- The product, if inspected out of the container, should be properly identified with the transport service and container.

Using Altered or Forged Certificates. The alteration or forgery of any certificate of inspection issued under the authority of the USDA is considered a false and misleading statement under PACA provisions and is subject to the penalties as severe as license revocation. Section 14.11 (b) of the PACA states "Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this Act, the Produce Agency Act of March 3, 1927 (7 U.S.C., sec. 491-497), or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court." See 7 U.S.C. 499n.

Examples of USDA Inspection Certificates

		U.S. DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE http://FPBIInspections.ams.usda.gov		INSPECTION CERTIFICATE T-011-0718-01235	
CARRIER or LOT ID: PO 123776		APPLICANT: (1234567) MR PRODUCE, INC		REQUESTED: 4/7/2009 1:55 P M	
LOADING STATUS: UNLOADED		ANY TOWN, PA		STARTED: 4/8/2009 7:56 A M	
STATED BY: APPLICANT		SHIPPER: GROWERS FARM, LLC		COMPLETED: 4/8/2009 9:40 A M	
ADDITIONAL ID: NA		SALINAS, CA		PASSWORD FOR ONLINE ACCESS	
CARRIER TYPE: NA		MARKET OFFICE: NEW YORK, NY		JXXXXXXXXL6DGJEX8	
REFRIG UNIT: NA	DOORS: NA	INSP SITE: APPLICANT'S STORE		ESTIMATED FEE: \$151.00	
REMARKS: CHECKNO: 1345 CHECKAMT: \$151.00.					

LOT A (QAC) - BRUSSELS SPROUTS			
TEMP: 34° to 42°F	INSP CT: YES	NUMBER OF CONTAINERS: 560 CARTON(S)	ORIGIN: CA
MARKINGS: BRAND: TO PLESS MARKINGS: PRODUCE OF USA GROWERS FARMS LLC SALINAS CA NET WT 25 LBS			
PLI: NONE		OTHER ID: ILLEGIBLE, 1A225, 28336.	

INJURY	DAM	SER DAM	V.S. DAM	OFFSIZE/DEFECTS
NA	0	0	NA	QUALITY DEFECTS
NA	0	0	NA	DECAY
NA	0	0	NA	CHECKSUM

GRADE:	MEETS U.S. NO. 1.
LOT DESC:	LENGTH: 1 TO 2 INCHES DIAMETER: 7/8 TO 1-1/2, MOSTLY 1 TO 1-1/4 INCHES ICE: PACK ICE: NO ICE (20%), GOOD AMOUNT CRUSHED ICE (80%) TEMPERATURES(3): 35°F, 34°F, 42°F

I, the undersigned, a duly authorized inspector of the United States Department of Agriculture, do hereby certify that at the request of the applicant and on the date indicated, samples of the herein described product were inspected and the quality and/or condition as shown by said samples were as herein stated.		
Warning: Any person who knowingly shall falsify, make, issue, alter, forge, or counterfeit this certificate or participate in any such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.	Signature: 0117-JONRESE/5/5-S.	Date: 4/8/2009

FORM FV-8200 (1.0, 11.1)

FRESH ELECTRONIC INSPECTION REPORTING / RESOURCE CERTIFICATE

Web Address
- to view certificate.

To allow access to view the certificate.

TEMPERATURE shows lowest to highest pulp temperatures recorded.

Time and date inspection requested, started and completed.

OFF-SIZE AND DEFECTS Shows the percentages and defects found during the inspection.

Estimated fee for services rendered.

GRADE Shows the grade determinations meeting or failing to meet the grade applied.

Commodity Inspected

LOT DESCRIPTION Shows the size, color, and other needed inspection information.

INSPECTOR INFORMATION The inspector's name, facsimile signature and inspector's code.

		U.S. DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE http://fpbinspections.ams.usda.gov		INSPECTION CERTIFICATE		T-002-0234-00002	
CARRIER or LOT ID: L123456 NC				APPLICANT: MY PRODUCE COMPANY		PAGE 1 of 1	
LOADING STATUS: UNLOADED				REQUESTED	3/10/2004	11:32:00 AM	
STATED BY: _____		SHIPPER: YOUR PRODUCE COMPANY		STARTED:	3/10/2004	11:35:00 AM	
ADDITIONAL ID: NA				COMPLETED:	3/10/2004	12:45:00 PM	
CARRIER TYPE: MECH REFRIG. TRAILER		MARKET OFFICE: CHICAGO		PASSWORD:	897P52VMSTAN9SZI		
REFRIG. UNIT: ON	DOORS: OPEN	INSP SITE: APPLICANTS WAREHOUSE		ESTIMATED FEE:	\$128.00		
REMARKS: INSPECTION MADE DURING PROCESS OF UNLOADING							
LOT A (QAC) - BROCCOLI, BUNCHED ITALIAN SPROUTING							
TEMP: 32 TO 36 F		INSP CT: YES		NUMBER OF CONTAINERS: 200 CARTONS		ORIGIN: CA	
BRAND: 'FRESH AND GREEN' MARKINGS: 16 BUNCHES, CALIFORNIA GROWN, 23 LB. NET WEIGHT							
PLI: NONE				OTHER ID: GR: 181			
INJURY	DAM	SER DAM	V.S. DAM	OFFSIZE DEFECTS			
NA	21	5	NA	QUALITY DEFECTS (11 TO 28%) HOLLOW STEMS, TOUGH AND WOODY STEAMS			
NA	6	6	NA	DECAY (2 TO 12%)			
NA	27	11	NA	CHECKSUM			
GRADE	FAILS TO GRADE U.S. NO. 1 QUALITY						
LOT DESC:	LENGTH 6 TO 8, MOSTLY 6 1/2 TO 7 1/2 INCHES DIAMETER 2 1/2 TO 5, MOSTLY 3 TO 4 INCHES DECAY EARLY STAGES PACK ICE - GOOD AMOUNT						
LOT B (QAC) - BROCCOLI, BUNCHED ITALIAN SPROUTING							
TEMP: 31 TO 38 F		INSP CT: YES		NUMBER OF CONTAINERS: 100 CARTONS		ORIGIN: CA	
BRAND: 'FRESH AND GREEN' MARKINGS: 18 BUNCHES, CALIFORNIA GROWN, 23 LBS. NET WEIGHT							
PLI: NONE				OTHER ID: GR: 190, 205			
INJURY	DAM	SER DAM	V.S. DAM	OFFSIZE DEFECTS			
NA	2	0	NA	QUALITY DEFECTS (0 TO 6%) HOLLOW STEMS			
NA	4	0	NA	BRUISING (0 TO 6%)			
NA	0	0	NA	DECAY			
NA	6	0	NA	CHECKSUM			
GRADE	U.S. NO. 1						
LOT DESC:	LENGTH: 6 TO 8 INCHES, MOSTLY 6 1/2 TO 7 1/2 INCHES DIAMETER 2 1/2 TO 5, MOSTLY 3 1/2 INCHES PACK ICE - GOOD AMOUNT OF PACK ICE						
I, the undersigned, a duty authorized inspector of the United States Department of Agriculture do hereby certify that at the request of the applicant and on the date indicated, samples of the herein described product were inspected and the quality and/or condition as shown by said samples were as herein stated.							
WARNING: Any person who knowingly shall falsely make, issue, alter, forge or counterfeit this certificate or participate in such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.				Signature: 002		Date: 04/15/04	
				<i>J.M. Inspector</i>			

