

**§ 875.408 What is the significance of incontestability?**

(a) Incontestability means coverage issued based on an erroneous application may remain in effect. Such coverage will not remain in effect under any of the following conditions:

(1) If your coverage has been in force for less than 6 months, the Carrier may void your coverage upon a showing that information on your signed application that was material to your approval for coverage is different from what is shown in your medical records.

(2) If your coverage has been in force for at least 6 months but less than 2 years, the Carrier may void your coverage upon a showing that information on your signed application that was material to your approval for coverage is different from what is shown in your medical records and pertains to the condition for which benefits are sought.

(3) After your coverage has been in effect for 2 years, the Carrier may void your coverage only upon a showing that you knowingly and intentionally made a false or misleading statement or omitted information in your signed application for coverage regarding your health status that was material to your approval for coverage.

(4) If your coverage is voided, as described in paragraph (a)(1), (a)(2), or (a)(3) of this section, no claims will be paid. In addition, the provisions of § 875.104 relating to the procedures for resolving a dispute involving benefits eligibility or claims denials do not apply to your situation. You may request a review by the Carrier if you believe that your coverage was voided in error. You must submit your request in writing to the Carrier within 30 days of the date of the rescission letter (letter voiding your coverage).

\* \* \* \* \*

■ 6. In § 875.410 revise the first sentence to read as follows:

**§ 875.410 May I continue my coverage when I leave Federal or military service?**

If you are an active workforce member, your coverage will automatically continue when you leave active service, as long as the Carrier continues to receive the required premium when due. \* \* \*

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**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Parts 916 and 917**

[Docket No. AMS-FV-06-0190; FV07-916/917-2 FIR]

**Nectarines and Peaches Grown in California; Temporary Suspension of Provisions Regarding Continuance Referenda Under the Nectarine and Peach Marketing Orders**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule temporarily suspending order provisions that require continuance referenda to be conducted for the nectarine and peach marketing orders during winter 2006-07. This rule enables USDA to postpone conducting the continuance referenda until the industry has had sufficient time to evaluate the effects of recent amendments to the marketing orders. Temporary suspension of the continuance referenda should also minimize confusion during the current committee nomination period, which overlaps with the scheduled referenda period.

**DATES:** *Effective Date:* April 16, 2007.

**FOR FURTHER INFORMATION CONTACT:** Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; *Telephone:* (202) 720-2491, *Fax:* (202) 720-8938, or *E-mail:* [Laurel.May@usda.gov](mailto:Laurel.May@usda.gov); or Kurt Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; *Telephone:* (559) 487-5901, *Fax:* (559) 487-5906, or *E-mail:* [Kurt.Kimmel@usda.gov](mailto:Kurt.Kimmel@usda.gov). The rule can be viewed at <http://www.regulations.gov>.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237; *Telephone:* (202) 720-2491, *Fax:* (202) 720-8938, or *E-mail:* [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order Nos.

916 and 917, both as amended (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the "orders." The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

This rule continues in effect the action that temporarily suspends the provisions in §§ 916.64(e) and 917.61(e) of the orders, which specify when continuance referenda should be conducted to determine whether growers favor continuance of the orders. Temporary suspension of the provisions for continuance referenda will provide growers with more time to evaluate the effects of recent amendments to the orders before voting on continuance of the marketing programs. Suspension of the referenda requirements will also diminish the confusion likely to occur if the referenda are held during current committee nominations. These actions were unanimously recommended by the Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC) (committees) at their August 31, 2006, meetings.

**Nectarines**

Section 916.64(e) of the nectarine marketing order currently provides that USDA shall conduct a continuance

referendum between December 1 and February 15 of every fourth fiscal period since winter 1974–75 to ascertain whether continuance of the order is favored by nectarine growers. A continuance referendum is, therefore, scheduled to be conducted between December 1, 2006, and February 15, 2007. Authorization to suspend the continuance referendum requirement is provided in § 916.64(b).

