



Tomato Suspension Agreement Webinar--Q&A Session Transcription March 14, 2013, Judith Rudman, USDOC and Brian Wright, USDA

What constitutes “further process” that qualifies for the processing exemption?

That one was sent in right at the beginning of the presentation, so I am hoping that it is now clearer and the idea is that tomatoes for processing have to be identified prior to entering the U.S., and have to be in a special pak-type, etc., There’s the appendix in the agreement that deals with tomatoes for processing, so we think we answered that one.

I have a few questions concerning the definition of a controlled environment. I read the definition for you kind of quickly, but I wanted to point to where it is in the text of the agreement and that might be helpful. It is in Section 4(c), 3(b), and I will read it again. It says (for purposes of the Agreement), controlled environment tomatoes are limited to those tomatoes grown in a fully-enclosed permanent aluminum or fixed steel structure, clad in glass, impermeable plastic, or polycarbonate, using automated irrigation and climate control, including heating and ventilation capabilities, in an artificial medium using hydroponic methods. This is a strict definition of what constitutes a controlled environment for tomatoes. If you have any questions, again, it is in Section 4(c), 3b of the Agreement.

There is a question here on if there will be any website, email or platform to report suspicious activities? Certainly people have notified Commerce in the past of these problems and PACA. I would refer you to the page actually that we are on now, where we have the PACA website. As Brian said during the presentation, if USDA is notified in writing, then that is what they need to follow up. Brian’s email and phone number in Tucson and I’m looking at Brian to see if he wants to add anything else right now. Okay, we’re good. Thanks.

Somebody asked how will the importations of non-signatory products be enforced at all the ports? By U.S. law, the agreement has to cover 85% of all imports of tomatoes into the U.S. So, in terms of enforcement under U.S. law, non-signatory product is permitted to enter the U.S. The enforcement with pricing etc., comes with Commerce after that. We monitor the imports to ensure that we have at least 85% coverage to ensure that we are meeting the requirements of U.S. law. There have been, as part of the new Agreement, some references in the new Agreement to actions that have been taken by the Mexican government. They have taken some actions that will significantly increase, we believe, the signatory coverage

and ensuring greater coverage of the agreement of Mexican imports. But that is something we monitor at Commerce to make sure we are still in compliance.

There is a question out there as to what are the differences between the summer and winter prices, and the statement that the growing costs aren't less? This was something that was developed early on in the Agreement, and it has reflected the market realities where we are and we carry it over into the current Agreement, having the two seasons.

We have a question if a grower has 50,000 pre-printed boxes with the 2008 Agreement listed, can they be used first? We specifically state, we specify a date the old boxes can be used by (and I believe it is September 30), but I am drawing a blank. But if you have pre-printed boxes, there is no reason to waste them. I mean new labels could be printed and put over them. We have seen it because we have now been thru several iterations of the Agreement where parties have blackened out some of the old labeling and put in the new labeling. This time we are asking with the new Agreement that the growing environment be on the box; that is a requirement of the Agreement. That can be rubber stamped, or labeled. I am looking at Brian to make sure there are no PACA concerns because they don't have the same labeling requirements as the Agreement. So as long as it is clearly marked on the box, as long as all the information is there in a clear, easily detected place, then those boxes can certainly be used. We are not trying to complicate things - it is just that we ask that the new labeling be in there instead of or in addition to what was already on there.

Next question: how is the cost of the freight from the farm to the border figured? The reference prices that were calculated are FOB from the selling agent. The Agreement takes into account the growing costs and the costs to get it to the border, and everything from the border is in addition to the reference price.

There is a question on here, about do packaging companies need to comply with the Agreement? I am not sure I understand the question completely; let me see if I can get at what I think is the right answer. The Suspension Agreement governs the first sale in the U.S., so the first purchaser, the first unaffiliated with sale, the first receiver, which is the sale that has to be made above the reference price. If the tomatoes are sold to a re-packer who, at or above the minimum price, that is where the Agreement governs that first sale. I am not exactly sure what the question meant, but I think hopefully that would answer the question. That it is the sale to first un-affiliated in the U.S., that is the sale that is subject to the terms of the Agreement.