Where Do I Find . . .

Location of Load
Indicates whether load was unloaded, partly unloaded or loaded.

Name of Applicant and Shipper
Applicant is the financial-ly interested party that requested the inspection.

Time and Date of Inspection
Date and local time inspector began in-spection.

Carrier Identification
Shows trailer license plate number, railcar number, or other carrier or lot identification numbers.

Product Identification
For each lot inspected, this area lists product name, container brands or markings, state or country of origin, and the number of containers in the lot.

Temperatures
Shows lowest to highest pulp temperatures recorded for each lot.

Identification of Defects
Briefly identifies, line by line, each defect found in lot, with sample ranges in parenthesis if average of defect exceeds 5%.

Frequency of Defect Occurrence
Percentages show the extent to which each lot was affected by the indicated defect. Checksum line is present to deter alteration of defect percentages.

Description of Important Factors
This area shows detailed descriptions of decay and other important defects. Also shows size ranges, color of tomatoes, ripeness of fruits, and other factors of special importance.

Grade Statement
Shows whether each lot inspected for grade and condition satisfied the requirements of the specified grade.

Estimated Cost of Inspection
The total cost, including fees and travel expenses, as estimated at the time of service.

<p>Restrictions And Unusual Conditions Sampling restrictions and other factors affecting condition of lots, and other information noted at applicant's request.</p>	<p>Signature of Inspector Name of inspector that performed the inspection.</p>	<p>Office to Contact for Copies/Information Name of market office to contact for further information (See back cover).</p>
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Number of Containers/Inspector's Count: The number of containers in the lot or portion of lot inspected (or weight for bulk loads) is entered in this block of the certificate. The type of package or container in which the produce was shipped is also entered. When containers are of the standard types commonly used for the product, the generally accepted descriptions of "lugs," "crates," "baskets," "sacks," "cartons," etc. are entered. When products are shipped in unusual containers or in variations of a common type of container, a further description is necessary.

When the product is inspected in a carrier and no record is available showing the definite quantity, the approximate amount is shown, provided the load is apparently intact and the inspector is able to see the number of rows, layers, stacks, etc. in order to make a reasonably accurate approximation. In partly unloaded carriers, the exact or approximate number of packages remaining at the time of inspection is shown, not the amount originally manifested.

ID T	AVERAGE DEFECTS	Including DAMAGE SEA DAM.		Including SEA DAM % Damage		OFFSIZE / DEFECTS	OTHER
		%	%	%	%		
A	07	%	09	%	00	UNDERSIZE (1-2 25/32)	LOT A - AVERAGE APPROXIMATELY
	06	%	01	%	00	QUALITY DEFECTS (SCARS, NOT FAIRLY WELL FORMED) (2 TO 8%)	5% GREEN AND BREAKERS
	08	%	02	%	00	SUNKEN DISCOLORED AREAS (4 TO 10%)	20% TURNING AND PINK
	07	%	00	%	00	MOLDY STEMS	75% LIGHT RED AND RED
	02	%	07	%	02	DECAY	
B	20	%	05	%	02	CHECKSUM	MEETS SIZE AS MARKED
	04	%	00	%	X	QUALITY DEFECTS (NOT FAIRLY WELL SHAPED, SCARS)	LOT B - SIZE: 2 1/2 TO 2 INCHES IN
	06	%	01	%	X	BRUISING (2 TO 8%)	DIAMETER 2 1/2 TO 3 1/2 INCHES IN
	02	%	00	%	X	PITTED AREAS	LENGTH
	03	%	07	%	X	DECAY (0 to 5%)	NO UNDERSIZE
	15	%	04	%	X	CHECKSUM	DECAY EARLY STAGES INCLUDING
							2% AFFECTING WALLS AND CALYX
						1% AFFECTING STEMS	

This portion of the certificate typically lists, from left to right:

- The lot designations from above when more than one lot is to be certified;
- The average percentage of each size factor and/or defect found;
- The simple name of the size factor or defect described on that line; and
- Any "Other" pertinent information relating to size, quality or condition.

Lot: Whenever more than one lot is certified on a certificate, all of the information for each lot is identified by a letter designation "A," "B," "C" or "D." This letter designation is written in the space provided under "Lot" next to the first line of the information for each lot. To separate additional lots, a solid line is drawn immediately under the last line entry for that lot.

Average Defects: Only percentages of defects or offsize are reported in these columns. Percentages for color classifications are not reported in this section. Exact, whole percentages are reported (fractional percentages may be reported on the certificate only when reporting small amounts of decay or soft rot or when reporting peanuts or tree nuts where greater accuracy is required).

