

WISCONSIN STATE  
LEGISLATURE  
COMMITTEE HEARING  
RECORDS

**2005-06**

(session year)

**Senate**

(Assembly, Senate or Joint)

**Committee on  
Agriculture and  
Insurance  
(SC-AI)**

File Naming Example:

Record of Comm. Proceedings ... RCP

- 05hr\_AC-Ed\_RCP\_pt01a
- 05hr\_AC-Ed\_RCP\_pt01b
- 05hr\_AC-Ed\_RCP\_pt02

COMMITTEE NOTICES ...

- Committee Hearings ... CH (Public Hearing Announcements)
- \*\*

- Committee Reports ... CR
- \*\*

- Executive Sessions ... ES
- \*\*

- Record of Comm. Proceedings ... RCP
- \*\*

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INFORMATION COLLECTED BY COMMITTEE  
CLERK FOR AND AGAINST PROPOSAL

- Appointments ... Appt
- \*\*

Name:

- Clearinghouse Rules ... CRule
- \*\*

- Hearing Records ... HR (bills and resolutions)
- **05hr\_ab0635\_SC-AI\_pt03b**

- Miscellaneous ... Misc
- \*\*

## Agricultural Producer Security

### Potential Legislative Language

#### Nonparticipating Processing Potato Buyers

***DRAFTING NOTE:** This language was prepared for discussion purposes only by staff in the Division of Trade and Consumer Protection. This draft has been neither reviewed nor endorsed by DATCP legal counsel or executive staff.*

This document is an attempt to present the policy ideas expressed in the "7<sup>th</sup> Revised Draft" created and circulated by the PVGA in a format that is more harmonized with technical provisions of the existing statute. Except that this working draft diverges from the PVGA draft in two significant policy considerations. First, this draft eliminates the provision to limit license fees to \$500 for nonparticipating processing potato buyers. Second, this draft lowers the threshold above which balances in the fund can be used as license fee credits.

This proposal creates a new subtype of vegetable contractor – Nonparticipating processing potato buyers. Under this proposal, processing potato buyers may, at their discretion and provided certain requirements are met, become "Nonparticipating processing potato buyers.

Under this proposal, vegetable contractors who qualify for status as nonparticipating processing potato buyers are exempt from the following provisions:

- They are not required to pay producer security assessments.
- They are not required to file annual financial statements.
- They are not required to file security.

Under this proposal, nonparticipating processing potato buyers are still licensed "vegetable contractors." Therefore, they must follow all portions the law that do not relate to the specific exemptions listed above.

Under this proposal, DATCP may not pay default claims arising from contracts that were in place at the time a vegetable contractor was a nonparticipating processing potato buyer – even if that contractor later becomes a contributing contractor.

*(DRAFTING NOTE – use of the term "Nonparticipating": Current law uses the term "noncontributing" to describe contractors who do not contribute to the fund. However, "noncontributing contractors" under current law in many cases have individual security on file with the department. Under this bill "nonparticipating processing potato buyers" would not. This is a very significant difference in the event the contractor fails to pay producers. Because, in common usage, the terms "noncontributing and*

*nonparticipating” are so often used interchangeably, it might be wise to use some other term to describe this new sub-type of vegetable contractor to avoid confusion.*

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**Discussion Draft Bill Language.**

**SECTION 1** 126.55(10m) and (10s) are created to read:

126.55(10m) “Processed potato buyer” means a vegetable contractor or producer agent who purchases processed potatoes.

126.55(10s) “Processed potatoes” means potatoes grown or sold for use in food processing, regardless of whether those potatoes are actually harvested or processed as food.

**SECTION 2** 126.56(6)(a) is amended to read:

126.56(6)(a). If the balance in the fund contributed by vegetable contractors exceeds ~~\$1,000,000~~ \$900,000 on November 30 of any license year, the department shall credit 50% of the excess amount against fees charged under sub. (4)(b) to contributing vegetable contractors who file timely license renewal applications for the next license year. The department shall credit each contributing vegetable contractor on a prorated basis, in proportion to the total fees that the vegetable contractor has paid under sub. (4)(b) for the 4 preceding license years.

**SECTION 3.** 126.56m is created to read:

126.56m. **PROCESSED POTATO BUYERS, OPTIONAL NONPARTICIPATION.** (1)

**Criteria for nonparticipation.** (a) A processed potato buyer who meets all provisions in sub (b) may, at its discretion, opt out of participating in the fund.

(b) A processed potato buyer who chooses not to participate must do all of the following:

1. Submit notice to the department, by January 31, that it will be a nonparticipating processed potato buyer beginning the following license year.
2. Maintain contracts with Wisconsin producers in which payment terms do not exceed 10 days or, if the contract is in writing, 30 days.
3. Maintain, in good standing, a PACA license with the United States Department of Agriculture -- Agricultural Marketing Service.
4. Disclose to all producers, in a form and manner specified by the department, that the processed potato buyers does not participate in the fund and does not maintain individual security.
5. Maintain evidence that each and every purchase of processing potatoes from Wisconsin producers qualifies for PACA Trust Protection and the producers' trust rights have been validly preserved.
6. Maintain compliance with this chapter and rules promulgated by the department under this chapter.

(c) The processed potato buyer may only opt out of participating one time in the life of the processed potato buyer. If the processed potato buyer later becomes a participating vegetable contractor, it must remain a participating vegetable contractor indefinitely.

**(2) RESUMING PARTICIPATION. (a)** A vegetable contractor who is a nonparticipating processing potato buyer under sub. (1) may become a participating contractor if the vegetable contractor notifies the department of its intention to become a participating contractor. Participation is effective 30 days after notice is provided or the effective date of the security described under par. (b), whichever is later.

(b) A nonparticipating processing potato buyer who is becoming a contributing vegetable contractor must meet the following conditions:

1. The vegetable contractor must post security.
  - i. The security must be in a form that meets the requirements described in 126.61(4)
  - ii. The amount of the security must be at least equal to 75% of the amount reported in 126.56(9)(a).
  - iii. The vegetable contractor shall maintain the security until the department releases it. The department may not release the security until the vegetable contractor has been a participating vegetable contractor for two continuous complete license years.
2. The vegetable contractor must begin contributing to the fund at the beginning of its second complete license year as a participating contractor. This subpar. does not apply to disqualified vegetable contractors under s. 126.59(2).

**SECTION 4** 126.57(1)(b)3 is created to read:

3. The vegetable contractor is a nonparticipating processing potato buyer.

**SECTION 5** 126.58(1)(c)3 is created to read:

3. The vegetable contractor is a nonparticipating processing potato buyer.

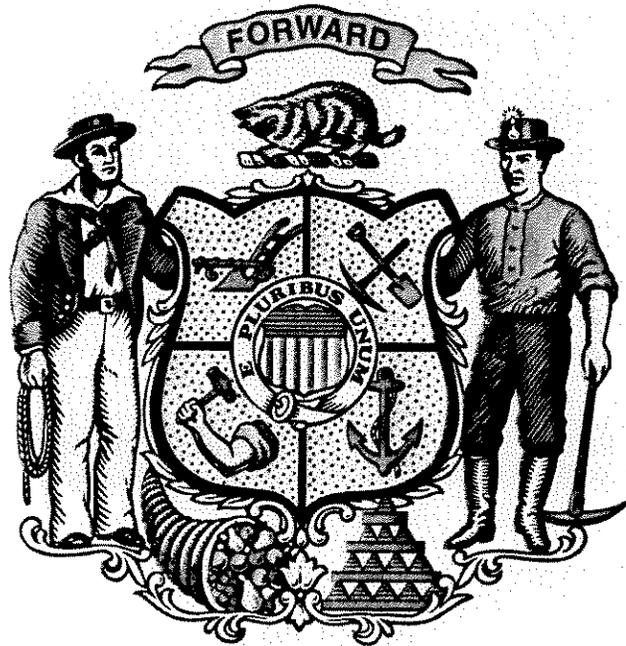
**SECTION 6** 126.61(1)(c)3 is created to read:

3. The vegetable contractor is a nonparticipating processing potato buyer.

**SECTION 7** 126.71(3)(d) is created to read:

- (d). In the event a nonparticipating processing potato buyer under 126.56m becomes a contributing contractor or contractor who has filed security, the department

may not pay any portion of claims arising from contracts that were in place at the time  
the vegetable contractor was a nonparticipating processing potato buyer.





