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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket No. FV02-369]

RIN 0581-AC21

Perishable Agricultural Commodities Act (PACA): Amending Regulations To Extend PACA Coverage to Fresh and Frozen Fruits and Vegetables That Are Coated or Battered

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is amending the regulations under the Perishable Agricultural Commodities Act (PACA or Act) to extend PACA coverage to include fresh and frozen fruits and vegetables that are coated or battered.

EFFECTIVE DATE: June 2, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: This regulation is issued under authority of section 15 of the PACA (7 U.S.C. 4990).

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

Marketing Service (AMS) administers and enforces the PACA.

The PACA also imposes a statutory trust for the benefit of unpaid sellers or suppliers on all perishable agricultural commodities received by a commission merchant, dealer, or broker and all inventories of food or other products derived from the sale of such commodities or products. Sellers who preserve their trust rights are entitled to payment ahead of other creditors, from trust assets, of money owed on past due accounts.

In January 2000, a large food service distributor in the United States with annual net sales of approximately \$8.9 million filed for Chapter 11 bankruptcy protection. The company, which listed over \$30 million in produce debt, settled all PACA trust claims except five that involved over \$11 million in coated and battered potato products. The firm contended that the coated and battered potatoes were not covered under the PACA trust provisions [7 U.S.C. 499e(c)]. As a result of the disputed bankruptcy claims, the Frozen Potato Products Institute (FPPI), a national trade association whose members are frozen potato processors accounting for 95 percent of all frozen potato products in the United States, in June 2000, asked AMS for a written advisory opinion to clarify whether or not coated or battered potato products are covered under the PACA.

The majority of FPPI's members coat or batter their potato products to preserve their color and crispness while under heat lamps after cooking. The operation involves dipping potato strips into a mixture of water and natural vegetable starch (e.g., potato or rice). Subsequently, a crisping agent such as dextrin and/or a chemical leavening agent are added to the product. The product is then air blown to remove all but a thin layer of coating, oil-blanching, and then finally frozen.

Coated or battered products are in great demand by fast food restaurants and consumers because the operation preserves the color and crispness of potatoes held under heat lamps, a common practice in fast food restaurants, although it does not alter the taste or texture of the product. Frozen potato processors have seen dramatic growth in the market for coated potatoes since the technology was first introduced in the early 1990's,

and FPPI states that it expects that trend to continue. The food service distributor that filed for bankruptcy protection supplied approximately 36,000 restaurants throughout the United States.

According to FPPI, 8.2 billion pounds of frozen potato products were produced in the United States from April 1999 to April 2000. Out of that total, approximately 26 percent were coated or battered, accounting for 2.1 billion pounds of potato products with a market value exceeding \$800 million.

In its response to FPPI, dated August 16, 2000, AMS concluded that coating or battering does not alter the essential character of the potato products because the operation leaves them virtually indistinguishable in appearance and texture from those that have not been coated or battered. The operation, AMS stated, is directly analogous to those described in 7 CFR 46.2(u) that may be performed on a perishable agricultural commodity without changing the commodity into a food of a different kind or character. In addition, the use of starches in the operation likely has less of an impact on the texture or essential character of the potato than other processes already expressly accepted in 7 CFR 46.2(u), such as chopping, oil blanching, and adding sugar or other sweetening agents.

Although the PACA regulations previously did not specify that coated and battered perishable agricultural commodities were covered under the PACA, it has always been AMS' policy to recognize that the PACA covered such commodities since the coating or battering operation had no impact on the texture or essential character of the end product. The regulatory amendment herein codifies USDA's policy by amending the current PACA regulations' definition of "fresh fruits and fresh vegetables" [7 CFR 42(u)] to expressly extend PACA coverage to perishable agricultural commodities that have been coated or battered.

Comments

A proposed rule to amend the PACA regulations was published in the **Federal Register** on December 16, 2002 (67 FR 77002). The proposal sought to amend Title 7, part 46, to expressly extend PACA coverage to perishable agricultural commodities that have been coated or battered. Before the comment period ended on January 15, 2003, we

received timely comments from Curt Maberry of Curt Maberry Farm, Inc., Lynden, Washington; and Frozen Potato Products Institute (FPPI), McLean, Virginia.

Mr. Maberry and FPPI strongly support AMS' proposal to extend the coverage of the PACA to include fresh and frozen fruits and vegetables that are coated or battered.

In his favorable comment, Mr. Maberry stated that he unequivocally recommends expanding the coverage of the PACA given that markets are ever-evolving, and AMS' proposal to allow fresh and frozen fruits to be coated or battered and still remain covered under the PACA is the correct and proper thing to do. Mr. Maberry applauded AMS for progressively taking care of the farmer.

FPPI fully supports the proposed changes, which grants the request made by FPPI in its petition seeking precisely that AMS codify its existing agency policy that the coating or battering of fruits and vegetables are not processes that are considered to change a perishable agricultural commodity into a food of a different kind or character. In its comment, FPPI requested that AMS include in the preamble to the final rule a statement that it is amending the list of processes in the regulations to codify AMS' historical opinion that coated or battered frozen potato products are perishable agricultural commodities.

AMS received no comments opposing the proposed regulation, and therefore is making no changes to the final rule.

Executive Orders 12866 and 12988

This final rule, issued under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*), 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 final rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), AMS has considered the economic impact of this final rule on small entities. The purpose of the

RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those whose annual receipts are less than \$5,000,000. There are approximately 15,700 firms licensed under the PACA, many of which could be classified as small entities.

AMS recognizes that frozen potato products represent the largest single frozen commodity in the United States. PACA coverage of such commodities will affect countless growers, shippers, processors, and distributors who deal in the commodities, most of which are small businesses. To exclude over 26 percent of frozen potato products from coverage of the PACA, however, is inconsistent with the intent of Congress in enacting the PACA to protect producers and dealers of fresh and frozen fruits and vegetables.

This final rule is being issued in response to the frozen food industry's request that AMS codify its opinion that the coating or battering of fruits and vegetables is an operation that does not change a perishable agricultural commodity into a food of a different kind or character. Producers and distributors of coated and battered produce will benefit since they will have the same rights as those afforded other processors and suppliers whose products may be indistinguishable in appearance or texture, but not coated or battered. AMS believes that this final rule will help reduce litigation time and expenses for small produce businesses that seek to enforce their trust rights in federal district courts.

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

Paperwork Reduction Act

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104-13), the information collection and recordkeeping requirements that are covered by this final rule were approved under OMB number 0581-0031 on September 30, 2001, and expire on September 30, 2004.

List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 46 is 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 (u) is revised to read as follows:

§ 46.2 Definitions.

* * * * *

(u) *Fresh fruits and fresh vegetables* include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, battering, coating, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.

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Dated: April 28, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03-10819 Filed 5-1-03; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 932

[Docket No. FV03-932-1 FR]

Olives Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.