Checksum: The last entry in the average defects columns for each lot is the checksum. The checksum does not represent the total defects in the lot and is not to be used for determining percentages of No. 1 quality or for determining whether or not a lot grades or fails to grade. The checksum is simply a total of the numbers in the column, and, when all defects, of tops and roots or external and internal when applicable, and offsize factors are totaled, it is possible and permissible that the checksum may exceed 100.

Offsize/Defects: This section identifies the Offsize/Defects by name only and, when necessary, to show ranges. Descriptions of defects, if needed, are written in the "Other" section. The proper line-by-line

sequence to follow when reporting Offsize/Defects is size first, then quality and finally condition. Permanent defects are referred to as "quality" defects.

Ranges are reported in parenthesis immediately to the right of the common name of the defect. If the applicant requests a further breakdown of the ranges, this is detailed in the "Other" section.

Other: This section is used for reporting non-defective factors of size, quality or condition. These non-destructive factors include size ranges, defect and decay description, and other factors, which do not affect grade but customarily have been reported on certificates because of their importance to applicants. This area is not to be used to report quality or condition defects, which are not serious enough to score.

GRADE	EACH LOT: FAILS TO GRADE U.S. NO 1 ACCOUNT OF CONDITION
REMARKS	INSPECTION MADE DURING THE PROCESS OF UNLOADING

Grade: In this section, a statement is shown whether or not the lot inspected meets the requirements of the grade or other specifications on which the application was based. When there is more than one grade statement, each statement is preceded by the letter of the applicable lot(s). If there are not U.S. grade standards for the product and a quality and condition inspection is performed, the words "No established U.S. Grade" is entered next to the applicable lot heading. If the lot passes, the grade or specification it passes is written next to the letter of the lot(s), which it identifies.

Remarks: Any explanatory or qualifying statement(s) that are necessary to complete the certificate are made under this heading. In many cases, it is not necessary to make any statement under "Remarks," and if all points have been sufficiently covered under the various other headings of the certificate, this heading is left blank.

<p>WARNING: Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.</p> <p><small>FD-302 (Rev. 11-19-83) (Replace FD-302 (Rev. 11-19-83) and FD-302 (Rev. 11-19-83) which are obsolete)</small></p>	<p><small>the undersigned, a duly authorized inspector of the United States Department of Agriculture, do hereby certify that in the presence of the applicant and/or the here indicated witnesses of the herein described product were inspected and the quality and/or condition as shown by said samples were as hereon stated</small></p>	<p>ESTIMATED TOTAL</p>
	<p>Inspector's Signature</p>	

Inspector's Signature: Entered in this section is the signature of the inspector performing the inspection, or the supervising inspector authorizing the results of the inspection.

Market Office: The local duty office location (city and state) is entered in this block to identify which office the applicant can contact for more information. If there is no official office established at the duty location, the office location, which performs the billing and filing functions, is entered.

Estimated Total: The estimated total of all charges is entered in U.S. dollars and cents. Charges may include inspection fees, travel time, overtime charges, mileage charges and any other appropriate expenses incurred during the performance of the inspection.

Example of USDA Grade Standard



**United States
Department of
Agriculture**

**Agricultural
Marketing
Service**

**Fruit and
Vegetable
Programs**

**Fresh
Products
Branch**

United States Standards for Grades of Tomatoes on the Vine

Effective January 17, 2008

United States Standards for Grades of Tomatoes on the Vine¹

Effective January 17, 2008

General

51.2165 General.

Grades

51.2166 U.S. No. 1.

51.2167 U.S. No. 2.

Tolerances

51.2168 Tolerances.

Application of Tolerances

51.2169 Application of tolerances.

Size classification

51.2170 Size classification.

Definitions

51.2171 Similar varietal characteristics.

51.2172 Mature.

51.2173 Soft.

51.2174 Clean.

51.2175 Fairly well formed.

51.2176 Reasonably well formed.

51.2177 Tomatoes on the vine.

51.2178 Damage.

51.2179 Serious damage.

51.2180 Metric conversion table.

General**§51.2165 General.**

These standards shall apply to all types of tomatoes on the vine except for cherry type tomatoes and grape type tomatoes.

Grades**§51.2166 U.S. No. 1.**

"U.S. No. 1" consists of tomatoes on the vine of similar varietal characteristics (except when marked as mixed type or mixed variety), which are mature but not overripe or soft, clean, fairly well formed; which are free from decay, sunscald, and freezing injury, and free from damage caused by bruises, cuts, shriveling, puffiness, catfaces, growth cracks, scars, disease, insects, or other means (See §51.2167.). The tomatoes shall be attached to stems/vines. The vines shall not be brittle and shall be free from decay; and free from damage by mold or other means.

§51.2167 U.S. No. 2.

"U.S. No. 2" consists of tomatoes on the vine of similar varietal characteristics (except when marked as mixed type or mixed variety), which are mature but not overripe or soft, clean,

¹Compliance with the provisions of these standards shall not excuse failure to comply with the provisions of the Federal Food, Drug and Cosmetic Act, or with applicable State laws and regulations.

reasonably well formed; which are free from decay, sunscald, and freezing injury, and free from serious damage caused by cuts, shriveling, puffiness, catfaces, growth cracks, scars, disease, insects, or other means (See §51.2167.). The tomatoes shall be attached to stems/vines. The vines shall not be brittle and shall be free from decay; and free from serious damage by mold or other means.

Tolerances

§51.2168 Tolerances.

In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by count, are provided as specified:

(a) **Defects - (1) U.S. No. 1 grade.** (i) Tomatoes. Not more than 10 percent of the tomatoes in any lot may fail to meet the requirements of the grade, but not more than one-half of this amount, or 5 percent, shall be allowed for serious damage, including in this latter amount not more than 2 percent for tomatoes which are soft or affected by decay. In addition, not more than 10 percent of the tomatoes in any lot may be detached from the stem/vine.