There is a question does the price at the border include the cost of warehousing at the border? The reference price requires that any charges incurred at the selling agent are added in. If they are warehoused for two weeks at the selling agent before they are shipped, that would be in addition to the minimum reference price.

I am scrolling through, and I see several questions again on the enclosed environment or the controlled environment tomatoes; I think that covers the definition.

There is a question why are cherry tomatoes classified a specialty tomato? They are not bulk-pack; they are not in standard boxes. You know rounds and romas that can go in the 25 lb boxes, those are non specialty categories. So, we have always looked at grapes and cherries differently and now in order to meet the changes in the market we have come up with this specialty category.

There is a question here, what about RPC weights. The box weight chart, those are net weights. So the RPC weights, the weights of the boxes, would be deducted. We know when we go and look and do verification, and we look at the prices and the paperwork, it is the weight of the product that is factored in. So the example that I used for the 5x5 sets (or the 6x6 maybe it was), the packaging type would not matter because the prices on the box weight chart are net prices. When we weigh the tomatoes we are sure to take the packaging into account.

I have a question, why is the adapted environment equal to shade house if a green house without the hydroponic methods of growing would also fall into the category of adapted environment? During the negotiations, we consulted with the U.S. industry. We talked at length with the Mexican growers. It was determined to use the specific definition of controlled environment that we have in the Agreement, and that then leaves anything that does not fall within that definition goes into open field or adapted environment.

There is a question, where can we find a copy of the price chart? They will be in this presentation; they are also on the Commerce website. You can into the tomato website that is on the screen now. You will see that there is the text of the agreement, and they are in the text. There is also a link for box weights that list all the charts separately.

A question of how long do we keep the paperwork? My suggestion would be at least one complete season. For instance, I would keep all of the paperwork from the winter season from 12/13 through at least the next agreement period. I have a better answer here; Brian says that PACA requires licensees to maintain the

paperwork for two years. That works well because it crosses over into that second season.

Why aren't all defects included in the defects allowed for adjustment? The intent of the Agreement is to ensure that tomatoes can be sold at or above the reference price. The Agreement does not allow for adjustments for quality defects because those are identifiable before the product is shipped. If there is already a heavy supply of tomatoes in the market, the lower quality tomatoes will not sell above the reference price. So this requires the Mexican signatory growers ensure that if there is already plenty of product, that they exercise restraint and they do not ship the lower quality tomatoes. So the idea is the Agreement makes adjustments for things that can change after shipment. So that is why we have the condition defects.

I have a question; if 25% are found soft and decay, how do we show we destroyed the tomatoes? Over the years I have seen a variety of examples of evidence: dump certificates, photos, certified statements, affidavits. I am looking at Brian to see if there is anything else that he can think from PACA that PACA would be looking for. Brian says, anything donated they would be looking for a donation certificate. Keep all of the paperwork together. The customer should provide the seller with the required paperwork, and it is the obligation of the seller to ensure they have what is needed before they give the condition defection adjustment on those.

The question is, if a full load is rejected, and it scores 25% out of grade, can the entire load be rejected or just 25%? If it meets the minimum requirement as it would with 25%, the entire load can be rejected in accordance with the Agreement. And again those requirements are all in Appendix B, the section for making adjustments for condition defects.

I have a question here; where some contracts from selling agents are saying that only one half of the customary repacking reconditioning charges are allowed to be deducted off if the lot fails. I would encourage you please to go to Appendix B of the Agreement. Section B4 explains the allowances for the repacking charges. And there is a difference if it is performed by unaffiliated party or if it is performed by the selling agent itself. So that is a very specific question, so it is probably best if you read that section of the agreement. It should become clear that if the salvaging and reconditioning activity is performed by the Selling Agent's customer or a party affiliated with the Selling Agent, the direct labor costs or, in lieu thereof, one-half of the ordinary and customary repacking charges may be reimbursed. So that is exactly where that statement comes from.