State of Wisconsin  
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection  
Rod Nilsestuen, Secretary

June 27, 2005

The Honorable Al Ott  
State Representative  
Chair, Assembly Committee on Agriculture

The Honorable Joan Ballweg  
State Representative  
41<sup>st</sup> Assembly District

The Honorable Dan Kapanke  
State Senator  
Chair, Senate Committee on Agriculture

Re: LRB 1813/3, relating to participation by certain persons who buy potatoes in the  
Agricultural Producer Security Program.

Dear Representative Ott, Representative Ballweg and Senator Kapanke:

Thank you for allowing us to review LRB-1813/3. Janet Jenkins and her staff in the Division of Trade and Consumer Protection have undertaken a careful analysis and reported her impressions and suggestions to me. A copy of her memo is included here for your reference.

We recognize the current producer security program may be inequitable for certain processing potato buyers and that it may be costing Wisconsin Potato Growers some markets. However, we are "lukewarm" at best on the approach LRB-1813/3 takes to solving this problem.

This bill presents some challenging enforcement issues for DATCP because it requires contractors to comply with certain provisions before they can opt-out of participating in the fund. If they fail, they must remain (or become) contributing contractors. The bill does not specifically charge DATCP with this enforcement duty, but there is an implied undertone that DATCP will do something about it if one of these contractors fails to comply. We believe that, sooner or later, this will put DATCP and the State of Wisconsin in an impossible position of responsibility without authority. However, having said this, we understand the reason the bill is set-up this way. The Wisconsin Potato and Vegetable Growers Association would like to go as far as possible in assuring coverage from either the Wisconsin Producer Security Program or the federal Perishable Agricultural Commodities Act – but not both. This is not an unreasonable goal, and this bill seems to accomplish it as well as could be expected.

We are very much opposed to the provision in the bill that would limit license fees to \$500 for those processed potato buyers who opted out of participating in the fund. Before we can explain

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why, we must first quickly review the basic fee structure contained in the program. Contractors pay two separate amounts to DATCP under this program; license fees and fund assessments. License fees are based on the total purchases made by the contractor and are used for administering the program. Assessments are based on both the total purchases and the contractor's financial statement ratios. Assessments are held for the benefit of producers in the event of a default.

There are several types of licensed contractors who do not pay assessments (in other words, are *noncontributing contractors*), including: milk contractors who meet certain minimum ratios, vegetable contractors who pay cash on delivery and contractors whose financial position disqualified them from contributing. All of these non-contributing contractors still pay the same license fees as contributing contractors.

Allowing certain potato buyers to be exempt from contributing to the Fund is reasonable (given that the growers -- whom the fund is designed to protect -- are the ones asking for the exemption). However, the producer security program includes more than just the Fund. Under this bill, these growers will still benefit from the program and DATCP regulation of contractors' trade practices. We do not believe LRB 1813/2 would reduce the time or expenses associated with regulating this segment of the industry. Offering license fee relief to this one segment unfairly burdens other vegetable contractors and (indirectly) grain dealers, grain warehouse keepers and milk contractors with the costs of regulating the processed potato buyers.

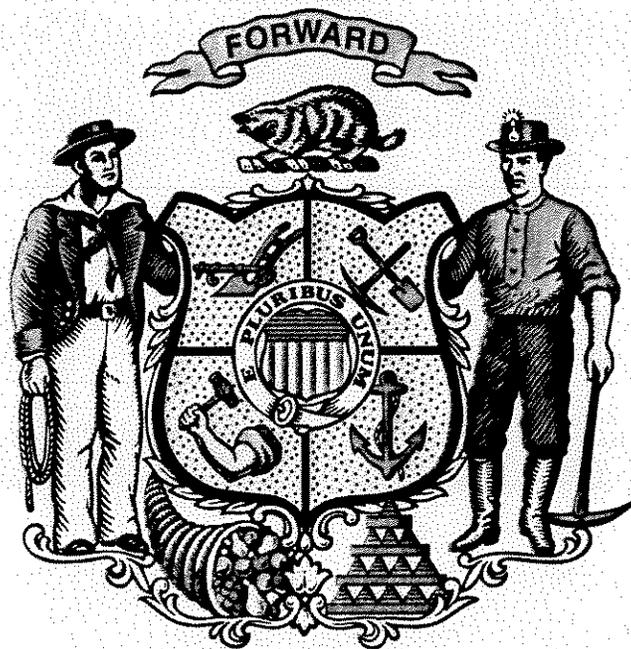
Again, despite our reservations about LRB-1813/3, we do agree that this is an important issue. We very much appreciate you keeping us involved. Please examine the technical discussion contained in Janet Jenkins's memo. My staff and I would be more than happy to meet with you for a technical discussion of the suggestions contained in Janet Jenkins's memo or, if you prefer, a broader discussion about the overall policy issue.

Sincerely,

Rod Nilsestuen,  
Secretary

Attachments

CC: Ron Kuen & Jordan Lamb, DeWitt, Ross & Stevens  
Mike Carter, Executive Director, WI Potato and Vegetable Growers Association  
Janet Jenkins, Administrator, Division of Trade and Consumer Protection  
Mike Dummer, Chair, Agriculture, Trade and Consumer Protection Board  
Andy Derks, Member, Agriculture, Trade and Consumer Protection Board



JUL 11 2005



State of Wisconsin  
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection  
Rod Nilsestuen, Secretary

July 1, 2005

The Honorable Al Ott  
State Representative  
Chair, Assembly Committee on Agriculture

The Honorable Joan Ballweg  
State Representative  
41<sup>st</sup> Assembly District

The Honorable Dan Kapanke  
State Senator  
Chair, Senate Committee on Agriculture

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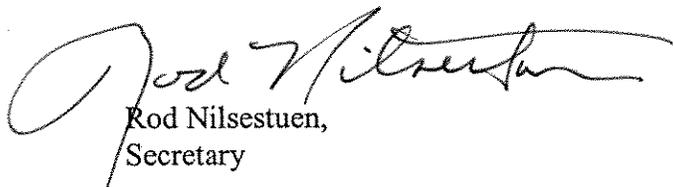
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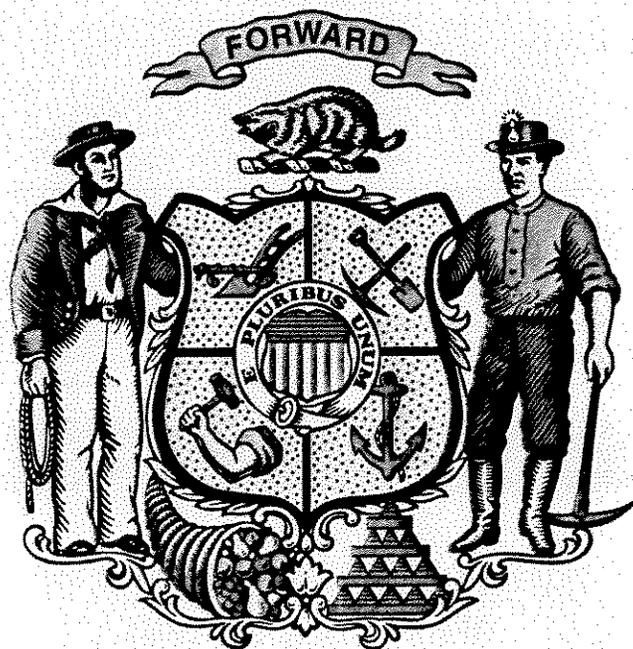
Sincerely,