(ii) Vines. Not more than 10 percent of the vines may fail to meet the requirements of the grade, but not more than one-half of this amount, or 5 percent, shall be allowed for decayed

stems/vines. (2) **U.S. No. 2 grade.** (i) Tomatoes. Not more than 10 percent of the tomatoes in any lot may fail to meet the requirements of the grade, including not more than 2 percent for tomatoes which are soft or affected by decay. In addition, not more than 10 percent of the tomatoes in any lot may be detached from the stem/vine.

(ii) Vines. Not more than 10 percent of the vines may fail to meet the requirements of the grade, but not more than one-half of this amount, or 5 percent, shall be allowed for decayed

stems/vines. (b) **Offsize.** 15 percent of the tomatoes in any lot may vary from the specified diameter, including therein not more than 5 percent for tomatoes which fail to meet any specified minimum diameter.

Application of Tolerances

§51.2169 Application of tolerances.

The contents of individual packages in the lot are subject to the following limitations:

(a) For a tolerance of 10 percent or more, individual packages shall have not more than one and one-half times the tolerance specified: **Provided**, That when the package contains 15 specimens or less, any individual package shall have not more than double the tolerance specified, except that at least one defective and one off-size specimen may be permitted in any package: **And provided further**, That the averages for the entire lot are within the tolerances specified for the grade.

(b) For a tolerance of less than 10 percent, individual packages in any lot shall have not more than double the tolerance specified, except that at least one defective and one off-size specimen may be permitted in any package: **Provided**, That the averages for the entire lot are within the tolerances specified for the grade.

Size Classification

§51.2170 Size classification.

The size of tomatoes may be specified by count or weight per container or specified to a minimum and/or maximum diameter.

Minimum diameter: Will not pass through a round opening of the designated diameter when tomato is placed with the greatest transverse diameter across the opening.

Maximum diameter: Will pass through a round opening of the designated diameter in any position.

Definitions

§51.2171 Similar varietal characteristics.

"Similar varietal characteristics" means that the tomatoes are of the same characteristic shape and color (bright red varieties shall not be mixed with varieties having a purplish tinge).

§51.2172 Mature.

"Mature" means that the contents of two or more seed cavities have developed a jellylike consistency and the seeds are well developed. External color shows at least a definite break from green to tannish-yellow, pink or red color on not less than 10 percent of the surface.

§51.2173 Soft.

"Soft" means that the tomato yields readily to slight pressure.

§51.2174 Clean.

"Clean" means that the individual tomato is practically free from dirt and other foreign matter.

§51.2175 Fairly well formed.

"Fairly well formed" means that the tomato is not more than slightly kidney-shaped, lopsided, elongated, angular, or otherwise slightly deformed from the characteristic shape of the variety.

§51.2176 Reasonably well formed.

"Reasonably well formed" means that the tomato is not more than moderately kidney-shaped, lopsided, elongated, angular, or otherwise moderately deformed from the characteristic shape of the variety.

§51.2177 Tomatoes on the vine.

"Tomatoes on the vine" means two or more tomatoes attached to the same vine.

§51.2178 Damage.

"Damage" means any specific defect described in this section; or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which materially detracts from the appearance, or the edible or marketing quality of the tomato. References to area, aggregate area, length, or aggregate length are based on a tomato having a diameter of 2-1/2 inches in diameter. The following specific defects shall be considered as damage:

- (a) Puffiness when the open space in one or more seed cavities materially detracts from the appearance of the tomato when cut through the center at right angles to a line running from the stem to the blossom end;
- (b) Catfaces when scars are rough or deep, when channels are very deep or wide, when channels extend into a seed cavity, or a fairly smooth catface aggregating more than an area of a circle one-half inch in diameter.
- (c) Growth cracks (radiating from or concentric to the stem scar) when not well healed, when more than one-eighth inch in depth, or any individual radial crack one-half inch in length, or having more than a 1 inch aggregate length of all radial cracks measured from the edge of the stem scar;
- (d) Scars (other than catfaces) no depth and aggregating more than an area of a circle three-eighths inch in diameter; and,
- (e) Cuts, not well healed, not shallow, or a cut more than one-half inch in length.

§51.2179 Serious damage.

"Serious damage" means any specific defect described in this section; or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which seriously detracts from the appearance or the edible or marketing quality of the tomato. References to area, aggregate area, length, or aggregate length are based on a tomato having a diameter of 2-1/2 inches in diameter. The following specific defects shall be considered as serious damage:

- (a) Puffiness when the open space in one or more seed cavities seriously detracts from the appearance of the tomato when cut through the center at right angles to a line running from the stem to the blossom end;
- (b) Catfaces when scars are rough or deep, when channels are very deep or wide, when channels extend into a seed cavity, or a fairly smooth catface aggregating more than an area of a circle 1 inch in diameter.
- (c) Growth cracks (radiating from or concentric to the stem scar) when not well healed, when more than one-eighth inch in depth, or any individual radial crack three-fourth inch in length, or having more than a 1-1/2 inch aggregate length of all radial cracks measured from the edge of the stem scar;
- (d) Scars (other than catfaces) no depth and aggregating more than an area of a circle 1 inch in diameter; and,
- (e) Cuts, not well healed, not shallow, or a cut more than one-half inch in length.

§51.2180 Metric conversion table.

Metric Conversion Table

Inches	Millimeters (mm)
1/8 equals.....	3.2
1/4 equals.....	6.4
3/6 equals.....	9.5
1/2 equals.....	12.7
5/8 equals.....	15.9
3/4 equals.....	19.1
7/8 equals.....	22.2
1 equals.....	25.4
1-1/4 equals.....	31.8
1-1/2 equals.....	38.1
1-3/4 equals.....	44.5
2 equals.....	50.8
3 equals.....	76.2
4 equals.....	101.6

Good Delivery and Suitable Shipping Condition

The concept was derived from the FOB term in the PACA Regulations.

As defined in the Regulations at 7 C.F.R. §46.43(i), FOB means that the produce quoted or sold is to be placed free on board the carrier at shipping point, in “suitable shipping condition” (discussed in detail below). The buyer assumes all risk of damage and delay in transit not caused by the seller, irrespective of how the shipment is billed. The buyer has the right of inspection at destination to determine if the produce shipped complied with the suitable shipping condition warranty at the time of shipment.

