

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION NOTICE OF PROPOSED GUIDANCE DOCUMENTS

Pursuant to section 227.112 of the Wisconsin Statutes, the Wisconsin Department of Agriculture, Trade and Consumer Protection (DA TCP) is hereby accepting comments on the proposed guidance document:

Processing Potato Buyers Nonparticipation Documentation Requirements

LOCATION OF PROPOSED GUIDANCE

Proposed guidance document may be reviewed by accessing:

[https://datcp.wi.gov/Pages/About Us/GuidanceDocuments.aspx](https://datcp.wi.gov/Pages/About%20Us/GuidanceDocuments.aspx)

SUBMITTING PUBLIC COMMENTS

Public comments on proposed or adopted guidance document may be submitted by accessing:

[https://datcp.wi.gov/Pages/About Us/GuidanceDocuments.aspx](https://datcp.wi.gov/Pages/About%20Us/GuidanceDocuments.aspx)

DEADLINE FOR SUBMISSION

The comment period will run no fewer than 21 days after the publication of this document in the Administrative Register.

AGENCY PUBLICATION

The attached guidance document contains statements or interpretations of law under the following applicable provisions of federal law or the applicable state statutory or administrative code provisions: Wis. Stat. ch. 126, Wis. Admin. Code, ch. 101.

CERTIFICATION

Pursuant to the authority delegated to me by the Secretary, I have reviewed the attached guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.



Lara Sutherlin
Administrator
Division of Trade and Consumer Protection



Wisconsin Department of Agriculture, Trade and Consumer Protection

Division of Trade and Consumer Protection

PO Box 8911, Madison, WI 53708-8911

Phone: 608-224-5164

Fax: 608-224-4937

GUIDANCE DOCUMENT

Processing Potato Buyers Nonparticipation Documentation Requirements

This guidance document is based on Wis. Stat. ch. 126 and chapter(s) ATCP 101 Wis. Admin. Code. This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed.

17 (TCP)

See attached.

October 15, 2019

Lara Sutherlin - Administrator, Division of Trade and Consumer Protection

DATE

Contributors:



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Bradley M. Pfaff, Secretary

Date: September #, 20##
To: Non-participating Potato Buyers
From: Eric J. Hanson, Chief, Producer Security Section
Subject: **Processing Potato Buyers Nonparticipation Documentation Requirements**

This memo offers guidance to all processing potato buyers that wish to remain exempt from participating in Wisconsin's Agricultural Producer Security Fund. Several processing potato buyers that claim this exemption have had difficulty complying with a statutory requirement to maintain documentation that growers have validly preserved trust rights under the Perishable Agricultural Commodities Act (PACA). This memo offers buyers three possible options to meet this requirement.

Only the grower can preserve their trust rights. While it's not possible for the buyer to preserve trust rights for growers the exemption requirements contained in Chap. 126, Wis. Stats., place the responsibility on the buyer to make certain growers are properly preserving their trust rights. Therefore, it is important for buyers and growers to work together to assure growers preserve PACA trust rights and assure processors comply with exemption requirements.

Here are a few options to comply with provisions of Wis. Stats. §126.595(1)(f).

OPTION 1: (for PACA licensed growers only)

- The method that best protects the grower is for growers to obtain and maintain a license under the Perishable Agricultural Commodities Act (PACA) and to preserve their trust rights simply by providing the PACA statutory wording on their own invoices and billing statements issued to the buyer.

OPTION 2: (for all growers)

- Growers must provide notice preserving their trust rights to buyers for each delivery. Sellers not licensed by PACA or PACA licensees not wishing to include the verbatim statement on the billing invoice, need to provide "Notice of Intent to Preserve Trust Benefits" form with required information to buyer. (contact PACA offices for example)
- Notice must be given to the buyer at the time the potatoes are delivered, or as soon as possible after delivery.
- Notice must be provided on a daily transaction by transaction basis.
- This is the next best option for the grower, since this is a conservative approach that preserves trust rights upon delivery of potatoes or shortly thereafter for each day's delivery.
- This option will also result in the most paperwork for the grower with daily filings and for the buyer with maintaining the daily filings of the grower.

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OPTION 3: (for all growers)

- Growers must provide notice preserving their trust rights within no more than 30 days after the payment due date, if payment has not been received. (For example, if the payment due date in a written contract is 30 days after delivery, then no later than the 60th day after delivery, if payment is still not received, a notice would be required to be provided by the grower to the buyer.)
- If the payment is made either on or before the due date or within 30 days after the due date, then the notice preserving their trust rights is not necessary.
- This option results in the least amount of paperwork for the growers to file and for the buyers to maintain.
- It becomes more important for buyers and growers to monitor payment due dates and past due amounts so that the buyer doesn't fail to comply and the grower doesn't miss their opportunity to preserve their trust rights.

In order to show DATCP compliance with the above-mentioned options, the processing potato buyer must maintain all information supplied by each grower.

These options are intended to be used for compliance with Wisconsin Statutes, and are not guarantees of PACA trust protection in a bankruptcy proceeding. Recovery of funds under PACA provisions is a decision made in a bankruptcy court. Although the Department is recognizing the methods presented above as 'documenting' a producer's trust rights, there may be other ways to do so. For additional information regarding PACA requirements please contact the PACA office located in Fort Worth, TX at 800-495-7222 or visit their website at: <http://www.ams.usda.gov/AMSV1.0/PACA>.

Keep in mind that, in addition to the requirement to maintain documentation that growers have validly preserved trust rights, there are several other statutory requirements that must be met in order to maintain an exemption from participating in Wisconsin's Agriculture Security Fund. Please refer to Wis. Stats. §126.595(1).

DATCP is providing this guidance to help Processing Potatoes Buyers continue to meet the exemption requirements. Future instances of non-compliance with provisions of Chapter 126, Wis. Stats., may be met with more strict enforcement action, including loss of a buyer's ability to claim the exemption, or license actions. License actions can include having the Processing Potato Buyer submit reports regularly to the Department or have their operations more frequently monitored for compliance.

Please share this memo with the Wisconsin growers that you purchase from, so they are aware of the PACA trust provisions and how to help you stay in compliance with the exemption requirements under Wis. Stats. §126.595(1).

If you have any questions, you may contact me at (608)224-4968 or by email at: Eric.Hanson@Wisconsin.gov.