Rod Nilsestuen,  
Secretary

Attachments

CC: Ron Kuehn & Jordan Lamb, DeWitt, Ross & Stevens  
Mike Carter, Executive Director, WI Potato and Vegetable Growers Association  
Janet Jenkins, Administrator, Division of Trade and Consumer Protection  
Mike Dummer, Chair, Agriculture, Trade and Consumer Protection Board  
Andy Diercks, Member, Agriculture, Trade and Consumer Protection Board



07-19-05



**DEWITT  
ROSS & STEVENS<sup>SC</sup>**  
LAW FIRM

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**Ron Kuehn**

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Capitol Square Office  
Two East Mifflin Street, Suite 600  
Madison, WI 53703-2865

Email [rwk@dewittross.com](mailto:rwk@dewittross.com)  
Tel 608-255-8891  
Fax 608-252-9243

**From:** Rep. Ballweg

**Sent:** Tuesday, July 19, 2005 4:02 PM

**To:** \*Legislative Assembly Republicans; \*Legislative Assembly Democrats; \*Legislative Senate Democrats; \*Legislative Senate Republicans

**Subject:** Co-Sponsor LRB 1813/4, Changes to Wisconsin's Producer Security Act, Deadline- Noon, August 5, 2005

**To:** All Legislators

**From:** Representative Joan Ballweg

**Date:** July 19, 2005

**Re:** LRB 1813/4—Changes to Wisconsin's Producer Security Act

**Deadline:** Noon, Friday, August 5, 2005

The Producer Security Fund is intended to assure producers that they will be paid for their products in the event of a business failure by dairy, grain or vegetable contractors. The agricultural producer security program provides financial security for producers in the event of default by contractors that buy these commodities from the producers or that market or store them on behalf of the producers. An indemnity fund provides revenues for payment to producers when a default occurs.

In addition to this state protection, the federal Perishable Agricultural Commodities Act (PACA) of 1930 grants preferred trust fund protection to eligible unpaid sellers and suppliers of perishable agricultural commodities. Under PACA, if the purchaser of perishable agricultural commodities files for bankruptcy, eligible unpaid sellers and suppliers of commodities are entitled to a priority placement in bankruptcy court to collect full payment of their PACA trust claims before the secured and unsecured creditors' claims are paid.

Current Wisconsin law exempts a vegetable contractor from having to purchase a Wisconsin PSA license (i.e., a license from DATCP through which the contractor pays into the Wisconsin fund) if the contractor is, "A vegetable contractor who procures vegetables primarily for unprocessed, fresh market use and is licensed under the federal Perishable Agricultural Commodities Act.

The federal PACA definition of "fresh fruits and vegetables" includes potato products such as frozen potatoes and potatoes that will be used for processing. However, the Wisconsin exemption from state producer security licenses is limited to, "vegetables primarily for unprocessed, fresh market use and is licensed under the federal Perishable Agricultural Commodities Act.

Therefore, Wisconsin law requires a Wisconsin license for those who also have a PACA license, if they are purchasing primarily potatoes used for processing (i.e., potatoes that will be chipped, frozen or canned) while allowing an exemption for potatoes that will be purchased for the fresh market.

Processors purchasing potatoes from Wisconsin potato growers for chip production have been very reluctant to do business in Wisconsin. These processors are very reluctant to pay a Wisconsin producer security fund license fee when properly structured transactions can be covered by PACA. Accordingly, several chip processors have indicated their intent to cease purchasing chip potatoes from Wisconsin producers.

At the request of the Wisconsin Potato and Vegetable Growers Association, I have drafted the proposed changes to the Wisconsin Producer Security Program. These changes will only apply to processors that are purchasing potatoes for chipping. Wisconsin potatoes sold for chips represent almost 1/3 of Wisconsin's potato crop. In order to prevent Wisconsin growers from losing access to the chip market, LRB 1813/4 authorizes certain licensed vegetable contractors who purchase only potatoes for processing to choose not to make contributions under the State producer security program if the buyer is licensed by the Federal government under PACA and maintains documentation that farmers from whom the potato buyer purchases potatoes qualify for protection under PACA. If a potato buyer who opts out of the program defaults on a contract with a farmer, the farmer is not eligible for reimbursement under the State producer security program.

Please contact my assistant Vince at 266-8077, if you are interested in co-sponsoring this proposal.

<<05-18134.pdf>>

*Analysis by the Legislative Reference Bureau*

*Participation of certain vegetable contractors in the Agricultural Producer Security Program*

Current law generally requires vegetable contractors to be licensed by the Department of Agriculture, Trade and Consumer Protection (DATCP). A vegetable contractor is a person who buys vegetables from vegetable farmers for use in food processing or who markets vegetables for use in food processing on behalf of farmers. Licensed vegetable contractors are, with some exceptions, required to make contributions under the Agricultural Producer Security Program (the program). The program is designed to reimburse farmers for a portion of the losses they incur when contractors, including vegetable contractors, default on their financial obligations.

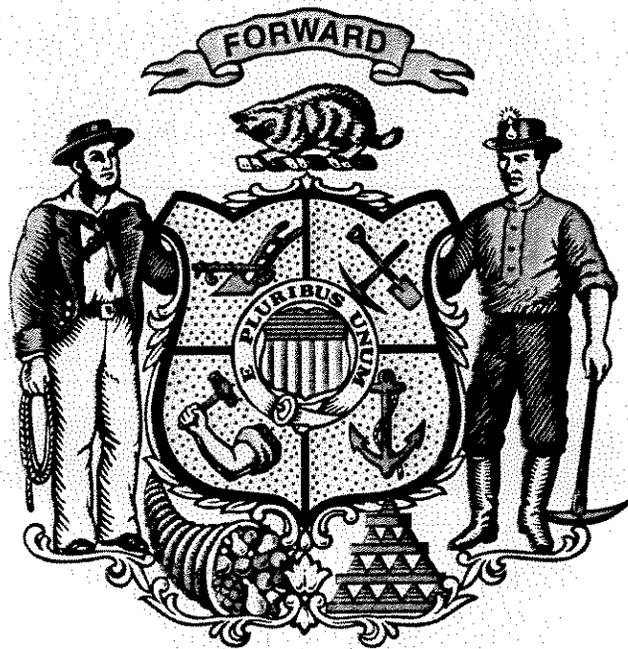
This bill authorizes certain licensed vegetable contractors who purchase only potatoes to choose not to make contributions under the program. If a potato buyer who opts out of the program defaults on a contract with a farmer, the farmer is not eligible for reimbursement under the program.

To be eligible to opt out of the program, a potato buyer must be licensed by the federal government under the Perishable Agricultural Commodities Act (PACA) and must maintain documentation that farmers from whom the potato farmer purchases potatoes qualify for protection under PACA. PACA provides means of enforcing contracts, but it does not directly provide payment for any of a farmer's losses. To be eligible to opt out of the program, a potato buyer must also agree not to enter into contracts under which payment is due more than 30 days after it receives potatoes and must notify farmers that the potato buyer does not participate in the program. A potato buyer who opts out of the program is exempt from requirements to maintain fire and extended coverage insurance and from filing annual financial statements with DATCP. A potato buyer who opts out of the program must pay an annual fee of \$500 or another amount established by DATCP. The bill provides a procedure by which a potato buyer who has opted out of the program may resume participation in the program.

