

Proposed Terms for a Suspension Agreement

May 22, 2019

The record of the 2013 Agreement reflects full compliance and a healthy US market. A recent report by the US Department of Agriculture finds that import prices for fresh tomatoes from Mexico are above the reference price, often significantly. Economist reports and testimony before the US International Trade Commission find that Mexican pricing in the US market is having no impact on Florida growers and that Mexican tomatoes sell for a premium over all US producers. In this context, the Mexican signatories have developed proposals on both sides of the border focusing on enforcing the arrival condition of the first sale. This will serve to significantly strengthen the US market, especially at peak season when volumes and inventories are at their highest point and FTE faces the most pressure. Major components of this proposal include regrouping reference prices by type; restructuring treatment of liquidated damages for breach of warranty; enhanced export management; and, enhanced enforcement by the Commerce Department and by USDA. As such, this proposal builds on the provisions of the 2013 Agreement and incorporates the existing terms by reference, except as modified below.

I. Definitions

- "Buyer" is the first firm¹ located in the United States that is unaffiliated with Seller (as defined herein), that takes title of the subject merchandise from Seller and may seek liquidated damages for breach of warranty under Appendix D.
- "Seller" is any person² who makes the first sale of the subject merchandise to a firm that is located in the United States and unaffiliated with Seller. The Seller may be the signatory itself or a person who, without taking title, facilitates or performs sales duties on behalf of the signatory.
- "Round" means round tomatoes, whether mature green or vine ripe, not including any stem on tomatoes, regardless of growing method or type of packing.
- "Roma" means roma or plum tomatoes, whether mature green or vine ripe, not including any stem on tomatoes, regardless of growing method or type of packing.
- "Stem on" means any type of tomato with some or all of the stem attached, including tomato clusters and single tomatoes with stem attached.
- "Specialty" means grape, cherry, heirloom, cocktail tomatoes, or any other tomato varietal, other than Round and Roma tomatoes.
- "Organic" means tomatoes produced by a production system that has been certified "organic" by the U.S. Department of Agriculture (USDA).

¹ "Firm" means any person engaged in business as a commission merchant, dealer, or broker. 7 C.F.R. § 46.2(k).

² "Person" means any individual, partnership, limited liability company, corporation, association, or separate legal entity. 7 C.F.R. § 46.2(i).

II. Reference Prices

As the Department is aware, price increases serve only to bring more Mexican growers into the business and more volume in the US market. The following proposals are modifications of what has been proposed by FTE, which are designed to foster continued market stability.

- The reference prices for each of the tomato types cover the entire growing season, regardless if the tomatoes are produced in the winter or summer.
- Each of the tomato types will have separate reference prices for organic and non-organic tomatoes. Organic reference prices will be based on a 30 percent price differential above non-organic reference prices.
- The reference prices are as follows:

Type	Non-Organic	Organic
Round and Roma	\$0.31/lb.	\$0.40/lb.
Stem On	\$0.41/lb.	\$0.53/lb.
Specialty: Loose	\$0.45/lb.	\$0.585/lb.
Specialty: Packed	\$0.59/lb.	\$0.767/lb.

III. Treatment of Liquidated Damages for Breach of Warranty

FTE's proposal on Appendix D of the 2013 Agreement, as articulated in multiple submissions on the record of the proceeding, misunderstands its purpose, the calculation and the legal requirements. What FTE proposes runs counter to US law, including but not limited to antitrust, PACA and US antidumping laws.

First, the Department has made no finding that adjustments under the current Appendix D substantially frustrate the purposes of the agreement and are having a measurable impact on the market and on the US industry. Nor has the Department even pointed to a single instance where a sale was made below the reference price. There is no record evidence that supports FTE's proposal on Appendix D. As such, the Department does not have the authority to impose additional restrictions.

Second, FTE's proposal has a disproportional and negative impact on any US distributor of Mexican tomatoes without a US repack operation. Such a proposal would open signatories to antitrust exposure as well as legal challenge by other US distributors.

Finally, FTE's proposal both penalizes and infringes on the legal rights of the US buyer, which the Department does not have the legal authority under the dumping law to do. Among other things, FTE's proposal requires the unaffiliated US Buyer to pay more for product than it is required to pay by law. It is for this explicit reason that Appendix D was added to the agreement in 2002. A provision increasing the price and severely limiting the legal rights of US buyers would separately open signatories to antitrust exposure.