The question about the repacking fee of \$250 per carton, how was that calculated; is it considered ordinary and customary? The Agreement tries to reflect the market realities. Over time we have had a lot of experience with this, and what is in there with the \$250 is only an example. We have found that it varies very much. It is going to cost much more to repack the tomatoes in New York than it will cost to repack them in Oklahoma, for instance. So those are things that we have a sense of: what is excessive, what seems to low. We get that over time, where we have questions we will ask and require supporting paperwork documentation. The concern is that in some of these cases, if the Agreement was more restrictive it would cause more problems for everyone. So this is recognition that it can be different in different locations, and if it seems too high or too low we do ask those questions.

Someone asked if it is possible that Mexican growers and sellers use Canada's market to sell tomatoes at really low prices to get rid of excess production? The Agreement would not permit that; it would require that the seller to the signatory seller notify the Canadian customer that any sales of the product back into the U.S. are subject to the terms of the Agreement.

Are you required to have a federal inspection for all price reductions, or just those that would go below the reference price? That's a good question. If the price is \$12 a box and the market drops, and it is agreed the seller and the buyer agree to \$10 a box instead of \$12, that adjustment can be made without involving Commerce. The Agreement comes into effect when any of the tomatoes in the lot are rejected, and therefore not sold below the reference price. And this is the thing that I said we need to be careful of; there is no averaging across the lot. That even if you have 1,000 boxes and let's say 25 of them are in such bad condition, there can never be sort of an averaging that results in any tomatoes being sold below the reference price. That is why we have the paperwork set up the way we do. Obviously, when there is a strong market with higher prices the condition defect claims processes do not come into play.

Roma or plum tomatoes regarded as specialty; are they subject to the Agreement? Yes, they are subject to the Agreement and they are an open field tomato unless they are grown in a controlled environment.

Who governs the Agreement or monitors it? The Commerce Department, (and it has been around for awhile) for 17 years. We have experience, the Agreement includes very strict reporting requirements and we monitor the compliance on a daily basis.

If I am a Mexican grower and I sell to my subsidiary in the U.S., and then the subsidiary delivers free consignment tomatoes to a selling agent in the U.S., how will the price be determined? Every Mexican signatory needs to ensure that the tomatoes are being sold at or above the reference price thru their selling agent. There is no free consignment. It is important to note that the obligation to meet the requirements of the Agreement starts at the signatory. They then enter into the contract with their selling agent to ensure the requirement to the Agreement and the minimum price requirements are met with the first sale to the non-affiliate.

If a U.S. seller sells a non-defective load of Mexican tomatoes to a U.S. buyer below the reference price, is that a violation of PACA? It would be a violation of the Agreement. PACA would need to see all of the particulars, but it is a violation of the Agreement if they sell below the reference price.

What is the grace period for exhausting existing inventories of invoices that comply with the 2008 Agreement? Does the stamp with the new language apply on the existing invoices suffice? That would work for purposes of the agreement, and there would be no issues for PACA as well.

Can a Canadian inspection report be used to determine if the tomatoes breach the Mexican Suspension Agreement? No; it is a USDA inspection.

Are there any additional markings required for the retail units? I can tell you only the markings the Agreement specifies have to be on the various boxes. So I am not sure beyond that. There is nothing else we would require for the Agreement.

Is a hydroponic boxed tomato and inserts considered a specialty? If they are hydroponic then they fall under the controlled environment (if they are basic hydroponic round or romas, otherwise they would go). If they are grape or a cherry they would fall into the specialty category. The round and roma hydroponics are in the controlled environment category.

There is a question about a re-packer cost for distributor account versus the price of the sale if the distributor received a load of two layer 4x5 tomatoes but repacked the load into one layer 28-count tomatoes. It is the first person who is selling the tomatoes that again is where the reference price applies. If the distributor is affiliated with the grower and is repacking them to make the first sale, then the reference price that applies is the one layer 28-count tomatoes. If they are sold to a re-packer in 25lb boxes, that is the first sale and what the re-packer does with them after that is not a party to the Agreement.

Does the Agreement require 100% of the Mexican growers and exporters to sign? Will Customs stop a shipment from a non-signatory, or from a signatory but with a price lower than the reference price? As I said, U.S. law requires that we have 85% coverage. We have that. The Mexican government has put some measures in place to increase the signatory coverage. All we can do on this side of the border is we can say where U.S. law applies and that requires that we have at least 85%. U.S. Customs does not monitor the price; that is what Commerce does after the fact. U.S. Customs would not be stopping a shipment based on price.

