



July 15, 2014

Paula Halucha  
Director-General,  
Marketplace Framework Policy Branch  
Industry Canada  
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**Re.: Proposed Amendments to Canada's Bankruptcy and Insolvency Act  
(BIA) – Extend Financial Protections to Frozen Produce**

Dear Director-General Paula Halucha:

As the voice of the U.S. frozen food industry, AFFI is the national trade association that promotes and represents the interests of all segments of the frozen food industry. AFFI members manufacture and distribute frozen foods throughout the United States and globally. AFFI appreciates this opportunity to provide comments regarding Industry Canada's request for feedback on BIA's existing super-priority for produce sellers, potentially expanding it to benefit U.S.-based fresh produce farmers and extending the delivery period from 15 days to 30 days, which is more consistent with practices in the marketplace. <sup>1/</sup>

The Canada-U.S. Regulatory Cooperation Council (RCC) action plan <sup>2/</sup> articulates how Agriculture and Agri-Food Canada (AAFC) and the United States Department of Agriculture (USDA)-Agricultural Marketing Service (AMS) "will establish comparable approaches to achieve the common goal of protecting **Canadian and U.S. fruit and vegetable suppliers** from buyers that default on their payment obligations." RCC did not limit the scope of protection to only *fresh* fruits and vegetables as suggested under *Membership Requirements for Buyers and Sellers of Fresh Fruit and Vegetables* in SFCA's "A New Regulatory Framework for Federal Food Inspection: Overview of Proposed Regulations". <sup>3/</sup> This has been the principal objective of the U.S. Perishable Agricultural Commodities Act (PACA), <sup>4/</sup> administered by USDA/AMS for decades, through which sellers of perishable

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<sup>1/</sup> Section on Fruit and Vegetable Suppliers in "Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (<http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/c100873.html#s45>)

<sup>2/</sup> Agriculture and Food 1 Working Group Record of Decisions (April 27, 2012), <http://www.agr.gc.ca/eng/industry-markets-and-trade/statistics-and-market-information/by-product-sector/horticulture/horticulture-canadian-industry/financial-protection-to-produce-sellers/agriculture-and-food-1-working-group-record-of-decisions-april-27-2012/?id=1344605278540>

<sup>3/</sup> The Canada-US Regulatory Cooperation Council (RCC) agreement included a commitment to address financial risk mitigation in the trade of fresh fruit and vegetables. (<http://www.inspection.gc.ca/about-the-cfia/accountability/consultations/federal-food-inspection/overview-of-proposed-regulations/eng/1400451508255/1400451811916#a4>)

<sup>4/</sup> 7 U.S.C. § 499a et seq.

agricultural commodities (fresh and frozen) have been protected from defaulting buyers. The PACA trust provides a high level of protection and places suppliers' – whether U.S. or Canadian - interests in a debtor's assets superior to those of other creditors, including secured creditors. Reciprocal protection should be afforded to U.S. suppliers in Canada.

Once frozen produce is cut, it becomes more perishable. From a quality standpoint, the shelf-life varies for different types of frozen produce and products cannot be stored frozen indefinitely. That is why frozen produce is considered perishable and protected under PACA.<sup>5/</sup>

Due to the perishability of fresh and frozen fruits and vegetables, fruit and vegetable producers, shippers and processors stand to lose a substantial amount when a buyer declares bankruptcy since repossession of shipments is not possible. A PACA-like trust mechanism and coverage of such products would benefit myriad farmers, shippers, and processors who deal with this commodity. Additionally, a BIA statutory trust mechanism would provide the necessary transparency and security to buyers and sellers of produce – both fresh and frozen – and guarantee access to all suppliers without the need for government funding or administration.

In order to ensure “comparable approaches” between the U.S. and Canada with respect to perishable fruits and vegetables, AFFI members urge Industry Canada to ensure that amendments to and reform of BIA provide PACA-like treatment of both fresh and frozen produce marketed in Canada. Comparable approaches will allow for reciprocity between the U.S./Canadian industries and minimize potential trade barriers across borders.

Specifically, AFFI recommends that financial protections extend to both fresh and frozen produce processors and dealers and not be limited to farmers to account for all members of the supply chain as the produce moves through commerce. AFFI suggested language in Canada's Bankruptcy and Solvency Act Section 81.2. is highlighted in **bold** below:

**81.2** (1) Where

(a) a farmer, **processor, or dealer** has sold and delivered products of agriculture, ...

**81.2** (2) In this section, ...

“products of agriculture” includes

(a) grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil, and ...

**81.2** (3) For the purposes of this section, each thing included in the following terms as defined in subsection (2), namely,

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<sup>5/</sup> 7 U.S.C. § 499a(b)(4) (defining “perishable agricultural commodity” as including Fresh fruits and Fresh vegetables of every kind and character, “whether or not frozen or packed in ice”).

(a) "products of agriculture", ...

comprises that thing **in any form or state and any part thereof and any product or by-product thereof or derived therefrom** (emphasis added).

It is noteworthy that "products of agriculture" is already defined in BIA to include all forms and states, encompassing fresh, frozen, whole, sliced, chopped, etc.

Alternatively, AFFI suggested amendments to BIA could limit the applicability of the proposed statutory deemed trust mechanism and corresponding financial protections to "perishable agricultural commodities as defined in the U.S. Perishable Agricultural Commodities Act," which, as explained above, encompasses both fresh and frozen produce.<sup>6/</sup>

Industry Canada should supplant a trust mechanism for the weaker protections currently afforded by Section 81.2., thereby ensuring reciprocity between U.S. and Canadian industries.

AFFI is grateful for Industry Canada's continued resolve in furtherance of the RCC initiative. AFFI thanks Industry Canada for taking these comments into consideration.

Sincerely,



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Vice President, Regulatory and Technical Affairs  
American Frozen Food Institute

cc Agriculture and Agri-Food Canada (AAFC) Minister Gerry Ritz  
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<sup>6/</sup> *Id.*