*Credit against fees charged to vegetable contractors*

Under current law, if the balance in the agricultural producer security fund contributed by vegetable contractors exceeds \$1,000,000 on any November 30, DATCP credits 50 percent of the excess amount against license fees charged to vegetable contractors for the next license year. This bill reduces the amount of the balance after which the credit against license fees applies from \$1,000,000 to \$825,000.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.



## Smyrski, Rose

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**From:** LeRoy, Kevin J DATCP  
**Sent:** Wednesday, August 17, 2005 12:00 PM  
**To:** Smyrski, Rose  
**Subject:** contractors roughly sorted by type.xls

**Attachments:** contractors roughly sorted by type.xls



contractors  
ghly sorted by

Hi Rose,

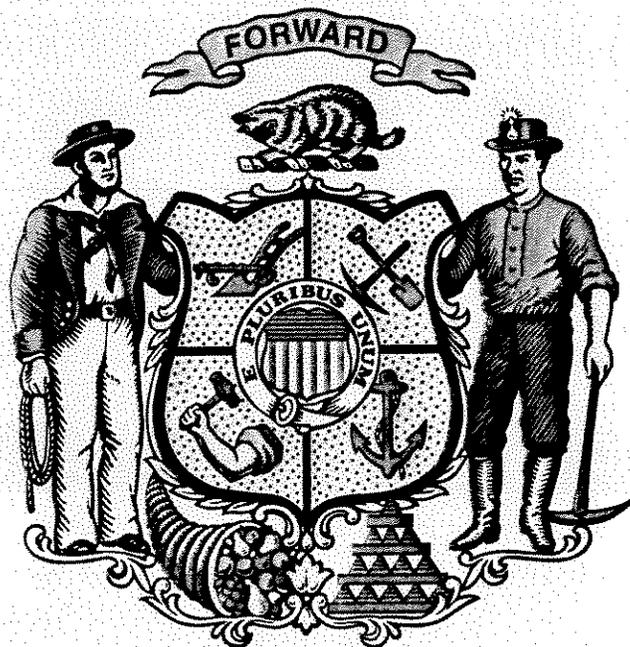
As we discussed Monday, attached, please find a list of Vegetable Contractors. Generally, these are companies who are currently licensed or at least had been licensed during the last year. I sorted the list into three categories:

- "Potato Chip Manufactures" are those contractors who mainly by potatoes for use in potato chips. These are the companies who are most likely to be able to "opt out" under LRB 1813
- "Potato Buyers (other than Chip Manufactures)" are contractors that buy processing potatoes for other uses (french fries, etc). These contractors could possibly opt out under LRB 1813, but it is my understanding that they are less likely to do so (because they are less likely to be able to meet the conditions of opting out).
- "Other Vegetable Buyers" are contractors who mostly buy vegetables other than potatoes. A good example of this type of contractors would be a canning company or frozen vegetable processor.

Please note that the above categories are not hard-and-fast divisions. There is a fair amount of crossover. Also, just a quick reminder, The Producer Security Law only applies to companies that purchase vegetables "for processing". There are many unregulated buyers who purchase vegetables for resale as fresh produce.

Let me know if you need anything else.

Kevin LeRoy  
Trade Practices Analyst  
Division of Trade and Consumer Protection



## Smyrski, Rose

---

**From:** Moll, Keeley A DATCP  
**Sent:** Thursday, August 18, 2005 2:46 PM  
**To:** Smyrski, Rose  
**Subject:** RE: Co-Sponsor LRB 1813/4, Changes to Wisconsin's Producer Security Act, Deadline-Noon, August 5, 2005

Hey Rose:

Here's what I have sent others who've contacted us. This is the "in a nutshell" version. Janet can definitely elaborate on this more. I know she's here today so I will run down to first floor and see if I can find her to give you a buzz back.

Our Trade Practices Bureau has been in close contact with Rep. Ballweg, interested industry groups and the WI Producer Security Council over the past several months trying to find a solution to the concerns raised by a the WPVGA for some of their members. Despite our best efforts to compromise, we still have a few objections (which Ballweg's office is aware of) to the draft being circulated....

These objections to LRB 1813/4 are being stated as briefly as possible, obviously we'd be happy to sit down with you and walk you through the concerns in greater detail. As you know, nothing is simple when it comes to the ever-complex Producer Security Program! Feel free to contact Jeremy McPherson (224-4882) with any specific questions.

- LRB 1813/4 contains a license fee reduction for processed potato buyers who do not participate in the fund. However, participation in the fund is only one portion of the protections provided by the Producer Security Program and only one portion of the staff-time required to administer the entire program. It is not fair to other contractors (those remaining in the fund) to have to subsidize the costs of regulating these potato buyers.
- The opt-out portion of this bill walks a very tight line in an attempt to ensure there is either PACA coverage or Wis. Producer Security coverage -- but not both. This is a reasonable goal. However, the extent of PACA coverage is nebulous. This will likely result in a few growers not having coverage under either program.
- The bill contains several somewhat detailed steps the potato buyer must take before they can opt-out of the program. Failing to do even one of these detailed steps results in the contractor being required to contribute to the fund. This could result in very sticky enforcement issues between DATCP and the contractor (because of the potentially very large costs associated with failing to comply with relatively insignificant details).
- The portions of the bill relating to the contractor reentering the fund are somewhat lacking in specific requirements and instead leaves things up to DATCP discretion. DATCP would prefer the requirements were spelled out more completely in the statute -- thereby avoiding potential conflicts later.

Keeley

---

**From:** Smyrski, Rose [<mailto:Rose.Smyrski@legis.state.wi.us>]  
**Sent:** Thursday, August 18, 2005 2:39 PM  
**To:** Moll, Keeley A DATCP  
**Subject:** FW: Co-Sponsor LRB 1813/4, Changes to Wisconsin's Producer Security Act, Deadline- Noon, August 5, 2005  
**Importance:** High

I am looking for feedback on this propoal. I have a call to Janet Jenkins about it but need something asap. HELP

---

**From:** Rep.Ballweg  
**Sent:** Tuesday, July 19, 2005 4:02 PM  
**To:** \*Legislative Assembly Republicans; \*Legislative Assembly Democrats; \*Legislative Senate Democrats; \*Legislative Senate Republicans  
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Therefore, Wisconsin law requires a Wisconsin license for those who also have a PACA license, if they are purchasing primarily potatoes used for processing (i.e., potatoes that will be chipped, frozen or canned) while allowing an exemption for potatoes that will be purchased for the fresh market.

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<< File: 05-18134.pdf >>

*Analysis by the Legislative Reference Bureau*

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Current law generally requires vegetable contractors to be licensed by the Department of Agriculture, Trade and Consumer Protection (DATCP). A vegetable contractor is a person who buys vegetables from vegetable farmers for use in food processing or who markets vegetables for use in food processing on behalf of farmers. Licensed vegetable contractors are, with some exceptions, required to make contributions under the Agricultural Producer Security Program (the program). The program is designed to reimburse farmers for a portion of the losses they incur when contractors, including vegetable contractors, default on their financial obligations.

