Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket No. FV99–361]

Perishable Agricultural Commodities Act: Recognizing Limited Liability Companies

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture (USDA) is proposing to amend the regulations under the Perishable Agricultural Commodities Act (PACA or Act) to recognize a limited liability company (LLC) as a legal entity, and also to recognize each member of an LLC, and/or any other person authorized by the members to conduct business on behalf of an LLC, as "responsibly connected" with the LLC, as defined in the PACA.

DATES: Comments must be received by November 24, 1999.

FOR FURTHER INFORMATION CONTACT: Charles W. Parrott, Acting Chief, PACA Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2095–So. Bldg., P.O. Box 96456, Washington, DC. 20090–6456, phone (202) 720–2272. Email—charles.parrott@usda.gov. All comments should reference the docket number and the date and page number of this issue in the **Federal Register** and will be made available for public inspection in the PACA Branch during regular business hours and posted on the internet at www.ams.usda.gov/fv/paca.htm.

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

Background

The Perishable Agricultural Commodities Act (PACA or Act) establishes a code of fair trade practices covering the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. The PACA protects growers, shippers, distributors, and retailers dealing in those commodities by prohibiting unfair and fraudulent trade practices. In this way, the law fosters an efficient nationwide distribution system for fresh and frozen fruits and vegetables, benefitting the whole marketing chain from farmer to consumer. USDA's Agricultural Marketing Service (AMS) administers and enforces the PACA.

Any person who buys or sells commercial quantities of fruits and vegetables in interstate or foreign commerce must be licensed under the PACA. Under the Act and regulations, the term "person" means any individual, partnership, corporation, association, or separate legal entity. 7 U.S.C. 499a(b)(1); 7 CFR 46.2(i). Separate licenses are required for each person. A person is designated as "responsibly connected" with a firm under the PACA if that person is affiliated as an owner, as a partner in a partnership, or as an officer, director or holder of more than 10 percent of the outstanding stock of a corporation or association. 7 U.S.C. 499a(b)(9); 7 CFR 46.2(ff). In the event that a licensee is found to have violated the Act and USDA suspends or revokes the firm's license, then the licensee and its "responsibly connected" principals face PACA licensing and employment restrictions which may include the denial of a license, a prohibition on employment with another PACA licensee, or the requirement that a bond be posted as a prerequisite to licensing or employment in the fruit and vegetable industry. 7 U.S.C.. 499h.

Although the PACA and PACA regulations do not specifically define a limited liability company as a "person," it is USDA policy to recognize an LLC as a separate legal entity, just as LLC's are recognized in most states, subject to licensing under the PACA. USDA published its current policy about recognizing LLC's in the **Federal Register** on April 14, 1999 (64 FR 18397) and no comments were received from the public. The proposed regulatory amendments herein will adopt that policy by expanding the current regulations to include LLC's under the PACA, especially with regard to the licensing of LLC's and the responsibly connected status of LLC members and managers.

An LLC may be described as a cross between a partnership and a corporation. This hybrid business structure is now available to businesses in most states. The personal liability protection afforded by the LLC is similar to that of a corporation. For example, the members are insulated from liability arising solely from being a member but are not insulated from liability for the acts of the LLC which violate any laws or regulations. Liability issues may vary somewhat according to state law and the LLC's organizational agreement.

Although an LLC affords personal liability protection to its owners that is similar to that of a corporation, the ownership characteristics of an LLC more closely resemble those of a partnership. The LLC owners are often referred to as members, and member-managers may be designated. Membership requirements in an LLC can be determined by the members; for example, members may join through financial contributions or through the performance of services.

In general, state LLC statutes require the filing of documentation similar to articles of incorporation, sometimes called articles of organization. In addition, an operating agreement is entered into which usually designates who has the authority to run the LLC company. This operating agreement usually details the process to be followed in choosing the manager(s) and sets forth the manager(s)" authority and the authority retained by the members. The manager(s) is often, but not always, a member of the LLC. Specific requirements vary by state.

Because of the unique composite nature of the LLC, an LLC's members are analogous to partners in a partnership, while managers, who are not always members, may be analogous to corporate officers, depending on the manager's responsibilities as set out by the LLC's operating agreement. Therefore, the proposed amendments would clarify that all LLC members, regardless of the member's financial contribution, are "responsibly connected" persons under the PACA, just as all partners are "responsibly connected" with a partnership. In addition, any person(s), whether or not a member, who is authorized by the LLC to be in charge of the daily business operations, management, and control of the LLC, would also be considered responsibly

connected to the LLC, just as officers in a corporation are under the PACA. The determination of whether a person other than a member is "responsibly connected" would depend upon the terms of the LLC's operating agreement. These agreements are similar to a partnership agreement or corporate bylaws which outline who is in charge of the business' daily operations. Those persons whom the LLC authorizes to be in charge of the day-to-day operation, management and control of the LLC's daily business activities may include, but would not be limited to, those with the titles of managers, officers, and/or directors.

