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NEW PACA REGULATION ALLOWS FOR POST-DEFAULT PAYMENT PLANS WITHOUT JEOPARDIZING A SUPPLIER'S PACA TRUST ELIGIBILITY

Yesterday, the new amendment to the USDA's PACA Regulations, 7 C.F.R. § 46.46(e)(2)&(3), took effect allowing produce sellers to make post-default payment agreements with their delinquent buyers without losing their PACA trust eligibility. Before this revision, a seller – who tried to collect on a past due account from its buyer by agreeing to a payment plan – jeopardized waiving its PACA trust rights. This waiver resulted in many produce sellers losing their priority status as PACA trust creditors and being downgraded to unsecured creditor status.

Rynn & Janowsky, LLP's Patricia J. Rynn took an active role in shaping this improved piece of law. Last year, the USDA published the proposed regulations for public comment. R&J recognized flaws in the proposed regulation and analyzed the affect they might have on our agribusiness clients. Because the draft regulations contained language that could be detrimental to our clients, Ms. Rynn submitted proposed revisions to the USDA on behalf of our clients. The USDA took note and incorporated R&J's suggestions into the final version of the new law.

Beginning today, produce suppliers can work out payment plans with their customers for *past due* invoices without losing their PACA trust rights. The new regulation only applies to *post-default* payment plans. In other words, a payment plan can only be arranged *after* a payment is past due. These payment arrangements can be either oral or in writing. Once a payment plan agreement is entered into, however, it replaces the old payment terms; consequently, to allow quick collection action, it is wise to include a provision that should the customer default on any payment, the entire sum owed becomes due and payable at the seller's option.

Of course, sellers must still be very careful to preserve their PACA trust rights by:

- Having "PACA prompt" payment terms, or if you agree to payment terms that are *different* from "PACA prompt" (which on a straight sale is 10 days from receipt and acceptance), you must have a separate pre-transaction written agreement stating those payment terms; however, they may not exceed 30 days from receipt and acceptance.
- Giving the buyer notice of your intent to preserve your PACA trust rights, by:
 - o If you are a PACA licensee, including the required statutory language on the face of your invoices and billing statements; or,
 - o If you are not a PACA licensee, giving written notice of your intent to preserve your PACA trust rights within 30 calendar days after payment was due.

The new law makes it clear that produce sellers are not extending their pre-transaction payment terms – and thereby losing their PACA trust eligibility – when they agree with their customer to a payment plan covering past due invoices. In the past, the only way a produce seller could agree to a payment plan was through a court approved stipulated judgment.

The changes made by the new regulation are shown below in the USDA's "final rule":

§46.46 Statutory trust.

- ***
- (e) ***
- (2) The maximum time for payment for a shipment to which a seller, supplier, or agent an agree, prior to the transaction, and still be eligible for benefits under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph a)(1) of this section.
 - (3) If there is a default in payment as defined in § 46.46(a)(3), the seller, supplier, or agent who has met the eligibility requirements of paragraphs (e)(1) and (2) of this section will not forfeit eligibility under the trust by agreeing in any manner to a schedule for payment of the past due amount or by accepting a partial payment.
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Rynn & Janowsky is pleased to bring this good news to you and to let you know that we are always working to shape and influence legislation in your best interest.

If you have any questions regarding this new law, or any other agricultural law issue, please contact Marion I. Quesenbery, by e-mail at marion@rjlaw.com or by telephone at (510) 705-8894, or any other attorney at **Rynn & Janowsky, LLP**.