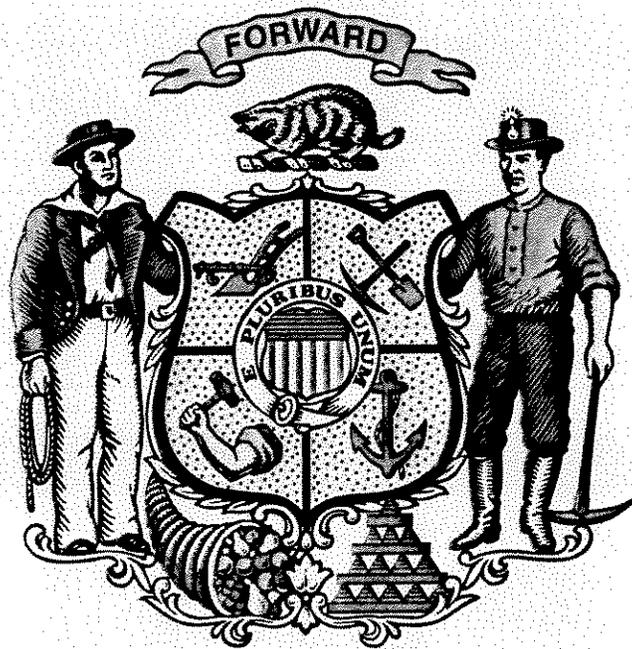
This bill authorizes certain licensed vegetable contractors who purchase only potatoes to choose not to make contributions under the program. If a potato buyer who opts out of the program defaults on a contract with a farmer, the farmer is not eligible for reimbursement under the program.

To be eligible to opt out of the program, a potato buyer must be licensed by the federal government under the Perishable Agricultural Commodities Act (PACA) and must maintain documentation that farmers from whom the potato farmer purchases potatoes qualify for protection under PACA. PACA provides means of enforcing contracts, but it does not directly provide payment for any of a farmer's losses. To be eligible to opt out of the program, a potato buyer must also agree not to enter into contracts under which payment is due more than 30 days after it receives potatoes and must notify farmers that the potato buyer does not participate in the program. A potato buyer who opts out of the program is exempt from requirements to maintain fire and extended coverage insurance and from filing annual financial statements with DATCP. A potato buyer who opts out of the program must pay an annual fee of \$500 or another amount established by DATCP. The bill provides a procedure by which a potato buyer who has opted out of the program may resume participation in the program.

### ***Credit against fees charged to vegetable contractors***

Under current law, if the balance in the agricultural producer security fund contributed by vegetable contractors exceeds \$1,000,000 on any November 30, DATCP credits 50 percent of the excess amount against license fees charged to vegetable contractors for the next license year. This bill reduces the amount of the balance after which the credit against license fees applies from \$1,000,000 to \$825,000.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.



## Smyrski, Rose

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**From:** Smyrski, Rose  
**Sent:** Monday, August 22, 2005 11:02 AM  
**To:** Jenkins, Janet A DATCP  
**Subject:** RE: Producer Security

Thanks Janet...I was curious if the agency's response was modified based on the draft that Rep Ballweg recently sent out on July 19th.

I will pass your kind thoughts to Dan--Thanks Janet!

Rose

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**From:** Jenkins, Janet A DATCP  
**Sent:** Friday, August 19, 2005 7:10 AM  
**To:** Smyrski, Rose  
**Cc:** Moll, Keeley A DATCP; McPherson, Jeremy S DATCP; Hanson, Eric J DATCP; LeRoy, Kevin J DATCP  
**Subject:** Producer Security

Hi, Rose -

I received your voice mail message as well as an email from Keeley Moll re your request. Attached are the letter that the Secretary sent re the producer security bill related to potatoes as well as my memo to the Secretary that discusses the issues in greater detail. If Dan would like to talk more about this, just let me know and we can schedule a meeting at his convenience. (I've cc'd in Keeley as well as those in the Division that are most familiar w/ the proposal. Feel free to give any, including me, a call.)

Also, please pass on my regards to Dan and ask him to let me know sometime how things are going.

P.S. Keeley's email indicated that your questions related to the "potato" bill. There is an additional producer security bill being drafted courtesy of Al Ott at the Dept.'s request that deals w/ general producer security issues, not potatoes. If this is the bill in which you're interested, please let me know.

Janet

<< File: Email to leg. re potatoes 6-27-05.rtf >>

## Smyrski, Rose

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**From:** Smyrski, Rose  
**Sent:** Monday, August 22, 2005 10:36 AM  
**To:** Dan Kapanke-Home (kapankefi@charter.net)  
**Subject:** Producers Security Bill--Janet

**Attachments:** Draft 05-18134.pdf

Dan

Sorry for the delay, I wanted DATCP's response before I sent it to you.

Bottom line: This bill could pass with a little work but we should do it on the front end

Below are the areas that DATCP has concerns with and based my understanding of the proposal these are items we could work out. Janet Jenkins sent me the background for the write up below.

In its current form, DATCP **opposes** LRB-1813/3.

- The agency is very concerned about enforcement of the new guidelines since they would be record keepers unable to ensure accuracy of the documents processors would submit.
- The unfairness of the current assessment formulas could be corrected by simply changing the formula. A wholesale change of the law is not necessary. Moreover (provided no defaults occur) the current unfairness in fund assessments and license fees will be almost entirely ameliorated in the next several years since those fees/assessments will decrease drastically.
- LRB 1813/4 contains a license fee reduction for processed potato buyers who do not participate in the fund. However, participation in the fund is only one portion of the protections provided by the Producer Security Program and only one portion of the staff-time required to administer the entire program. It is not fair to other contractors (those remaining in the fund) to have to subsidize the costs of regulating these potato buyers.
- The opt-out portion of this bill walks a very tight line in an attempt to ensure there is either PACA coverage or Wis. Producer Security coverage -- but not both. This is a reasonable goal. However, the extent of PACA coverage is nebulous. This will likely result in a few growers not having coverage under either program.
- The bill contains several somewhat detailed steps the potato buyer must take before they can opt-out of the program. Failing to do even one of these detailed steps results in the contractor being required to contribute to the fund. This could result in very sticky enforcement issues between DATCP and the contractor (because of the potentially very large costs associated with failing to comply with relatively insignificant details).

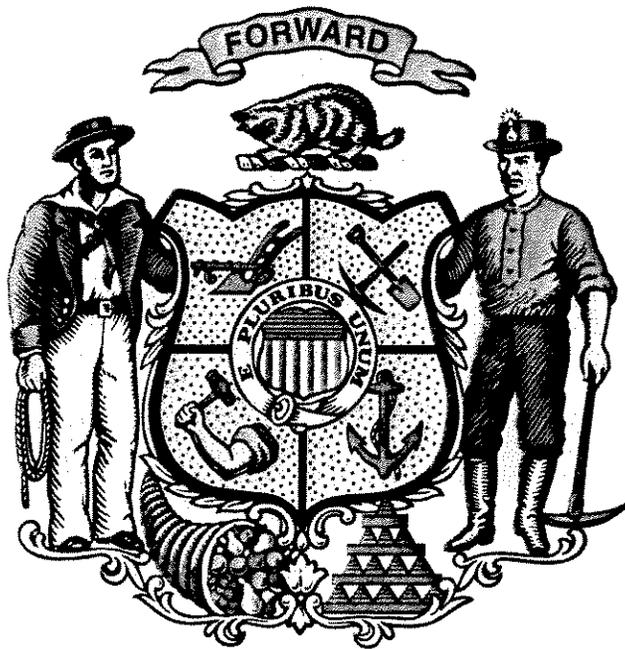
- The portions of the bill relating to the contractor reentering the fund are somewhat lacking in specific requirements and instead leaves things up to DATCP discretion. DATCP would prefer the requirements were spelled out more completely in the statute -- thereby avoiding potential conflicts later.
- The bill states that payment terms for unwritten contracts must be within 20 days or no more than 30 days with a written contract. It would need to read, " payment terms must be within 10 days without a written contract," in order for producers to be eligible for PACA.