An LLC members' ownership in the company closely resembles a partnership. Therefore, the proposed amendments would require that all LLC members, including corporations or other entities, be identified on the firm's PACA license application. If a member is a corporation or other legal entity, more information, such as the names of officers of the corporation or other data, would be required by AMS. LLCs submitting PACA license applications would be required to submit organizational information about the company, including, but not limited to, documentation filed with the state in which the LLC is legally established, such as its articles of organization and its operating agreement. Only one LLC member's signature would be required to make a valid PACA application. In addition, just as is required of other legal entities, if the articles of organization or the operating agreements were to change, the LLC would be required to notify AMS" PACA Branch as soon as possible and submit revised documents to the PACA Branch.

The LLC business structure has become widely accepted throughout the United States as a new legal entity. AMS is hereby proposing that the PACA regulations be amended to require certain information from an LLC in order to obtain a license under the PACA. In addition, the proposed amendment would also expand the definition of the term "responsibly connected" to include all LLC members and LLC managers, even when they are not also members. The "responsibly connected" status of LLC managers would be determined on a case-by-case basis, depending upon the terms of the LLC's operating agreement and the ways in which the person's status is analogous to that of an officer, director or shareholder of a corporation. Therefore, both members and managers would be subject to PACA sanctions if the Act is violated by the LLC.

Executive Orders 12866 and 12988

This proposed rule, issued under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*), as amended, has been determined to be not significant for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform and is not intended to have retroactive effect. This proposed rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USDA has considered the economic impact of this proposed rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been defined by the Small Business Administration (13 CFR part 121) as those with less than 500 employees. The PACA requires all businesses that operate subject to its provisions to maintain a license issued by USDA. There are approximately 15,700 PACA licensees, the majority of which may be classified as small entities.

The proposed revisions to the PACA regulations would recognize a limited liability company (LLC) as a legal entity under the PACA regulations, and amend the definition of "responsibly connected" under the regulations to include any member of an LLC, and/or any other person authorized by the members to conduct business on behalf of an LLC. The LLC business structure has become widely accepted throughout the United States as a new legal entity and these proposed revisions to the regulations would clarify how USDA deals with these entities and their principals under the PACA.

Like a sole proprietorship, partnership, corporation, or any other separate legal entity, a LLC, whether a small or large business, must obtain and maintain a valid PACA license if it buys or sells commercial quantities of fruits and vegetables in interstate or foreign commerce. AMS believes that this proposed rule would have no more impact on an LLC than the current PACA regulations have on sole proprietorships, partnerships, associations, or corporations operating subject to the PACA, whether large or small.

Since LLC's are required to be licensed under the PACA as a "separate legal entity," they are subject to disciplinary actions by USDA for violating the PACA and regulations. Therefore, these proposed revisions would mainly impact those persons USDA considers as "responsibly connected" with the LLC under the PACA. If USDA suspends or revokes a firm's license for PACA violations, the firm and any person found "responsibly connected" with the firm are restricted for a certain period of time from holding a PACA license or from being employed with another PACA licensee. However, these restrictions apply to any firm which has been found to have violated the PACA, regardless of the firm's size or type of ownership.

Given the preceding discussion, AMS has determined that the provisions of this proposed rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The revisions set forth in this proposed rule involve a change in the existing information collection and record keeping requirements which were previously approved by the Office of Management and Budget (OMB) under provisions of 44 U.S.C. Chapter 35. In accordance with the Paperwork Reduction Act of 1995, this notice announces AMS' intentions to request a revision to a currently approved information collection in support of the Reporting and Record Keeping Requirement under the Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act (PACA) (7 U.S.C. 499a—499t).

Title: Reporting and Record Keeping Requirements Under Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930.

OMB Number: 0581–0031.

Expiration Date of Approval: April 30, 2001.

Type of Request: Revision of a currently approved information collection.

Abstract: The PACA was enacted by Congress in 1930 to establish a code of fair trading practices covering the marketing of fresh and frozen fruits and vegetables in interstate or foreign commerce. It protects growers, shippers, and distributors dealing in those

commodities by prohibiting unfair and fraudulent trade practices.

The law provides for the enforcement of contracts by providing a forum for resolving contract disputes, and for the collection of damages from anyone who fails to meet contractual obligations. In addition, the PACA imposes a statutory trust on licensees for perishable agricultural commodities received, products derived from them, and any receivables or proceeds due from the sale of the commodities for the benefit of suppliers, sellers, or agents that have not been paid.