Where produce is sold FOB, any grade description associated with the produce applies only at shipping point, and the seller warrants that the produce is in suitable shipping condition (SSC) to reach the agreed contract destination without abnormal deterioration.

Since fresh produce is inherently perishable, it cannot remain in the same condition forever. Therefore, the application of the SSC concept allows for a “normal” amount of deterioration while the commodities are in transit.

The SSC warranty applies to **both** condition and quality defects combined in a **grade specified** contract, for example U.S. No.1, etc.

The SSC warranty applies to condition defects **only** in a “No-Grade” contract.

The SSC warranty is applicable only when the ultimate destination has been agreed to.

The SSC warranty may be voided if the transportation is abnormal.

Suitable Shipping Condition

Under PACA Regulation 7 C.F.R. §46.43(j), suitable shipping condition (commonly referred to as the warranty of suitable shipping condition) applies only in FOB sales, and means that the produce, at the time of shipment, is in a condition which, *if handled under normal transportation conditions*, will assure delivery at the contract destination *without abnormal deterioration*.

The suitable shipping condition rule is a requirement that cuts in two directions. For instance, it is not enough that a commodity sold FOB, U.S. No. 1 actually be U.S. No. 1 at time of shipment. It also must be in such condition at the time of shipment that it will make good delivery. It is entirely possible that a commodity grading U.S. No. 1 at the time of shipment, and delivered under normal transportation conditions, will not make good delivery at destination. By the same token, the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition. Thus, a “normal” amount of deterioration is allowed. For all commodities other than lettuce, what is “normal” or “abnormal” deterioration is judicially determined. The USDA has, however, published good arrival guidelines for most fruits and vegetables, which reflect the additional condition defect allowances for a 5-day cross country trip.

Where the issue of abnormality of transportation service and conditions is not raised either by evidence on the face of the record or by a party, the transportation is assumed to be normal; but where the issue is raised, a buyer who accepts a commodity has the burden of proving that the transportation service and condition were normal. However, where an effective rejection is made of a commodity, the seller has the burden of proving that the transportation service or conditions were abnormal so as to void the suitable shipping condition warranty. If a temperature recorder was placed in the conveyance vehicle at shipping point, a negative inference as to conditions in transit may be drawn where the buyer, who bears the risk of damage in transit, is unable to locate the temperature recorder at destination.

Good Delivery Standards

“Good delivery” is a term used in connection with FOB contracts for the purchase and sale of perishable agricultural commodities and means that the commodities meet the contract requirements at the time of loading and, if the shipment is handled under normal transportation and conditions, will arrive at the contract destination without abnormal deterioration. Whether the commodities make “good delivery” at the contract destination is determined on a case-by-case basis for all commodities other than lettuce, which has a specific good delivery standard. See 7 C.F.R. §46.44.

If the contract of sale calls for a specific U.S. Grade (e.g., “U.S. No. 1,” “U.S. No. 2,” or “U.S. Extra Fancy”), published U.S. Grade Standards will determine whether the commodity meets the quality requirements of the specified grade, and the total quality and condition defects may not exceed the allowances provided in the good arrival guidelines.

Many receivers have the produce inspected at destination based on the U.S. No. 1 Grade, regardless of whether a U.S. Grade was specified in the contract of sale. If the contract of sale does not specify a U.S. Grade, only the condition defects disclosed by a USDA inspection will be used to determine whether the commodity meets good arrival guidelines.

Depending upon the grade specified under the contract, timely destination inspections will disclose whether the shipment either met or failed to meet the contracted for requirements (i.e., whether seller fulfilled its warranty of suitable shipping condition), or whether a transportation problem is indicated.

Foreign Survey Results Important in Breach of Contract Claims Involving Exported Produce

As U.S. exports of fresh and frozen fruits and vegetables have increased over time, we have seen a corresponding increase in the number of claims filed under the PACA involving contract disputes of exported produce. These disputes generally involve produce that shows abnormal deterioration following arrival at the contract destination. The foreign receiver then seeks to recover damages, which it claims resulted from the seller’s failure to ship produce that was in suitable shipping condition. When the exporter withholds payment from its supplier, the supplier files a PACA complaint. Since government inspections cannot be obtained in most foreign countries, the outcome of the claim is often dependent upon the results of an inspection made by a foreign surveyor. These reports are often incomplete and poorly drafted, causing major losses

to firms that might otherwise successfully establish a claim. Survey reports should contain the following information in order to have an influence on the outcome of a PACA claim:

- The date when the shipment arrived at destination and when it was made accessible for survey must be stated in the report.
- The date the survey was performed must be in the report, and must be distinguished from the date the report was prepared.
- The number of packages present and available for survey should be recorded.
- All label information and markings on the packages (such as Lot Numbers) should be recorded.
- The pulp temperature of the produce should be taken in random places, and the report should indicate where temperatures were taken. The report should also note the ranges of the temperatures recorded.
- Sampling procedures should be described. The report must reflect that samples were randomly selected and consisted of 1 percent or more of the shipment.
- Each defect found must be described in order to give a verbal picture of the defect. For example, instead of describing a commodity as affected by rot or decay, the survey should describe it as "...affected by decay, in the form of .25 to .50 inch black spots with mold sometimes in the middle of the spots." Or, instead of using the term "poor quality," the survey should state "...affected by shallow scars ranging from .25 to .75 inch in length."
- The percentage of the fruit or vegetables affected by each defect must be stated. For example, "6 to 14 percent, average 9 percent, of [commodity] in each container are affected by decay in the form .25 to .75 inch blue-green to black irregular shaped spots," or "3 to 9 percent, average 6 percent of the fruit in each container are affected by deep scaring and the scars range from .50 to .75 inch in length."
- The surveyor should secure temperature-recording devices, and a clear, legible, and complete copy of the chart should be attached to the report. If this is not possible, the survey should recount efforts to secure the charts, and state why the charts were not obtained.