Questions, give me a call

Rose



Draft  
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## **Agricultural Producer Security**

### **Potential Legislative Language - DATCP Proposal**

#### **Vegetable Contractors with PACA coverage.**

This bill would exempt vegetable contractors from filing financial statements and paying assessments if all of the following occur:

- All vegetables that the vegetable contractor are covered under the PACA trust provisions
- The vegetable contractor must sign an affidavit stating that all transactions/contracts are in accordance with PACA requirements.
- The vegetable contractor provides the producer with a disclosure statement stating that the producer is covered under PACA, but not the Wisconsin Agricultural Producer Security Fund.
- The vegetable contractor must also maintain a basic license under Wisconsin Statute Chapter 126.

(DRAFTING NOTE – This language was modeled after existing language exempting contractors who pay C.O.D. for all vegetables.)

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#### **First Draft of Bill Language.**

**SECTION X.** 126.58(1)(c) 3. is created to read:

126.58(1)(c) 3. The vegetable contractor submits to the department, by January 31, of each year *and/or when first licensed*, an affidavit certifying each of the following:

- a. That the vegetable contractor has, in good standing, a license with the PACA agency (*insert proper name of federal agency*).
- b. That all vegetable procurement contracts with producers and producer agents disclose that all vegetables purchased from producers and producer agents by the vegetable contractor are purchased subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499(e(c)))

c. That the producers and producer agents were provided a disclosure informing the producers and producer agents that the payment for vegetables delivered to the vegetable contractor are not secured under Wisconsin Statute Chapter 126.

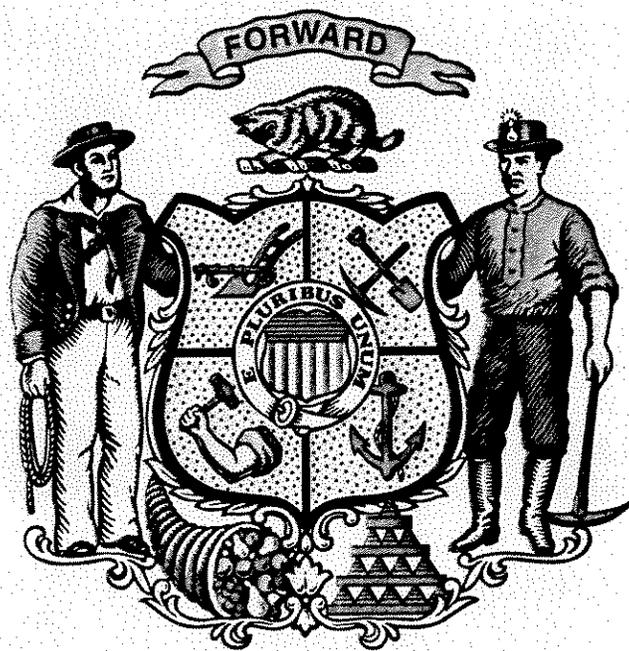
**SECTION Y.** 126.59(1)(d) is created to read:

126.59(1)(d) The vegetable contractor submits to the department, by January 31, of each year *and/or when first licensed*, an affidavit certifying all of the following:

a. That the vegetable contractor has, in good standing, a license with the PACA agency (*insert proper name of federal agency*).

b. That all vegetable procurement contracts with producers and producer agents disclose that all vegetables purchased from producers and producer agents by the vegetable contractor are purchased subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499(e)(c))

c. That the producers and producer agents were provided a disclosure informing the producers and producer agents that the payment for vegetables delivered to the vegetable contractor are not secured under Wisconsin Statute Chapter 126.



**Amendments to the Wisconsin Producer Security Act**  
Wisconsin Potato & Vegetable Growers Association

**ISSUE #1: Double-licensure required for potatoes sold for processing in Wisconsin under the Wisconsin Producer Security Act and the federal Perishable Agricultural Commodities Act discourage purchase of Wisconsin potatoes for processing.**

**A. Background**

*1. State Protection*

The Wisconsin Producer Security Act ("PSA") (Wis. Stats. Chap 126) establishes an agricultural security program that helps protect commodity producers against catastrophic financial defaults by processors and handlers by allowing the DATCP to obtain a proprietary line of credit in case a processor defaults on an amount greater than the deductible amount for a particular commodity. The PSA covers dairy, grain and vegetable contracts.

*2. Federal Protection*

In addition to this state protection, the federal Perishable Agricultural Commodities Act ("PACA") of 1930 grants preferred trust fund protection to eligible unpaid sellers and suppliers of perishable agricultural commodities. Under PACA, if the purchaser of perishable agricultural commodities files for bankruptcy, eligible unpaid sellers and suppliers of commodities are entitled to full payment of their PACA trust claims, before the secured and unsecured creditors' claims are paid.

*3. Current Exemption from State Requirement for Federal Compliance*

In order to prevent double coverage, current Wisconsin law exempts a vegetable contractor from having to purchase a Wisconsin PSA license (i.e., a license from DATCP through which the contractor pays into the Wisconsin fund) *if* the contractor is, "A vegetable contractor who procures vegetables primarily for unprocessed, fresh market use and is licensed under the federal Perishable Agricultural Commodities Act, 7 USC 499a to 499t." See Wis. Stat. § 126.56(2)(a) (2004). This language was intended to prevent contractors purchasing vegetables from Wisconsin producers from having to get BOTH a PACA and a PSA license. *However*, it doesn't.

Under the PACA, anyone buying or selling commercial quantities of fruit and vegetables must be licensed by the U.S. Department of Agriculture.<sup>1</sup> PACA defines the term "perishable agricultural commodity" as "Fresh fruits and fresh vegetables of every kind and character..." See

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<sup>1</sup> See <http://www.ams.usda.gov/fv/paca.htm> .

7 U.S.C. § 499a? In 2003, the USDA adopted rules that guide the application of PACA and defined “fresh fruits and vegetables” as the following:

“Fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, battering, coating, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seeds, pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents used to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruits or vegetables for packaging in any type of containers; or comparable methods of preparation.” See 7 C.F.R. § 46.2(u) (*emphasis added*).

## **B. The Problem**

### *1. Double Licensure is Expensive*

Securing a license under Wisconsin’s PSA is expensive (especially when audited financial statements are required – see below). In addition, PACA licenses are also expensive. Having to get both a federal and a state license is unnecessary, therefore Wisconsin enacted an exemption for those who have a federal PACA license, when Wis. Stat. § 126.56 was enacted in 2001.

### *2. Wisconsin Law Has Not Been Updated to Recognize the Expanded Applicability of Federal PACA Coverage*

The federal PACA definition of “fresh fruits and vegetables” (see above), includes potato products such as frozen potatoes and potatoes that will be used for processing. However, the Wisconsin exemption is limited to, “vegetables primarily for unprocessed, fresh market use and is licensed under the federal Perishable Agricultural Commodities Act, 7 USC 499a to 499t.” See Wis. Stat. § 126.56(2)(a).

Therefore, Wisconsin law inadvertently requires a Wisconsin license for those who also have a PACA license, *if they are purchasing primarily potatoes used for processing* (i.e., potatoes that will be chipped, frozen or canned) while allowing an exemption for potatoes that will be purchased for the fresh market.

This result was likely the effect of the Wisconsin law preceding the federal rule. The PACA regulation became effective on June 2, 2003, which is about 2 years after Wis. Stat. § 126.56 was enacted.<sup>2</sup> Accordingly, an update to Wisconsin law is needed to track PACA because there is a perception by contractors purchasing potatoes from Wisconsin growers that this double licensure makes doing business in Wisconsin unnecessarily expensive and these buyers are refusing to purchase Wisconsin potatoes.

<sup>2</sup> Wis. Stat. § 126.56 was enacted on August 30, 2001, as a part of 2001 Wisconsin Act 16, the biennial budget bill.

### **C. The Solution**

A simple amendment to Wisconsin's PSA to bring it into agreement with PACA would eliminate the requirement for double licensure for contractors purchasing potatoes used for processing.