The PACA is enforced through a licensing system and is user-fee financed through a license fee. All commission merchant, dealers, and brokers engaged in business subject to the PACA must be licensed. The license is effective for three (3) years for retailers and grocery wholesalers, and must be renewed on a triennial basis. The license for all other licensees is effective for up to three (3) years. These licensees must also renew their licenses, but have the option of a 1-year, 2-year, or 3-year license term. Those who engage in practices prohibited by the PACA may have their licenses suspended or revoked.

The information collected from respondents is used to administer licensing provisions under the PACA. The records maintained are used to adjudicate reparation and administrative complaints filed against licensees to determine the imposition of sanctions on firms and responsibly connected individuals who have engaged in unfair trade practices. Since the LLC business structure became accepted by states and USDA first accepted PACA applications from LLC's, we have found that the majority of LLC applicants did not properly report the identities of the firms' principals. In most instances, AMS has found it necessary to request that LLC's submit copies of their articles of organization and operating agreements in order to identify the persons responsibly connected with each firm. Under the circumstances, USDA in this proposed revision to the PACA regulations would require that an LLC submit its articles or organization and its operating agreement as part of its application.

We estimate the paperwork and time burden on the above to be as follows:

Regulations Section 46.4(b)(3)—Application for License: LLC's submission of Articles of Organization and Operating Agreement.

Estimate of Burden: Public reporting burden for the collection of information is estimated to average .083 hours per response.

Respondents: Commission merchants, dealers, and brokers who are organized as limited liability companies and are engaged in the business of buying, selling, or negotiating the purchase or sale of fresh and/or frozen fruits and vegetables in interstate or foreign commerce are required to be licensed under the PACA (7 U.S.C. 499(c)(a)).

Estimated Number of Respondents: 160.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 13 hours.

The revision to the information collection requirements approved under 0581–0031 also requests approval of existing requirements associated with this program.

A revision of collection 00581–0031 was submitted on December 1, 1997, and was subsequently approved by OMB on April 1, 1998. This revision allowed for respondents to use a business reply card (Form FV–232) as a means of informing USDA that a license was not required for their firm. We have discontinued the use of Form FV–232, Business Reply Card after a trial period. We found that our customers were not utilizing the form in sufficient numbers to make it cost effective for the program to continue its use. We also found that our customers continued to call or write us to verify whether or not they needed a PACA license. Under the circumstances, we are reducing the public's reporting burden by 330 hours (10,000 respondents × 2 minutes per business reply card = 330 hours).

In addition, the PACA requires that USDA mail each licensee a license renewal application (Form FV–231–1 to non-retailers and non-grocery wholesalers, who pay license fees, or FV–231–2 to retailers and grocery wholesalers, who do not pay license fees) at least 30 days prior to the licensee's PACA license anniversary date. If a licensee is continuing to operate subject to the PACA, it must renew its license prior to its anniversary date. If a licensee fails to renew its license prior to that date, the licensee has 30 days under the PACA to reinstate its license by submitting the proper license fee plus a $50 reinstatement fee. Currently, we notify licensees by letter of the need to reinstate their licenses and request that they submit Form FV–231–1 or FV–231–2, along with the license and reinstatement fees, to AMS so that the license renewal can be processed.

We have found this process creates confusion and raises difficulties for our licensees. In most instances, the licensees no longer have the renewal application (Form FV–231–1 or FV–231–2), or they inform us that they never received it in the mail. They usually contact one of the PACA programs' regional offices to find out how to reinstate a license.

We have developed Forms FV–231–1A and FV–231–2A, "Reinstatement Notice," for use only in the event we do not receive a licensee's renewal application. These two new forms are duplicates of the renewal applications (Form FV–231–1 or Form FV–231–2). A reinstatement notice (Form FV–231–1A or Form FV231–2A) is sent to a licensee only in the event AMS does not receive the licensee's renewal application (Form FV–231–1 or Form FV–231–2). We believe that the development of the reinstatement form will reduce confusion and other related problems that AMS" customers have with the reinstatement letter. Either form, FV–231–1/FV–231–2, or FV–231–1A/FV–231–2A would be sufficient for a licensee to send to AMS, along with the proper fees, for a renewed PACA license. We believe that there will be no additional reporting burden on the public with the addition of Form FV–231–1A/FV–231–2A.

AMS is now accepting Visa and MasterCard payments for PACA license and complaint fees. This change was adopted for customer convenience. Until now, customers/licensees had to pay fees by check, money order, or cash. We are updating our license, renewal, and reinstatement applications to include an area for the credit number and expiration date. No additional burden should result from this change.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Charles W. Parrott, Acting Chief, PACA Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2095–So. Bldg., P.O. Box 96456, Washington, D.C. 20090–6456. Email—charles.parrott@usda.gov.

All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and record keeping requirements.