The omission of any one of these items may cause the survey to be unusable. Fruit and vegetable exporters may wish to supply their foreign customers with this list of elements so that they can ensure that the surveyors understand the specific information needed to support a claim under the PACA.

Acceptance and Rejection

Acts of Acceptance

A receiver who does not communicate an effective rejection is generally deemed to have accepted the commodity in question. Acceptance also occurs when the receiver:

- Diverts the load to a destination other than that called for in the original contract; or
- Unloads the commodity from the transport vehicle.

A single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract is considered a “commercial unit,” which, according to section § 46.43 (ii) of the PACA regulations, must be accepted or rejected in its entirety. This means that if a receiver wishes to reject a load that it sold to multiple customers, it will be necessary for it to do so when the product arrives at the first customer’s place of business. This is because under the contract terms between the shipper and the receiver, the load would be considered one commercial unit, so if the first lot tendered for delivery is accepted, that acceptance functions as acceptance of the whole load under the contract terms between the receiver and the shipper. Any subsequent rejection of a portion of the load by any of the receiver’s customers could conceivably be effective as between said customers and the receiver, but would not be effective as a rejection between the receiver and the original shipper.

Again, in order for a receiver with multiple customers to correctly reject a commercial unit, it would be necessary for it to have the entire load inspected at the first drop, and then reject or accept the whole load based upon the results of the inspection.

Exception: If the lots sold by the receiver to its customers are manifested and billed individually by the shipper to the receiver, precedent cases have established that the receiver can reject the non-conforming lot, provided the rejection is effective.

In situations where a receiver diverts a load from its original destination, the diversion would generally constitute acceptance. As such, a rejection of the commodity by the receiver could not be effective. Rather, any rejections under such circumstances would generally be illegal.

Likewise, a receiver that offloads a commodity (or commodities) constituting a commercial unit for anything other than making it accessible for the purpose of obtaining an inspection is deemed to have accepted the commodity. As such, any subsequent rejection would be ineffective. As set forth in § 46.2(bb) of the PACA Regulations, any rejection following an act of acceptance would be a rejection “without reasonable cause.”

General Legal Consequences of Acceptance of Goods. Uniform Commercial Code (UCC) § 2-607 provides the following legal consequences of a receiver’s acceptance:

- The buyer must pay the contracted price for the accepted goods.
- The buyer loses the right to reject.
- Time starts to pass within which the buyer must complain of a breach or be barred from any remedy.

- The burden shifts to the receiver to establish a breach of contract.

Revocation of Acceptance

A **revocation of acceptance** is a combination of the buyer's refusal to keep the delivered goods and its notification to the seller that the buyer will not keep them. Said refusal comes after the buyer has accepted by allowing the time for rejection to pass (J. White & R. Summers, **Handbook of Law Under the Uniform Commercial Code, Second Edition** (St. Paul, Minnesota: West Publishing Co., 1980) 8:293).

UCC section 2-608 places the following conditions upon the receiver's ability to revoke its acceptance:

- Revocation must occur within a "reasonable" amount of time after the buyer discovers (or should have discovered) the grounds for it and **before** any substantial change in the condition of the goods which is not caused by their own defects.
- Acceptance must have been based on (1) the difficulty of discovering the non-conformity prior to acceptance; (2) the seller's assurances that the produce conformed to the contract specifications; or (3) the buyer's assumption that the seller would fix the problem in a timely manner.

A buyer who properly revokes acceptance has the same rights and duties with regard to the goods as if it had rejected them.

Procedurally Effective Versus Ineffective Rejections

Regardless of whether or not the shipper (seller) has breached the contract of sale, the shipper has a positive duty to take back the rejected goods where there has been an **effective** (prompt and clear) rejection by the receiver (buyer). If the rejection is later found to be wrongful, the receiver (buyer) could be held liable to the seller for the original contract price and incidental expenses, less any resale proceeds received by the shipper (seller).

A procedurally effective rejection is established when the following elements are met:

- The receiver rejects within a "reasonable time," i.e., for trucklot shipments – 8 hours after the receiver (or a responsible representative) is given notice of arrival and produce is made accessible for inspection; for boat shipments – not to exceed 24 hours after the produce is unloaded and made accessible for inspection and the receiver is given notice thereof; and for rail shipments – not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection.
- In accordance with section 46.2(cc)(4) of the PACA regulations, if a shipment arrives on a non-work day or after the close of regular business hours on work days when a representative of the receiver who has the authority to reject a shipment is not present, non-working hours preceding the start of regular business hours on the next working day are not to be included in calculating the 8- or 24-hour "rejection window."
- In situations where the commodity is made available for inspection immediately following arrival, but an inspector is not available, the 8-hour time period to reject is extended until the Federal inspection is made, plus 2 hours after the report is made available to the receiver.

- Again, however, the receiver must inform the shipper during the initial 8- or 24-hour time period after arrival of the commodity that (a) the load arrived with problems; (b) an inspection has been requested; and (c) it intends to reject the shipment as soon as an inspection can be made, depending on the inspection results.
- In the event a receiver does not notify the shipper of any problems regarding a load of produce which it has purchased until after the inspection is completed, and following the expiration of the initial 8- or 24-hour applicable time period, any subsequent rejection by the receiver would be rendered procedurally ineffective. Consequently, the receiver is deemed to have accepted the commodity.

“Rightful” Versus “Wrongful” Rejections

In a “best-case” scenario, a receiver who effectively rejects a load meets the following criteria:

- The receiver gives notice of the rejection to the shipper within a reasonable time, 8 hours if by truck and 24 hours if by boat or rail.
- Terms of said rejection are communicated to the shipper in clear and unmistakable terms.

But, is an effective rejection essentially a **rightful** rejection?

Not necessarily. While there is a positive duty on a shipper to take back rejected goods if an effective (prompt and clear) rejection is made, it is possible that the receiver rejecting the commodity may not be able to subsequently establish that a breach of contract has occurred.