Wis. Stat. § 126.56(2) shall be amended to read:

**(2) Exempt contractors.** The following vegetable contractors are exempt from licensing under sub. (1):

(a) A vegetable contractor who procures vegetables ~~primarily for unprocessed, fresh-market use~~ and is licensed under the federal Perishable Agricultural Commodities Act, 7 USC 499a to 499t.

(b) A restaurant or retail food establishment that procures processing vegetables solely for retail sale at the restaurant or retail food establishment.

**There are two other issues that need to be addressed. However, the above-described PACA exemption amendment would likely resolve most of the WPVGA members' concerns regarding Wisconsin's PSA.**

**ISSUE #2: Wisconsin's requirement of an "audited financial statement" for contractors purchasing more than \$4 million in vegetables per year is unnecessary.**

**A. Background**

Under the Wisconsin PSA, a vegetable contractor is required to file an "audited" financial statement with the DATCP if the contractor's "latest annual license application reported more than \$4,000,000 in annual contract obligations." See Wis. Stat. § 126.58(3) (2004). Yet, contractors under the \$4,000,000 threshold are only required to file a "reviewed" financial statement. See *id.*

**B. The Problem**

The provision requiring an audited financial statement was intended to apply to very large contractors. Yet, a \$4,000,000 contractor is not a large contractor.

Audited financial statements are very expensive and do not provide much additional protection when compared to a reviewed financial statement.

**C. The Solution**

Accordingly, we request that this section be amended such that an audited financial statement is not required until the contracted amount exceeds \$10,000,000.

**ISSUE #3: Wisconsin's license fee is unnecessarily expensive.**

**A. Background**

Under the Wisconsin PSA, fees are charged by the department to companies that procure potatoes to be used for processing. These fees include a licensing fee as well as a security fund fee. These fees are determined by a formula established by state statute, which considers the financial health of the processor and the value of the produce they are buying in a given year.

**B. The Problem**

Wisconsin growers are finding themselves at a competitive disadvantage with producers in neighboring states because of the high cost to be licensed under PSA in Wisconsin. Under the Wisconsin PSA, the fee is based on a company's debt to equity ratio, has two parts (security fee and licensing fee) and is graduated over a 6-year period. This fee is different for each company based on these parameters, and is generally substantially higher than the fees paid to do business in Michigan (\$130) North Dakota (\$158) and Nebraska (\$0). By comparison, one large chip manufacturer paid over \$127,000 to do business in Wisconsin in 2003.

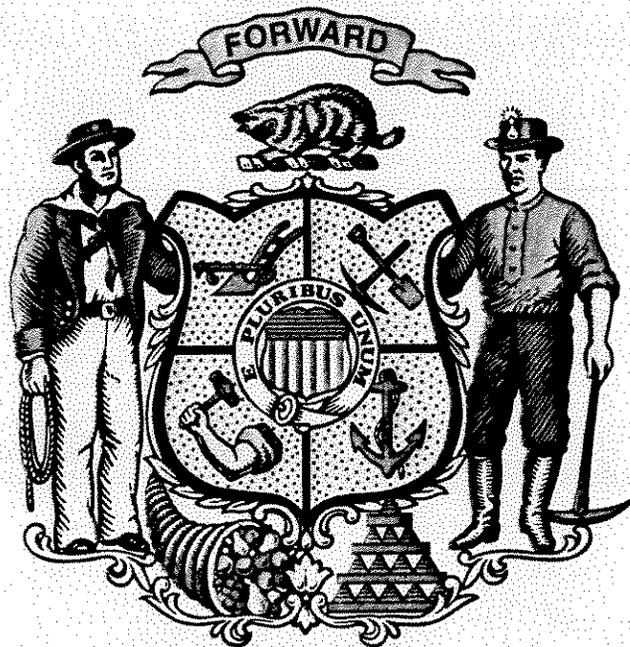
This disparity in the cost to do business in Wisconsin is making processors consider sourcing their potatoes from other states or reduce the return to growers in Wisconsin to make up for

their increased costs. Because of reduced demand for potato chip and french fry products in the current marketplace, the processors are under pressure to reduce all input costs to be competitive, including fees like those imposed under the PSA. There are reports from some out-of-state processors indicating that they will no longer contract for potatoes from Wisconsin until the fees are more consistent with the fees in other states.

### **C. The Solution**

Under Wisconsin state statutes prior to the enactment of the PSA, companies were allowed to purchase a bond to insure that growers would be paid for their product in the event of a default.

We propose returning this option to processors under state law. Under this proposal, a company would be required to either be secured by the PSA, or by PACA, or by a bond. This insures all growers have some form of protection from default, yet gives the companies options on how to purchase that coverage, and insuring that the coverage is as inexpensive as possible.



1 **~~Sixth~~ Seventh Revised DATCP Working Draft Bill Language**

2  
3 **SECTION 1** 126.55(10m) is created to read:

4 126.55(10r) "Processed potato buyer" means a vegetable contractor or a producer  
5 agent who purchases processed potatoes.

6 126.55(10s) "Processed potatoes" means potatoes grown or sold for use in food  
7 processing, regardless of whether those potatoes are actually harvested or processed as  
8 food.<sup>1</sup>

9 **Section 2.** 126.56(4)(f) is created to read:

10 (f) A vegetable contractor who is a processed potato buyer who does not  
11 participate in the fund in accordance with s. 126.56m, shall pay a fee of not more than  
12 \$500.

13 *Department Request* → **SECTION 3.** 126.56m is created to read:

14 126.56m. **PROCESSED POTATO BUYER OPTIONAL NONPARTICIPATION.** (1)

15 **Criteria for Nonparticipation.** Processed potato buyers who meet all of the provisions  
16 in sub (2) may, at their discretion, opt out of participating in the fund.

17 (2) A nonparticipating processed potato buyer must do all of the following:

18 (a) Submit to the department when first licensed and thereafter by January 31 of  
19 each year, a notification of nonparticipation

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<sup>1</sup> "Food processing" in this section refers to the definition stated in Wis. Stat. § 97.29(1)(g).

1 (b) Certify, in a statement to the department, that the processed potato buyer will  
2 not, in the next license year, enter into contracts with Wisconsin producers where  
3 payment terms exceed 20 days, or if the contract is in writing, 30 days.

4 (c) Certify, in a statement to the department, that the processed potato buyer  
5 does not currently have any unpaid obligations with producers where payment terms  
6 exceed 20 days, or if the contract is in writing, 30 days.

7 (d) Provide evidence to the department that the processed potato buyer has, in  
8 good standing, a PACA license with the United States Department of Agriculture --  
9 Agricultural Marketing Service.

10 (e) Disclose to all producers that the processed potato buyer does not participate  
11 in the fund by including, in at least 10 point bold type, the following statement in each  
12 contract for procurement of processed potatoes: ***The undersigned processed potato***  
13 ***buyer, as defined in s. 126.55(10r) Wisconsin Statutes, does not participate in the***  
14 ***Wisconsin agriculture producer security fund, established under s. 25.463, Wisconsin***  
15 ***Statutes. As a result, you, the producer, do not have the security or other protections***  
16 ***against non-payment provided by that fund.***

17 (f) Maintain on file evidence that each and every purchase of Wisconsin potatoes  
18 grown for processing qualifies for PACA Trust Protection and the producers trust rights  
19 have been validly preserved.