If the petitioning U.S. industry sought to withdraw or terminate the Agreement and investigation, why is there a revised Agreement? I think if you read the various documents, the Federal Register notice, that request was made. The prior Agreement the U.S. industry did not think it was meeting the requirements. When we entered into negotiations with the Mexican tomato growers, we consulted with the U.S. industry and we are certain the current agreement meets the requirements of U.S. law.

If a whole load is rejected, can it then be re-graded to sell good produce and dump bad product? If the whole load is rejected, those tomatoes can never be sold. They cannot enter the fresh market, or the processed product. They have to be destroyed or donated to a food bank.

With the sheer volume of tomatoes coming in, how can Commerce and USDA monitor it effectively? We have various mechanisms in place; we have the involvement of the Mexican growers associations. We monitor the prices, we verify, we get different reports, we are monitoring it on a daily basis. We look at the AMS reports. It is just something we do on a daily basis.

For the definition of a controlled environment do all the components have to be true to be considered controlled environment? Yes, that is a very specific definition.

In the case where a broker is selling to a processor, all requirements being met package-wise, can the shipper-grower sell to a broker, then a broker sell to a processor? Again, the first sale has to be at or above the reference price and so if the first sale was to a broker above the reference price that is the sale that is subject to Agreement. What happens to them afterwards is not a factor for the Agreement.

There is a question of getting information on the farms, who is checking on the production methods? The new Agreement includes measures, as I mentioned, by the Mexican government. We are going to have collaborative information sharing;

we also get reports from the associations. We have gone to visit the growers and verified there before, so we do have authority to do that under the Agreement.

The question is, I understand the Agreement requires 100% compliance, but you just said the law requires compliance of only by 85%. U.S. law requires 85%. If the Mexican government has put in a law requiring 100%, that is on that side of the border. The Agreement has to meet the requirements of U.S. law and U.S. law says 85%.

Is a terminal market seller in violation of the Agreement if they sell for below the reference price even though they paid the selling agent the reference price or higher, essentially the seller absorbing the loss? According to the terms of the Agreement, it is that first sale that has to be above the reference price, so if they are absorbing the loss and that first sale was still above the reference price, it was made in accordance with the Agreement.

If a load is received outside of the USDA hours of operation, on the weekend for example, and an inspection is needed, how do we request the inspection to ensure we meet the eight hour time limit? Over the years I have seen records of phone calls, the inspection only has to be requested. I have seen certification statements, affidavits. The inspection has to be called. It can be emailed, faxed. If you have confirmation that it has been requested, it meets the requirement.

Does the Agreement cover or overlap to the Canadian market in any form? No, the Agreement covers Mexican tomatoes sold in the United States.

There are some questions about greenhouse products. The Agreement does not use the term greenhouse it uses controlled environment. We know there has been a shift in how the product is being reported under the new Agreement unless it meets that in the AMS Tomato Facts report. Unless the tomatoes meet that strict definition in the Agreement for controlled environment, they are open field or specialty. The Agreement does not define greenhouse.

The Agreement text you can find at our website, it should take you there and you should see the 2013 Agreement and all the other ones are there. It was also published in the Federal Register on March 8, so that is another place to look at it. But it should be right there; also if you go to Trade.gov/IA it should be there under highlights and news that is another shortcut, not through the Agreement but through the general Commerce website.

If a purchase is made at the farm, how is the price determined? I have never in 17 years not heard of that. All expenses beyond the port of entry to the United States need to be added to the reference price.

What are examples of the adapted environment? I think we gave a couple: shade cloth, minimally protected agriculture, shade cloth, tents, anything that doesn't meet the definition in the Agreement.

There are some questions, particulars about the inspection process and if you have a certain percentage of defects. Again, I would encourage you to go to Appendix B of the Agreement and if it meets the greater than eight percent soft and decay; if you look at the text of the Agreement, that should be spelled out there for you.

Someone asked why is a 25 lb bulk average weight 26.79? When we weighed tomatoes at the port we found that the average weight of a 25lb carton was 26.79 and that is how that average weight was determined. It is my understanding that the seller wants to ensure that the receiver gets at least 25lbs and I know that there is evaporation as the tomatoes travel, so in order to get the most accurate value for the tomatoes and the minimum prices we derived these average weights and we calculated it that way.