For the reasons set forth in the preamble, 7 CFR part 46 is proposed to be amended as follows:

PART 46—[AMENDED]

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

Authority: Sec. 15, 46 Stat. 537; 7 U.S.C. 499o

2. In § 46.2, paragraph (i) and (ff) would be revised to read as follows:

§ 46.2 Definitions.

* * * * *

(i) *Person* means any individual, partnership, limited liability company, corporation, association, or separate legal entity.

* * * * *

(ff) *Responsibly connected* means affiliation as individual owner, partner in a partnership, member, manager, officer, director or holder of more than a 10 percent ownership stake in a limited liability company, or officer, director or holder of more than 10 percent of the outstanding stock of a corporation or association.

* * * * *

3. Section 46.4, is amended as follows:

a. Paragraphs (b)(3) and (b)(4) are revised,

b. Paragraphs (b)(6)(ii) and (b)(6)(iii) are removed,

c. Paragraph (b)(6)(iv) is redesignated as paragraph (b)(6)(ii) and revised,

d. Paragraphs (b)(6)(v) and (b)(6)(vi) are redesignated as paragraphs (b)(6)(iii) and (b)(6)(iv), and

e. The introductory text of paragraph (b)(6) and paragraph (c) are revised to read as follows:

§ 46.4 Application for license.

* * * * *

(b)* * *

* * * * *

(3) Type of ownership. If a corporation or limited liability company, the applicant shall furnish the month, day, and year incorporated or organized; the State in which incorporated or organized; the name in which incorporated or organized; and the address of the principal office. A limited liability company shall also furnish a copy of its articles of organization and its operating agreement.

(4) Full legal name, all other names used, if any, and home address of owner. If a partnership, the applicant shall furnish the legal names, all other names used, if any, and home address of all partners, indicating whether general, limited, or special partners. If a limited liability company, the applicant shall furnish the full legal names, all other names used, if any, and home address of all members, managers, officers, directors and holders of more than 10 percent of the ownership stake, and the percentage of ownership in the company held by each such person. If an association or corporation, the applicant shall furnish the full legal names, all other names used, if any, and home address of all officers, directors and holders of more than 10 percent of the outstanding stock and the percentage of stock held by each such person. Minors shall also furnish the full name and home address of their guardian. If the applicant is a trust, the name of the trust and the full name and home address of the trustee must be furnished. If the applicant is a limited liability company and a member or holder of more than 10 percent of the ownership stake is a partnership, another limited liability company, corporation, association, or separate legal entity, the applicant shall furnish the full legal names and home address of that member's partners, members, managers, directors, and officers.

* * * * *

(6) Whether the applicant, or in case the applicant is a partnership, any partner, or in case the applicant is a limited liability company, any member, manager, officer, director or holder of more than 10 percent of the ownership stake, or in case the applicant is an association or corporation, any officer, director, or holder of more than 10 percent of the outstanding stock, has prior to the filing of the application:

(i)* * *

(ii) Within three years been adjudicated or discharged as a bankrupt or was an officer, director, stockholder, partner, member, manager or owner of a firm adjudicated or discharged as a bankrupt.* * *

* * * * *

(c) The application shall be signed by the owner, all general partners, or in case the applicant is a limited liability company, a member or manager, or in case the applicant is an association, or corporation, a duly authorized officer.

* * * * *

4. The first sentence of § 46.11 would be revised to read as follows:

§ 46.11 What constitutes valid license, form and use.

Each license shall bear a serial number, the names in which authorized to conduct business, type of ownership, if the business is individually owned, the name of the owner; if a partnership, the names of all general partners; if a limited liability company, the names of all members, managers, officers, directors and holders of more than 10 percent of the ownership stake, and the percentage of ownership in the company held by each such person; if a corporation or association, the names of all officers, directors, and shareholders of more than 10 percent of the outstanding stock and the percentage of stock held by each such person; the facsimile signature of the Deputy Administrator, the seal of the Department and shall be duly countersigned. * * *

5. Section 46.13 would be amended by revising paragraphs (a)(2) and (a)(5) to read as follows:

§ 46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.

The licensee shall:

(a) * * *

(2) Any changes in officers, directors, members, managers, holders of more than 10 percent of the outstanding stock in a corporation, with the percentage of stock held by such person, and holders of more than 10 percent of the ownership stake in a limited liability company, and the percentage of ownership in the company held by each such person;

* * * * *

(5) When the licensee, or if the licensee is a partnership, any partner is subject to proceedings under the bankruptcy laws. A new license is required in case of a change in the ownership of a firm, the addition or withdrawal of partners in a partnership, or in case business is conducted under a different corporate charter, or in case a limited liability company conducts business under different articles or organization from those under which the license was originally issued.

* * * * *

Dated: October 18, 1999.

Eric M. Forman,

Acting Deputy Administrator, Fruit and Vegetable Programs.

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