



Electronic Data Interchange: Bringing PACA Into The 21st Century

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The way the produce industry does business continues to evolve and so must the legal protections under the Perishable Agricultural Commodities Act ("PACA"). Originally relying on a handshake, the industry moved to paper invoices and PACA provided methods to use invoices to protect the produce Sellers' rights, which is the subject of another article. Now a new way of placing orders is beginning to take hold, namely the use of the Electronic Data Interchange ("EDI") where a produce Buyer can tap into the Sellers' computer system and place an order directly. This new method has opened a number of questions as to whether PACA, as it exists today, will extend its trust protections to EDI transactions, or whether a Seller runs the risk of losing his standing as a trust beneficiary - thereby losing his priority among other creditors. There is no current case law or USDA regulations governing how the use of Electronic Data Interchange ("EDI") affects PACA trust rights. However, based on established law and regulations, this article asserts that EDI transactions are protected by the PACA trust, provided certain steps are taken.

Just as with standard produce invoices, a Seller's EDI must include normal billing information and must quote the required statutory language in order to preserve PACA trust rights. When the Buyer places the order, the screen must set forth the following language:

“The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The Seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of the commodities until full payment is received.”

This should be sufficient to maintain PACA trust rights and a Seller must merely retain written records. Printing and keeping hard copies of EDI orders showing the required language should enable a Seller to prove it preserved its trust

rights. If Buyers won't accept EDI with any language other than billing information on it, the Seller can use the alternative method, of sending a separate notice of intent to preserve PACA Trust rights to any Buyer who is less than 30 days overdue in paying. This method should only be used as a last resort as it would be easy to forget to send the notice and accidentally waive your PACA trust rights.

The reason for believing that using the statutory language in EDI transactions will be sufficient is that PACA and the USDA require that the statutory language appear on ordinary and usual billing statements, which under USDA Regulations means, "communication customarily used between parties to a transaction in perishable agricultural commodities *in whatever form, documentary or electronic for billing or invoicing purposes*" 7 CFR § 46.46(a)(5) (emphasis added). Thus, placing the statutory language on either invoices or EDI should be acceptable. As long as EDI are the ordinary course of business between the Buyer and Seller, including the statutory language in the EDI should protect the Seller. Along with the statutory language and normal billing information, the Seller needs to make sure the EDI includes other contract terms such as any alteration of the net 10 language, and a statement that the Buyer agrees to pay interest on overdue balances, as well as collection costs and attorney's fees.

If the Seller uses the alternative method, it will be sending overdue Buyers a separate notice of intent to preserve trust rights within 30 days of when payment is due. If payment is made and then dishonored, as with a returned check, the Seller has another 30 days. Either way, the notice should be sent immediately. The trust notice must be in writing and must include the statement that it is a notice of intent to preserve PACA Trust benefits and include information regarding each shipment: 1) the name and address of the trust beneficiary; 2) the date of the transaction, 3) commodity, 4) invoice price and 4) terms of payment; 5) the date of notice that a payment was dishonored (if appropriate); and 6) the amount past due. 7 CFR § 46.46(f). If a computer program is set up which automatically sends trust notices to Buyers whose payment is overdue, then the timeliness of the notice should be guaranteed. The notice becomes a past due reminder and a part of the ordinary course of business between the Seller and the Buyers and may be proven in court. If sending the notice of intent is not regularly programmed into the computer and is done on a case-by-case basis, the Seller needs to retain proof that the notice was sent, such as a certified mail receipt or fax record. Either way, a hard copy of all trust notices should be kept.

In conclusion, while there are no legal rulings on EDI's impact on the PACA trust, the current regulations provide justification for preserving PACA trust rights with the use of EDI so long as the statutorily required language and terms of sale are shown on the Buyer's EDI screen and the Seller keeps a hard copy for proof. If the EDI screen cannot be modified, the alternative is to send a separate trust notice to overdue Buyers indicating that the Seller intends to preserve its PACA Trust rights. The safest way of preserving PACA trust rights is still the invoice method, but the use of EDI can bring PACA, and the produce industry, into the 21st Century.

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