

# 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. 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:** Proposed rule.

**SUMMARY:** The Department of Agriculture (USDA) is proposing to amend 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 to maintain taste, color, and/or texture prior to or after cooking. It is USDA's opinion that coated or battered fruits and vegetables are covered under the PACA since the process of coating or battering does not alter the character of the end product. USDA seeks to codify its position so that all dealers of perishable agricultural commodities are properly on notice as to the scope of products covered by PACA regulations.

**DATES:** Comments must be received by January 15, 2003.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to Dexter Thomas, Senior Marketing Specialist, PACA Branch, F & V Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 2095-So. Bldg., Washington, DC 20250-0242. E-mail [dexter.thomas@usda.gov](mailto:dexter.thomas@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](http://www.ams.usda.gov/fv/paca.htm).

**FOR FURTHER INFORMATION CONTACT:** James R. Frazier, Chief, PACA Branch, Room 2095-So. Bldg., Fruit and Vegetable Programs, AMS, USDA, Washington, DC 20250, Phone (202) 720-2272.

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

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, the largest food service distributor in the United States 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. 499 (e) 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-blanched, 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 CFR 46.2(u), such as chopping, oil blanching, and adding sugar or other sweetening agents.

FPPI is now asking that USDA amend the 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. In its petition of June 21, 2001, FPPI requested that AMS codify its August 2000 opinion to ensure that all dealers of perishable agricultural commodities are properly on notice as to the scope of products covered by PACA regulations.

#### Executive Orders 12866 and 12988

This proposed 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 proposed 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 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 (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 would 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 is inconsistent with the intent of Congress in enacting the PACA to protect producers and dealers of fresh and frozen fruits and vegetables.

This regulatory amendment is being proposed in response to the petition of the frozen food industry to codify USDA's opinion that the coating or

battering of fruits and vegetables is an operation that is not considered as changing a commodity into a food of a different kind or character. Producers and distributors of coated and battered product would benefit since they would have the same rights as those afforded other processors and suppliers whose product may be indistinguishable in appearance or texture, but not coated or battered. AMS believes that codifying this opinion 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 made an initial determination that the provisions of this proposed rule would 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 proposed rule were approved under OMB number 0581-0031 on September 30, 2001, and expire on September 30, 2004.

#### List of Subjects in 7CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping 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 (u) would be 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.

\* \* \* \* \*

Dated: December 9, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 02-31583 Filed 12-13-02; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. FV03-916-1]

### Nectarines, Pears, and Peaches Grown in California; Continuance Referenda

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Referenda order.

**SUMMARY:** This document directs that referenda be conducted among eligible growers of California nectarines, pears, and peaches to determine whether they favor continuance of the marketing orders regulating the handling of nectarines, pears, and peaches grown in the production area.

**DATES:** The referenda will be conducted from January 6 through January 31, 2003. To vote in these referenda, growers must have been producing California nectarines, pears, and peaches during the period April 1 through November 30, 2002.

**ADDRESSES:** Copies of the marketing orders may be obtained from the office of the referenda agents at 2202 Monterey Street, Suite 102B, Fresno, California 93721, or the Office of the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture (USDA), 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250-0237.

**FOR FURTHER INFORMATION CONTACT:** Kurt J. Kimmel or Terry Vawter, California Marketing Field Office, Marketing Order Administration Branch, Fruit and