Are grape and cherry tomatoes in clamshells included in the Agreement? All fresh tomatoes, except tomatoes that are for processing, are included in the Agreement. The packaging type style does not matter; it covers all fresh tomatoes.

Grape tomatoes are on the specialty tomato chart. That was a question.

Who is responsible for certification of the different categories to verify compliance? We (USDOC) will be monitoring that; we will be getting reports from the signatories; we have the authority to verify. We will be establishing an information exchange with the Mexican government that tracks Mexican exports.

There are a lot of questions regarding if the tomatoes are sold and then "x" happens? Again, the point I can't emphasize enough it's the first sale, so if the tomatoes have sold, then they have been sold. It is that first sale that's governed by the Agreement.

How is the 85% policed? We have over 600 signatories. We get reports from the signatories themselves; we get data from U.S. Customs and Border Protection and we ensure that we have at least 85% coverage from the signatories based on entries of product from the U.S. Customs data.

Again another question about Canada, this is a Mexican agreement only.

If a grower does not sign the Agreement, can they sell at U.S. competition prices?

If a grower does not sign the Agreement they are not subject to the terms of Agreement and they can set their prices.

Is the term greenhouse no longer relevant in terms of the reference price?

Greenhouse was not a relevant term used before. In the 2002 and 2008 Agreements we had single reference prices for each season. We do not define greenhouse in the current Agreement. I know it is an industry standard or well known term in the industry, but it is not something the Agreement addresses.

Again, some of these questions are getting into hypotheticals. I would encourage you, if you have evidence of circumvention attempts, to work around the Agreement, the Agreement clearly specifies what constitutes a violation of the Agreement and those were in the slide presentation as well. As Brian said, if you have evidence, come to us; send it to PACA in writing. Again, the violations are in Section 5 of the Agreement and 5F lists several, including the repeated over-filling, selling for processing without meeting the requirements of Agreement; selling to Canada, etc.

Question: I mentioned over 600 signatories, is there a record on file listing all the growers? It is publically out there on our website, so go to the link. You will see the list of current signatories that we updated after the signing of the current Agreement, so that should be there for you.

How do you become a selling agent or a distributor? For that one contact PACA. The PACA Customer Service Hotline is 800-495-7222. So those sorts of questions, getting involved in the business end, etc., I would refer you to Brian (PACA).

If a product comes directly to Canada but then plans on shipping to the U.S. do you accept the Canadian inspection. The Agreement requires a U.S. inspection.

There are a couple of questions that have to do with getting the documentation from the customer if you are the seller. The agreement specifies the paperwork needs to be done within a certain timeframe. The coverage of the Agreements is so vast that almost all of the receivers are buying under the terms of the Agreement and so both buyers and sellers are familiar with the process. I have verified at companies where the receiver just refused to provide some of the paperwork and I have seen sworn statements from employees of the company and the efforts that they went to, to get the documentation that the tomatoes were rejected. I can tell

you those instances are very rare. We are very careful to make the Agreement work in a way that it doesn't make it impossible for people to comply. Sometimes the customer goes out of business, and you keep the documentation of all of those things.

I am going to take a risk and answer what is the definition of the "lot." I will give the non-technical PACA definition. For the Agreement purposes, it is the whole amount, as they were typically. They are the same type of tomatoes, like 1,000 cartons of 5x5, you know, 500 cartons of 4x6, and so if the problems on that were only with the 5x5, then if the 1,000 5x5 were inspected because there were problems there, that is what would be considered the "lot" for purposes of the Agreement and making the adjustment.

Why isn't abnormal coloring considered a condition defect? Again, that is a defect that the signatory would know before shipping the product; that it was a defect and should not ship it if the market is such that it can't command the reference price. The reference price is based off of 26.79 pounds. When you look at those prices in the box weight chart, the actual box prices, that is how that works. If you look at the website I am sure you noticed the box weight chart does not include all types of tomatoes. There is a procedure you are supposed to follow if a signatory intends to ship tomatoes in a new pack style that is not on the box weight chart. So I would refer you to our website for that form.

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