Accordingly, the Mexican signatories propose the following revision to the existing Appendix D that removes 100 percent of defective product from the US market and penalizes only the Mexican signatories for any bad arrival condition:

- If the Buyer calls for a USDA inspection for certain condition³ defects, the sales price of an entire load of Signatory tomatoes may be adjusted for such condition defects found under the USDA inspection as long the sales price of the remaining accepted tomatoes in the load is not less than the reference price.
- The Buyer may not resell the defective tomatoes in the partial load being rejected. Such tomatoes must be destroyed under USDA oversight, with a USDA certificate provided to the Buyer as proof of destruction. Proof of such destruction must be maintained by the Buyer and is subject to submission to, and verification by, Commerce.
- In the case of an FOB shipping point sale at the reference price, the Signatory or the Seller may pay liquidated damages to the Buyer for breach of warranty demonstrated by a USDA inspection certificate to include destruction costs, freight expenses, repacking charges, and inspection fees, as applicable.
- A lot containing more than 35 percent eligible condition defects based on a USDA inspection certificate in the first sale to an unaffiliated buyer in the United States may be rejected and the signatory will pay all expenses related to the return of the defective product to Mexico.
- Signatories will consent to USDA sending all such inspection and destruction certificates to Commerce.
- Signatories will submit proof of destruction or return to Mexico with their quarterly certifications and certify that there were no additional rejections beyond what it is being provided, allowing the Department to seek prosecution of any false statements.
- Failure to comply with these terms may be deemed a violation of the agreement.

In order to consider anything beyond this, the Department would need to ensure protection from legal challenge and exposure to treble damages. Depending on the proposal, the Department would need to provide some combination of the following:

- A published opinion from the Department of Agriculture that US buyers do not have the legal right to liquidated damages for a seller's breach of warranty.
- A published opinion from the Department of Commerce that it has the jurisdiction based on record evidence to restrict an unaffiliated US buyer's right to liquidated damages for a seller's breach of warranty.
- A published opinion from the Department of Justice (i) extending the antitrust waiver of the antidumping statute and the suspension agreement to the restriction of distribution in the United States to only those that have repack operations and the restriction of US buyers' rights to, among other things, seek compensation for cost outlays and (ii) immunizing the Mexican signatories from antitrust liability and prosecution.
- Take full responsibility for enforcing and defending such a provision in court and ensuring that the Department of Agriculture does the same under PACA.

³ Allowable condition defects include those currently listed under A.5 of Appendix D of the 2013 Agreement.

IV. Enhanced Export Management

The Mexican signatories make the following proposals to block unintended exports of signatory-grower tomatoes by non-grower signatories. This will help Mexican growers track how much of their product is reaching the United States at any time and better manage inventory levels.

Require growers to formally assign volumes sold in Mexico to another party in order for that party to get an export license.

- Require quarterly certifications to include volumes assigned and or received for export.
- Designate exporting fresh tomatoes to the United States under a signatory number different than one's own signatory number a violation of the suspension agreement that may result in the revocation of a signatory's export license in Mexico.

V. Enhanced Enforcement by USDA under an Amended Federal Marketing Order

Adding all tomatoes (specifically romas and specialty tomatoes, which are currently not included), to the USDA Marketing Order on Florida Tomatoes would allow USDA to block entry to imports that do not make the stated requirements:

- Round tomatoes must meet the requirements for U.S. No. 1, U.S. Combination, or U.S. No. 2 of the U.S. Standards for Grades of Fresh Tomatoes.
- Roma tomatoes must meet the requirements for U.S. No. 1, U.S. Combination, or U.S. No. 2 as defined in a new US Standards for Grades of Fresh Roma Tomatoes and included in a revised USDA marketing order.
- Tomatoes "on the vine" must meet the requirements for U.S. No. 1 or U.S. No. 2 of the U.S. Standards for Grades of Tomatoes on the Vine.
- Specialty tomatoes must meet the requirements for U.S. No. 1 or U.S. No. 2 as defined in a new US Standards for Grades of Fresh Specialty Tomatoes and included in a revised USDA marketing order.
- All would apply as soon as the new USDA Grade Standards and ended USDA marketing order are in place.