The NAC recommended that the provision requiring the winter 2006–07 continuance referendum be temporarily suspended to allow the industry time to fully realize the impact of recent amendments to the marketing order. Amendments to the order were approved by nectarine growers in a referendum held in March 2006. The majority of the amendments were implemented on January 1, 2007. The continuance referendum cycle will resume as provided in § 916.64(e) in the period between December 1, 2010, and February 15, 2011. A referendum can be held in the interim if deemed appropriate by USDA.

Among the recent amendments to the order are revisions to the NAC's nomination procedures, which require a transition to mail balloting. Ballots for the 2007–09 term of office were mailed to growers in January 2007. The NAC believes that receiving both the nomination ballots and the continuance referenda ballots during this transitional period would confuse growers, who would then be less likely to return any of the ballots. The committees expect that temporary suspension of the continuance referendum will minimize confusion and maximize grower participation in both the committee nominations and the continuance referendum. After this initial transitional period, biennial committee nominations should take place earlier in the year and are not expected to overlap with scheduled continuance referendum periods.

#### **Peaches**

Section 917.61(e) of the peach marketing order currently provides that USDA shall conduct a continuance referendum between December 1 and February 15 of every fourth fiscal period since winter 1974–75 to ascertain whether continuance of the order is favored by peach growers. A continuance referendum is, therefore, scheduled to be conducted between December 1, 2006 and February 15, 2007. Authorization to suspend the continuance referendum requirement is provided in § 917.61(b).

The PCC recommended that the provision requiring the winter 2006–07

continuance referendum be temporarily suspended to allow the industry time to fully realize the impact of recent amendments to the marketing order. Amendments to the order were approved by peach growers in a referendum held in March 2006. The majority of the amendments were implemented on January 1, 2007. The continuance referendum cycle will resume as provided in § 917.61(e) in the period between December 1, 2010, and February 15, 2011. A referendum can be held in the interim if deemed appropriate by USDA.

Section 917.61(e) also requires that USDA conduct continuance referenda regarding the provisions of Part 917 pertaining to pears. Although the provisions pertaining to pears are currently suspended, the pear referenda are conducted concurrently with the peach and nectarine continuance referenda. In order to stay synchronized with the peach and nectarine referenda, the pear referendum will not be held during the period between December 1, 2006, and February 15, 2007. The pear continuance referendum cycle will resume as provided in § 917.61(e) in the period between December 1, 2010, and February 15, 2011. A referendum can be held in the interim if deemed appropriate by USDA.

Among the recent amendments to the order are revisions to the PCC's nomination procedures, which require a transition to mail balloting. Ballots for the 2007–09 term of office were mailed to growers in January 2007. The PCC believes that receiving both the nomination ballots and the continuance referenda ballots during this transitional period would confuse growers, who would then be less likely to return any of the ballots. The committees expect that temporary suspension of the continuance referendum will minimize confusion and maximize grower participation in both the committee nominations and the continuance referendum. After this initial transitional period, biennial committee nominations should take place earlier in the year and are not expected to overlap with scheduled continuance referendum periods.

#### **Final Regulatory Flexibility Act**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order

that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 150 handlers of nectarines and peaches who are subject to regulation under the order and approximately 800 growers of these fruits in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$6,500,000, and small agricultural growers are defined as those having annual receipts of less than \$750,000. The majority of California nectarine and peach handlers and growers may be classified as small entities.

The committees' staff has estimated that there are fewer than 26 handlers in the industry who could be defined as other than small entities. For the 2005 season, the committees' staff estimated that the average handler price received was \$10.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 600,000 containers to have annual receipts of \$6,000,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2005 season, the committees' staff estimates that small handlers represent approximately 86 percent of all the handlers within the industry.

The committees' staff has also estimated that fewer than 10 percent of the growers in the industry could be defined as other than small entities. For the 2005 season, the committees' staff estimated the average grower price received was \$5.25 per container or container equivalent for nectarines and peaches. A grower would have to produce at least 142,858 containers of nectarines and peaches to have annual receipts of \$750,000. Given data maintained by the committees' staff and the average grower price received during the 2005 season, the committees' staff estimates that small growers represent more than 90 percent of the producers within the industry.