Example -

- (1) The receiver communicates a rejection to the shipper and obtains an inspection that does not indicate a breach of contract; or
- (2) The receiver fails to obtain an inspection of the commodity to support the rejection.

In short, a seller cannot “refuse to accept” an effective rejection.

However, if a receiver effectively rejects a commodity, but fails to obtain an inspection or some form of evidence to establish a breach of contract, said rejection would in most cases be considered to have been substantively wrongful, for which the shipper would be entitled to provable damages.

Responsibilities After Rejection

Assuming that a receiver (buyer) makes an effective and rightful rejection, and the shipper (seller) refuses to take possession of the rejected goods, the receiver should dispose of such goods for the account of the shipper, and would only be held to “good faith” standards in making the resale in accordance with UCC § 2-603.

Under the following circumstances, however, the receiver would have an obligation to do more than hold the rejected goods for a sufficient amount of time for the shipper to remove them (NOTE: *Each of the following conditions must be met*):

- The shipper has no agent or place of business at the market of rejection;
- The receiver is a merchant; and

- The goods are in the receiver's possession or control.

In the event that each of the above conditions is met, the receiver is responsible for following reasonable instructions issued by the shipper, and in the absence of such instructions, selling the goods for the shipper's account (UCC § 2-602 and § 2-603).

A shipper (seller) does not, however, have to take back goods which are **ineffectively** rejected. An ineffective rejection has the same legal consequence as acceptance. Consequently, legal title is not revested in the seller.

There have been situations, however, where a shipper may offer to *conditionally* accept a receiver's ineffective rejection; that is, the shipper agrees to accept the receiver's rejection with strings attached. If the receiver agrees to the shipper's conditional acceptance of the rejection, a positive duty would then be imposed upon the shipper to retake possession and dispose of the rejected commodity, and the receiver would be absolved of any subsequent liability.

In the event that a receiver (buyer) refuses to sell the commodity that it is ineffectively rejecting, the shipper (seller) would want to handle the goods for the receiver's account in order to mitigate its damages. A shipper (seller) who does so, however, should exercise care to make clear that by disposing of the goods, it is **not** accepting the receiver's (buyer's) **ineffective rejection**.

Frequently Cited Sections of the Uniform Commercial Code (UCC)

§ 2-602. Manner and Effect of Rightful Rejection

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two following sections on rejected goods (Sections 2-603 and 2-604),
 - (a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
 - (b) If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
 - (c) The buyer has no further obligations with regard to goods rightfully rejected.
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on seller's remedies in general (Section 2-703).

§ 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods

- (1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when

the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

§ 2-604. Buyer's Options as to Salvage of Rightfully Rejected Goods

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

§ 2-606. What Constitutes Acceptance of Goods

(1) Acceptance of goods occurs when the buyer

- (a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
- (b) Fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
- (c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

§ 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be

seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) If the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) If the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312).

§ 2-608. Revocation of Acceptance in Whole or in Part

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) On the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) Without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

- (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.
- (4) If a buyer uses the goods after a rightful rejection or justifiable revocation of acceptance, the following rules apply:
- (a) Any use by the buyer that is unreasonable under the circumstances is wrongful as against the seller and is an acceptance only if ratified by the seller.
 - (b) Any use of the goods that is reasonable under the circumstances is not wrongful as against the seller and is not an acceptance, but in an appropriate case the buyer is obligated to the seller for the value of the use to the buyer.

Frequently Cited Sections of the PACA Regulations

46.2(bb) Reject without reasonable cause means in connection with purchases, consignments, or joint account transactions:

- Refusing or failing without legal justification to accept produce within a reasonable time.
- Advising the seller, shipper, or his agent that produce, complying with contract, will not be accepted.
- Indicating an intention not to accept produce through an act or failure to act inconsistent with the contract; or
- Any rejection following an act of acceptance.

46.2(cc) Reasonable Time, as used in paragraph (bb) of this section, means:

- For frozen fruits and vegetables with respect to rail shipments, 48 hours after notice of arrival and the produce is made accessible for inspection, and with respect to truck shipments, not to exceed 12 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection;
- For fresh fruits and vegetables with respect to rail shipments, not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection; and with respect to truck shipments, not to exceed 8 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection; and, with respect to boat shipments, not to exceed 24 hours after the produce is unloaded and made accessible for inspection and the receiver is given notice thereof;
- If, within the applicable period, the receiver cannot make a thorough inspection due to adverse weather condition or applies for but cannot obtain Federal inspection before the end of this period, and so notifies the consignor within the applicable period, the period shall be extended until weather conditions permit inspection or until Federal inspection is made, as

the case may be, plus two hours after either an oral or written report of the results of such inspection is made available to the receiver; and

- In computing the time periods specified above, (i) for shipments arriving on non- work days or after the close of regular business hours on work days when a representative of the receiver having authority to reject shipments is not present, non- working hours preceding the start of regular business hours on the next working day shall not be included; and (ii) for shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period shall run without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period shall be extended and run from the start of regular business hours on the next working day.

46.2(dd) Acceptance means:

- Any act by the consignee signifying acceptance of the shipment, including diversion or unloading;
- Any act by the consignee which is inconsistent with the consignor's ownership, but if such act is wrongful against the consignor it is acceptance only if ratified by him; or
- Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section: Provided, That acceptance shall not affect any claim for damages because of failure of the produce to meet the terms of the contract.

46.43(ii) Commercial Unit means:

- A single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract, such commercial unit must be accepted or rejected in its entirety. Acceptance of a commercial unit does not modify the parties' existing contractual rights and responsibilities

Misbranding & Misrepresentation

What is Misbranding?

