

**August, 2010 (Draft Technical Comments)**

PACA Trust Post-Default Comments  
Agricultural Marketing Service, Fruit and Vegetable Programs  
PACA Branch  
1400 Independence Avenue, SW  
Room 2095-S, Stop 0242  
Washington, DC 20250-0242

RE: Docket Number AMS-FV-09-0047 Perishable Agricultural Commodities Act: Impact on Post Default Agreements on Trust Protection Eligibility

United Fresh Produce Association, (United Fresh) representing the interests of member companies from small family businesses to the largest international corporations throughout the global fresh produce supply chain, including growers, shippers, fresh-cut processors, wholesalers, distributors, retailers, foodservice operators, industry suppliers and allied associations, respectfully submit these comments to the Proposed Rule on Post Default Agreements and strongly urge the revisions to the rule as explained below.

The preamble to the proposed rule clearly explains the serious problems undermining the PACA trust due to several court rulings improperly invalidating the trust rights of unpaid produce suppliers simply because the suppliers agreed to a payment schedule after the buyer defaulted. Under these rulings, whenever a buyer fails to make timely payment – the only time the trust is needed -- the supplier's trust rights are in jeopardy. As a result, many in the industry, including the USDA's own Fruit and Vegetable Industry Advisory Committee, urged the Secretary to amend the regulations to remedy this problem.

In practice, when a buyer fails to pay on time, an accounts receivable clerk or salesman makes informal efforts to obtain payment. Initially, this is done by phone. A typical exchange would be as follows. "Seller: We're calling about your past due bill. Buyer: Sorry for the delay, it will be paid in the next 30 days. Seller. Ok. Thank you." Often, emails or faxes are exchanged confirming payment dates. Under the court rulings, if the buyer then fails to pay, a simple undisputed produce trust debt turns into an enormous legal battle over whether the seller waived its trust rights. This involves extensive discovery, including production of documents and depositions, as attorneys for lenders and debtors seek to prove there was a post-default agreement. Assuming the supplier can afford the time and expense of the litigation to pursue such a claim, it is still likely a court will invalidate its trust rights. Alternatively, suppliers must consult a PACA lawyer whenever a produce bill is past due to obtain advice as to what can and cannot be said or written to maintain PACA trust rights. Thus, whenever a seller engages in a post-transaction communication it is akin to walking across a minefield.

In the preamble, the Secretary finds that the courts have interpreted the statute incorrectly in holding that post-default agreements waive PACA trust rights, and that post-default agreements are not extensions of credit but an attempt to collect a debt. The preamble then states:

In the context of the PACA trust, the right to make a claim against the trust are vested in the seller, supplier, or agent who has met the eligibility requirements of paragraphs (e)(1) and (2) of Sec. 46.46 (7 C.F.R. 46.46(e)(1) and (2)). The seller, supplier, or agent remains a beneficiary of the PACA trust until the debt owed is paid in full. An agreement to pay the antecedent debt in installments is not considered payment in full. Thus, we

do not believe that a post-default payment agreement should constitute waiver of a seller's previously perfected trust rights. 75 FR 32308; FR Doc 2010-13634, pp. 6-7.

This is the correct interpretation of the statute which explicitly states that trust assets must be held for unpaid suppliers "until full payment of the sums owing in connection with the transactions has been received by such unpaid suppliers, sellers, or agents" (7 U.S.C. 499e(c)(2)), as the Secretary notes in the preamble. It also echoes the original legislative history (1984 U.S.C.C.A.N. 409), and the preamble to the original final regulations to implement the trust provisions in 1984. 49 FR 45735, p. 9. However, the Secretary promulgates a proposed rule which adopts a post-default waiver of trust rights similar to that imposed by the courts, which is also contrary to the statute and will result in more problems than the court-imposed waiver rule.

Under the proposed rule, a supplier forfeits its trust rights if it enters into a post-default payment agreement unless the post-default agreement is in writing and less than 180 days from the date payment was due. If the supplier enters into an oral payment agreement, or agrees to payment more than 180 days from the payment due date, the supplier forfeits the trust rights it has preserved. Thus, the proposed rule formally establishes what the incorrect court decisions have held -- post-default agreements to collect trust assets can result in a waiver of trust rights. But this rule should not be adopted for the following reasons.

First, the proposed rule is contrary to the statute. In the preamble, the Secretary explains that the statute states unambiguously that full payment is the only action that discharges a trust creditor's rights under the PACA trust provisions. By endorsing this new post-default waiver provision, the proposed regulation conflicts with the statutory language that a trust creditor remains eligible for trust benefits until it has received full payment. The courts based their interpretation on the incorrect idea that post-default agreements extend the pre-transaction 30 day limit. The Secretary has clearly explained in the preamble why that is incorrect based on the statutory language and the agency's enforcement of the Act's prompt pay requirements. There is nothing in the statute or legislative history that indicates Congress intended that sellers, who preserved their trust rights, would "forfeit eligibility under the trust" by any actions to collect the trust debt after the buyer has defaulted. Rather, the legislative history also states that once sellers become trust creditors, they "remain trust beneficiaries until they have received payment in full. 1984 U.S.C.C.A.N. 409.