There is currently no mechanism that gives the parties authority to block imports; amending the USDA Marketing Order on Florida Tomatoes would provide that authority. Since 1955, the marketing order has authorized quality, container and pack regulations for Florida fresh market tomatoes. In accordance with separate USDA regulations, imported tomatoes are required to meet the same or comparable minimum grade, size, quality, and maturity requirements, as those specified under this marketing order. To the extent FTE has concerns about quality or condition defects of imported Mexican tomatoes, this measure would provide an unprecedented level of protection to Florida and it is well within in FTE's power to have this implemented.

VI. Enhanced Enforcement by USDA under PACA

The 2013 Agreement requires each signatory to enter into a contract with the party responsible for the first sale of its tomatoes to an unaffiliated customer in the United States incorporating the terms of the agreement.⁴ This entity, called a Selling Agent, can be an importer, agent, distributor or any other entity that facilitates the transaction between the signatory and the first unaffiliated US customers that meets the definition of "commission merchant," "dealer," or "broker" in the PACA.⁵ The agreement sets out specific actions signatories should take to ensure that their

⁴ 2013 Agreement at IV.C.3.a.

⁵ 2013 Agreement at Footnote 2.

efforts to abide by the agreement are upheld in any claims taken under PACA.⁶ Based on these documents, a violation of the agreement also constitutes an unfair trade practice that violates the PACA.⁷

PACA enforcement of the 2013 Agreement is, therefore, currently available under PACA's existing authority, both with respect to reparation claims⁸ and issues relating to incorrect accountings, or false or misleading statements.⁹

Indeed, PACA has already demonstrated not only its existing ability to enforce the terms of the 2013 Agreement, but also its ability to independently investigate potential agreement violations without an official complaint or allegation.¹⁰

To facilitate and strengthen continued PACA enforcement, the Mexican signatories make the following proposals:

- The addendum to the contract incorporating the terms of the agreement between the Mexican signatory and any and all selling agents, as defined by the agreement, will be submitted on the Commerce Department record.
- Preseason letters from the selling agent, as defined by the agreement, to the first unaffiliated customer in the United States will be submitted on the Commerce Department record.
- The quarterly certifications will be amended to cover all agreement terms and add an explicit statement that "intentional violations of the agreement are subject to additional civil penalties." This implicates 18 USC 1001 and 734(i) of the Tariff Act. These revised certifications will be signed quarterly by:
 - o Each Mexican signatory
 - o Each selling agent, as defined by the agreement
- Each signatory will agree that the above-listed documentation can be provided to PACA for enforcement.

These proposals will place on the record all information necessary for the Department or counsel under Administrative Protective Orders to submit a complaint or a violation allegation with USDA under PACA for immediate investigation.

⁶ 2013 Agreement at Appendix G.

⁷ 2013 Agreement at V.E.

⁸ PACA Section 6.

⁹ PACA Section 2.

¹⁰ Tomato Specialties LLC, d/b/a The Avocado Company International, PACA Docket No. 16-0068 (Oct.18, 2017).

VII. Enhanced Enforcement by the Department

In addition to the monitoring and enforcement activities already undertaken by the Department, the Mexican signatories propose the following:

- Expand provisions of 2013 Agreement to incorporate examination of all violations or allegations that the agreement is not meeting the statutory requirements in consultation and review procedures.
- Establish a task force with Commerce, USDA and CBP to review agreement data and information and coordinate enforcement action.
- Require quarterly verifications, in Mexico, at border-crossing locations or through questionnaires issued by the Department, to spot check compliance. One such exercise could include, for example, the Department selecting transactions based on USDA inspection certifications for additional documentation review.
- Signatory quarterly meetings with the Department or more frequently during peak season, as necessary, to discuss monitoring and enforcement matters. The locations of these meetings could be in Washington DC, Mexico City or any border-crossing location to facilitate more frequent verifications.
- The Working Group will submit quarterly and annual reports on its monitoring and enforcement activities.
- The Mexican signatories are open to third-party verification of compliance.

VIII. Necessary Measures to Avoid Needless Litigation

- All proper notice and comment procedures must be followed, including the timely release of all required Department memoranda.
- As already specified in the 2013 Agreement, parties agree on the market basis for above-listed changes and the agreement.