Labeling Requirements. Perishable agricultural commodities are not required to be labeled under the PACA; however, the PACA does require that any labeling that is used be accurate. Responsible growers and shippers have always been deeply concerned with instances of misbranding produce. Much of this concern has centered on the misuse of the U.S. grade designations and/or the misrepresentation of the state, country or region of origin of the produce. Unlike most other agricultural products, fresh fruits and vegetables may be labeled with U.S. Grades without official inspection and certification. Those who buy and sell fresh fruits and vegetables throughout the marketing chain do so, for the most part, on a good faith basis. Persons who knowingly misbrand or misrepresent fruits and vegetables pose a serious threat to responsible businesses. The ethical trader is placed at a price disadvantage when competing with misrepresented produce and the disadvantage carries all the way through to the ultimate consumer who pays for something that he/she does not get.

What constitutes misbranding? Misrepresentation by word, act, mark, stencil, label, statement, or deed, of the character, kind, grade, quality, quantity, size, pack, weight, condition, degree, or maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce constitutes misbranding. PACA officials have the authority to examine the records of any licensee to determine the ownership, control, packer, or State, country or region of origin, of any perishable agricultural commodity that is suspected of being misbranded.

What happens when it is determined that a lot is misbranded? The responsible firm must make arrangements to correct the markings on the container prior to resale. An unintentional and inadvertent misbranding will typically be settled informally either with a written warning or a monetary penalty. The penalty is based on the circumstances surrounding the violation and a firm's misbranding or misrepresentation history.

Schedule of Warnings and Penalties

Warning Letters. When informal settlement of liability is appropriate, violators are given two written warnings and an opportunity to take preventative action. Warning letters include an explanation of the requirements of the Act and recommendations of actions that the violator can take to avoid future violations.

Informal Sanctions. Violations subsequent to the sending of the warning letters referred to above, other than flagrant violations, may be settled informally. The informal procedure permits the violator to resolve the matter in lieu of a formal proceeding by paying a monetary penalty pursuant to a schedule set forth in section 46.45(c)(1) of the Regulations under the PACA.

Formal Sanctions. In cases involving repeated or flagrant violations of the Act, formal proceedings seeking the suspension or revocation of the violator's license may be instituted.

The best way to safeguard against misbranding violations is to make sure that all descriptive factors (i.e., grade, size, origin, weight, count, etc.) are covered by a USDA Positive Lot Identification (PLI) inspection on all commodities prior to shipment. Securing this type of inspection provides the shipper with evidence of compliance. It also provides assurance to the buyer that the lot is properly marked.

Three Primary Rules

Traders who adhere to the following rules are less likely to run afoul of the PACA or be involved in disputes with other traders:

1. **Say What You Mean.** Use trading terms (e.g., FOB, Delivered, Consigned) that are defined by the PACA or have been discussed and understood by all the parties involved in the transaction.
2. **Mean What You Say.** Exercise good faith and honesty in your dealings with trading partners.
3. **Confirm It!** Use the means available to you to reduce the terms of your contract to writing (e-mail, fax, overnight mail, etc.).

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- Nevada
- New Mexico
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- Oregon
- South Dakota
- Utah
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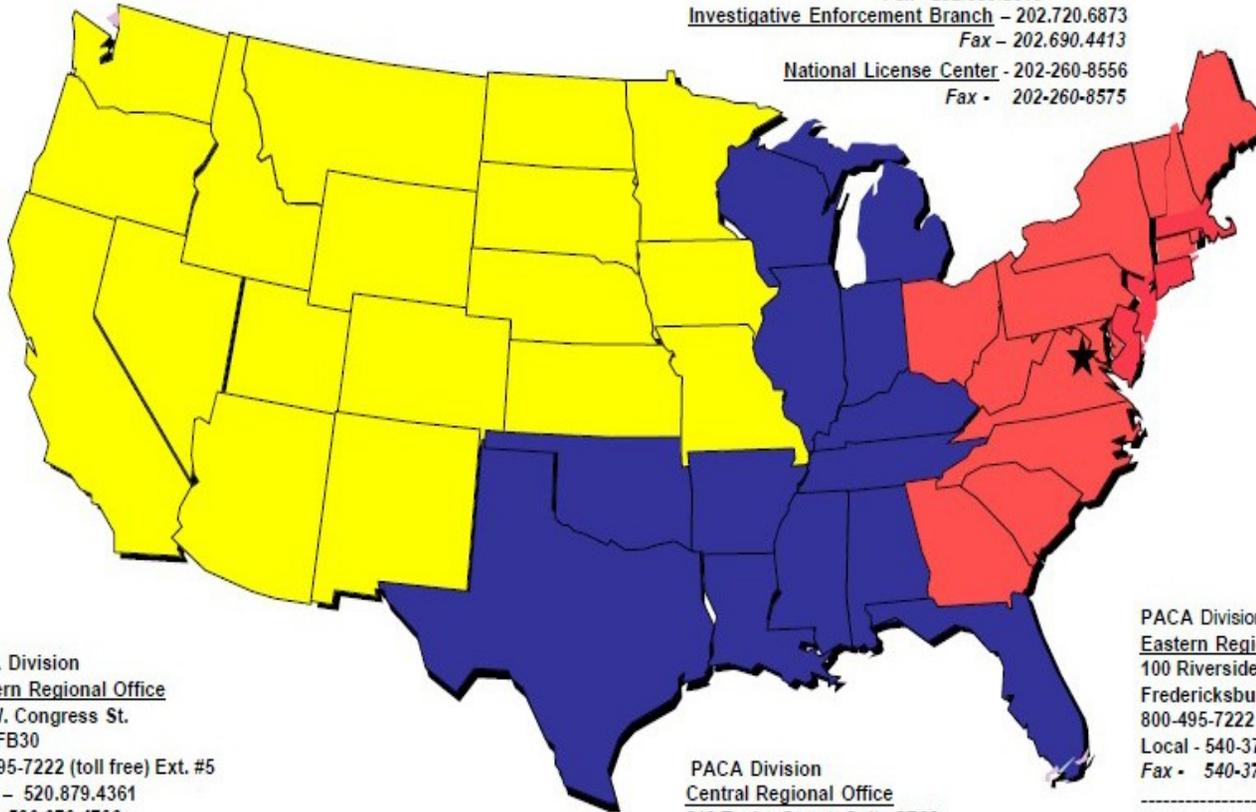
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