With an average grower price of \$5.25 per container or container equivalent, and a combined packout of nectarines and peaches of approximately 38,776,500 containers, the value of the 2005 packout is estimated to be \$203,576,600. Dividing this total estimated grower revenue figure by the

estimated number of growers (800) yields an estimated average revenue per grower of about \$254,471 from the sales of peaches and nectarines.

This rule continues in effect the action that temporarily suspends the provisions in §§ 916.64(e) and 917.61(e), which specify the time period in which continuance referenda should be conducted to determine if growers favor continuance of the nectarine and peach marketing orders, respectively. Pursuant to these provisions, the next continuance referenda are scheduled for the period between December 1, 2006, and February 15, 2007. Authorization to suspend these provisions is provided in §§ 916.64(b) and 917.61(b) of the orders.

The committees recommended suspension of these provisions to allow the industry time to evaluate the effects of recent amendments to the marketing orders before voting on continuation of the programs. For instance, several of the amendments were intended to increase industry participation in program activities. Others were intended to modernize the marketing orders' operations to better reflect current industry business practices. Postponing the referenda will give the industry time to operate under the amended orders and determine whether the intended goals were met before the next continuance referenda. The continuance referenda cycles as provided in §§ 916.64(e) and 917.61(e) will resume in the period between December 1, 2010, and February 15, 2011. Referenda can be held in the interim if deemed appropriate by USDA.

This action is also expected to decrease the confusion likely to occur if the continuance referenda scheduled for the period between December 1, 2006, and February 15, 2007, are held as scheduled. Implementation of the order amendments required a transition to mail balloting for NAC and PCC nominations in January 2007, which would overlap with the scheduled continuance referenda. Growers could each receive as many as four ballots during the overlapping nominations and referenda periods if they produce both nectarines and peaches. The committees are concerned that the flood of ballots could confuse growers and discourage them from participating fully. Therefore, the committees recommended that the continuance referenda be postponed. After this initial transitional period the biennial committee nominations should take place earlier in the year and are not expected to overlap with scheduled continuance referenda periods.

One alternative to this action would be to conduct the referenda as scheduled. However, the committees

believe that growers need additional time to evaluate the effectiveness of the amendments that were adopted before voting on continuation of the marketing programs. Postponing the continuance referenda until a later time is expected to provide a better assessment of industry support for the orders. Further, if the continuance referenda were not postponed the referenda period would overlap with the committee nominations period. Voter confusion would likely occur due to the receipt of multiple ballots during that time. The committees were concerned that the confusion would lead to decreased grower participation in both the referenda and the committee nominations. Therefore, USDA has determined that the provisions requiring that continuance referenda be conducted during the period between December 1, 2006, and February 15, 2007, should be temporarily suspended.

The AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large nectarine or peach handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the committees' meetings were widely publicized throughout the nectarine and peach industry and all interested persons were invited to attend the meetings and participate in committee deliberations. Like all committee meetings, the August 31, 2006, meetings were public meetings and all entities, both large and small, were able to express their views on this issue.

An interim final rule concerning this action was published in the **Federal Register** on December 28, 2006. The committees posted the rule on their Web site. In addition, the rule was made available through the Internet by USDA and the Office of the Federal Register. That rule provided for a 30-day comment period which ended January 29, 2007. One comment supporting the proposal was received. The commenter cited more time to evaluate the effects of recent amendments to the order and reduced confusion for committee

nominations as justification for temporarily suspending the provisions for continuance referenda.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the committees' recommendations, and other information, it is found that the order provisions suspended by this action no longer tend to effectuate the declared policy of the Act for the 2006–07 period. Accordingly, we are finalizing the interim final rule, without change, as published in the **Federal Register** (71 FR 78042, December 28, 2006).

#### List of Subjects

##### 7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

##### 7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

#### PART 916—NECTARINES GROWN IN CALIFORNIA

#### PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

■ Accordingly, the interim final rule amending 7 CFR parts 916 and 917, which was published at 71 FR 78042 on September 28, 2006, is adopted as a final rule without change.

Dated: March 9, 2007.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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