Second, there is no problem with post-default agreements. Instead, the problem at issue is a wrong interpretation of the Secretary's prompt pay regulations. The courts have simply ignored the statute and regulations which state that payment terms can only be extended before the transaction. As the Secretary explains in the preamble, post-default agreements are not extensions of credit but are an attempt to collect a debt. There is no problem in the industry with post-default agreements to collect trust assets outside of litigation. Nor is there any authority in the statute or legislative history to regulate such agreements. So no regulatory action is required or authorized over such agreements.

Third, the proposed rule will result in even more practical problems than the industry is now experiencing under the incorrect court rulings. As is the case now, under the proposed rule every time there is a past due debt, which is the only time the trust is required, the door opens to complex litigation over whether trust rights have been "forfeited." As in every other industry, initially produce suppliers try to resolve past due payments over the phone. Thus, under the proposed rule, every subsequent trust claim will be the subject of the same

expensive litigation to determine if there was a "forfeiture" due to an oral post-default agreement.

If a supplier prepares a post-default written agreement, the supplier must assure that the written agreement is no more than 180 days from the "due date of the transaction." But determining the "due date of the transaction" is not as simple as it sounds. The regulations list 11 different "due dates" for various kinds of produce transaction. 7 C.F.R. 46.2(aa). Even the most common "due date" of 10 days after the day on which the produce is accepted in a purchase-sale transaction is problematic. 7 C.F.R. 46.2(aa)(5). Technically, the "due date" in such a transaction cannot be varied unless there is a written agreement entered into before the transaction and maintained in the parties' records. But many suppliers put 21 or 30 days on their invoices without a written agreement. If those suppliers enter into a 180 day post-default agreement from the "due date" on their invoices, they "forfeit" their trust rights. This kind of technicality invites litigation over the simplest claims. Furthermore, if the buyer fails to pay in 180 days, there will still be litigation to determine if the agreement was somehow extended beyond 180 days either orally or in writing. Thus, everytime there is a past due debt, sellers will have to consult a PACA lawyer. In sum, there are even more of the same kinds of problems under the proposed rule than under the erroneous court rulings. It is inconceivable that Congress intended these kinds of technicalities and booby-traps which rob suppliers of their trust rights.

Finally, the proposed rule could be interpreted by the courts to prohibit all post-transactions agreements. Once the Secretary acknowledges in the regulations that post-default agreements can "forfeit" trust rights, it is not difficult to foresee a court holding that there is no basis in the statute, legislative history or regulations for allowing any post-default agreements. Since the Secretary agrees in principle that post-default agreements can waive trust rights, then all such agreements "forfeit" trust rights. As a result, the industry would be right back where it started, except that waivers due to post-default agreements would be part of the regulations and applied in all cases.

This is a remedial statute, and such statutes must be interpreted broadly to achieve their goals. The goal of the PACA trust provision is to assure that produce suppliers are paid from the proceeds of the produce they supply. Congress set up a simple notice requirement under which suppliers preserve their trust rights so they are paid for the produce they supply. The proposed rule is not based on any statutory language or legislative history; and, like the court rulings, it makes achievement of the goal of the trust provisions nearly impossible and very expensive, which was not the intent of Congress. Therefore, we most strongly urge that the 180 day provision be stricken, and that the regulation states that post-default agreements do not waive or forfeit a supplier's properly preserved trust rights as set forth below.

We also request that the last two (2) sentences of Sec. 46.46(e)(3) of the proposed rule be deleted since they are unnecessary. If there is a bankruptcy, or if a buyer is ordered to hold all trust assets by a court, then there cannot be any further collection action by operation of law; and the remaining unpaid amount under a payment agreement would continue to be a PACA trust debt by operation of law. If such wording is not necessary, it is better to delete it to avoid unintended creative interpretations by imaginative lawyers and judges.

We submit the following amended language for your consideration.

(3) If there is a default in payment as defined in Sec. 46.46(a)(3), the seller, supplier, or agent who has met the eligibility

requirements of paragraphs (e)(1) and (2) of this section does not waive its trust rights or forfeit eligibility under the trust by agreeing ~~in writing~~ to a schedule for payment of the past due amount in any manner. ~~The maximum time for payment of a past due amount to which a seller, supplier, or agent can agree, after a default, and still be eligible for benefits under the trust is 180 days form the default date, that is, the original payment due date of the transaction. The seller, supplier, or agent must cease all collections of past due amounts under a scheduled payment agreement if the buyer enters into bankruptcy or if the buyer is ordered to hold its inventory, accounts receivables and proceeds intact until a determination of trust interest in a civil action. The remaining unpaid amount under the scheduled payment agreement will continue to qualify for trust protection.~~

Thank you for your consideration.



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