1           **(2) Limitation on Resuming Participation.** Processed potato buyers who meet  
2 all of the criteria under sub. (1) and who opt out of the fund may re-enter the fund in  
3 accordance with the applicable provisions of this chapter. However, if a processed potato  
4 buyer has any obligations under an existing contract for processed potatoes that remain  
5 outstanding at the time the processed potato buyer chooses to resume participation in the  
6 fund, those obligations will not be covered by the fund. In addition, the processed potato  
7 buyer must purchase a bond in an amount sufficient to cover any potential default on any  
8 contracts entered into after resuming participation in the fund until current financial  
9 information is provided to the Department and the Department releases the bond  
10 requirement. Verification of a bond in a sufficient amount to cover any such contracts  
11 must be provided to the Department prior to resuming participation. Once current  
12 financials are provided to the Department, the Department must issue a decision within  
13 60 days regarding any assessments and whether to release the bond requirement.

*included*

14           **(3) Merger of Participating and Nonparticipating Processed Potato Buyers or**  
15 **Other Vegetable Contractors.** If a nonparticipating processed potato buyer merges with  
16 a processed potato buyer or any other vegetable contractor who is a contributing  
17 vegetable contractor, the merged entity will be a contributing vegetable contractor that  
18 participates in the fund unless the merged entity meets all of the provisions in sub. (2)  
19 and opts out of the fund.

1           **(2) Limitation on Resuming Participation.** Processed potato buyers who meet  
2 all of the criteria under sub. (1) and who opt out of the fund may re-enter the fund in  
3 accordance with the applicable provisions of this chapter. However, if a processed potato  
4 buyer has any obligations under an existing contract for processed potatoes that remain  
5 outstanding at the time the processed potato buyer chooses to resume participation in the  
6 fund, those obligations will not be covered by the fund. In addition, the processed potato  
7 buyer must purchase a bond in an amount sufficient to cover any potential default on any  
8 contracts entered into after resuming participation in the fund until current financial  
9 information is provided to the Department and the Department releases the bond  
10 requirement. Verification of a bond in a sufficient amount to cover any such contracts  
11 must be provided to the Department prior to resuming participation. Once current  
12 financials are provided to the Department, the Department must issue a decision within  
13 60 days regarding any assessments and whether to release the bond requirement.

14           **(3) Merger of Participating and Nonparticipating Processed Potato Buyers or**  
15 **Other Vegetable Contractors.** If a nonparticipating processed potato buyer merges with  
16 a processed potato buyer or any other vegetable contractor who is a contributing  
17 vegetable contractor, the merged entity will be a contributing vegetable contractor that  
18 participates in the fund unless the merged entity meets all of the provisions in sub. (2)  
19 and opts out of the fund.

1           **SECTION 4.** 126.57(1)(b)3 is created to read:

2           3. The vegetable contractor is a nonparticipating processed potato buyer.

3           **SECTION 5.** 126.58(1)(c)3 is created to read:

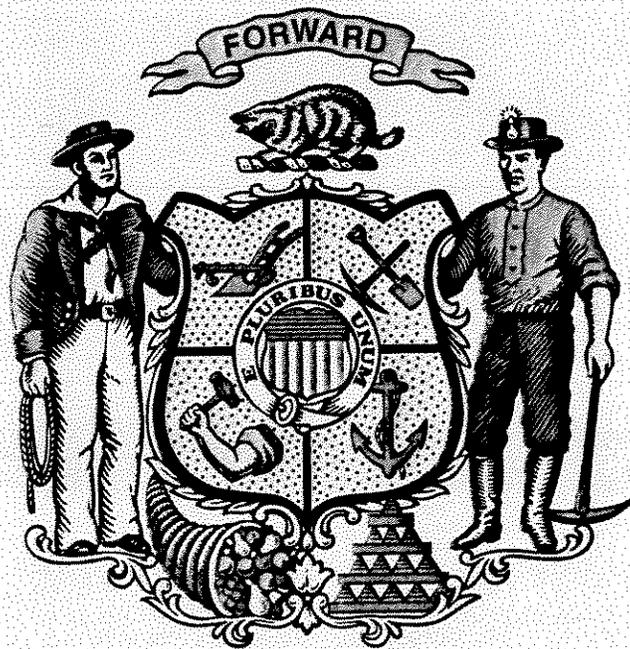
4           3. The vegetable contractor is a nonparticipating processed potato buyer.

5           **SECTION 6.** 126.61(1)(c)3 is created to read:

6           3. The vegetable contractor is a nonparticipating processed potato buyer.

7

8



	Contractor	City	State
<b>Potato Chip Manufactures</b>			
	BLACK GOLD POTATO SALES INC	Grand Forks	ND
	Bradley Industries, Inc. (Door County Potato Chips)	MILWAUKEE	WI
	C.J. VITNER COMPANY, INC.	Freeport	IL
	E. K. BARE & SONS, INC.	Bird-In-Hand	PA
	H.C. SCHMIEDING PRODUCE CO., INC.	Springdale	AR
	HEARTLAND AGRICULTURAL MARKETING, INC.	HANCOCK	WI
	NEUMILLER FARMS, INC.	Somers	WI
	ONEIDA POTATO EXCHANGE, LLC	Rhineland	WI
	PEPSICO, INC. (Frito Lay)	DALLAS	TX
	PETERSON PRODUCE, INC.	Summerdale	AL
	SOWINSKI FARMS, INC.	Rhineland	WI
	UTZ QUALITY FOODS, INC.	Hanover	PA
	WYANDOT, INC.	Marion	OH
<b>Potato Buyers (other than Chip Manufactures)</b>			
	ANDERSON DISTRIBUTOR INC	BALDWIN	WI
	BAGINSKI POTATO COMPANY, L.T.D.	Antigo	WI
	BASIC AMERICAN, INC.	PLOVER	WI
	CUSTOM CUTS, INC.	MILWAUKEE	WI
	KIRSCHLING, INC.	STEVENS POINT	WI
	Mccain Foods USA, Inc	OAK BROOK	IL
	Michael Foods, Inc. (dba Northern Star)	Minneapolis	MN
<b>Other Vegetable Buyers (I.E., Canning companies, etc.)</b>			
	AGRILINK FOODS INC-OB	ROCHESTER	NY
	ALLEN CANNING COMPANY	SILOAM SPRINGS	AR
	BIRDS EYE FOODS, INC	ROCHESTER	NY
	BRADSHAW FARMS INC.	MILWAUKEE	WI
	BUSH BROTHERS & COMPANY	SHIOCTON	WI
	CHIPPEWA VALLEY BEAN COMPANY, INC.	Menomonie	WI
	CHIQUITA PROCESSED FOODS LLC	NEW RICHMOND	WI
	Cooperative Regions of Organic Producer Pools (dba Organic Valley)	La Farge	WI ←
	DEAN FOODS INC	GREEN BAY	WI
	DEL MONTE FOODS CORPORATION	PLOVER	WI
	DELICIOUS POPCORN & DISTRIBUTORS CO., INC.	Waupaca	WI
	FARIBAULT FOODS, INC.	MINNEAPOLIS	MN
	GREAT LAKES KRAUT COMPANY, LLC	BEAR CREEK	WI
	GREAT LAKES KRAUT COMPANY, LLC O/B	BEAR CREEK	WI
	HARTUNG BROTHERS, INC.	MADISON	WI
	J. G. VAN HOLTEN AND SON, INC.	WATERLOO	WI
	KELLY PICKLE COMPANY	OCONTO	WI
	LAKESIDE FOODS, INC.	MANITOWOC	WI
	LINDSAY FOODS, INC.	MILWAUKEE	WI
	LODI CANNING COMPANY, INC.	LODI	WI
	MARKS BROS. PICKLE CO., INC.	WAUTOMA	WI
	Myron Kudick (dba Kudick Farms)	DENMARK	WI
	NEW HARVEST FOODS, INC.	PULASKI	WI
	RAZORBACK FARMS, INC.	SPRINGDALE	AR
	RIPON PICKLE COMPANY INC	RIPON	WI
	SCOTT F LOFY	HARTFORD	WI
	SENECA FOODS CORPORATION	JANESVILLE	WI