

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. AO-90-A7; FV05-916-1]

Nectarines and Peaches Grown in California; Secretary's Decision and Referenda Order on Proposed Amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referenda order.

SUMMARY: This decision proposes amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 (orders), which regulate the handling of nectarines and peaches grown in California, and provides growers with the opportunity to vote in referenda to determine if they favor the changes. The amendments are based on those proposed by the Nectarine Administrative Committee (NAC), the Peach Commodity Committee (PCC), and the Control Committee (part of M.O. No. 917) (Committees), which are responsible for local administration of orders 916 and 917. The proposed amendments to order 917 only apply to peaches. The proposed amendments would: update definitions for "handle", "grower", and add a definition for "pure grower" to both orders; increase committee membership of the NAC from eight to thirteen members and modify sections of order 916 to conform to the increased membership; eliminate the Shippers Advisory Committee in order 916; allow the Control Committee under order 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; authorize interest and late payment charges on assessments paid late in both orders; and other related amendments.

The proposed amendments are intended to streamline and improve the administration, operation, and functioning of the orders.

DATES: The referenda will be conducted from March 6 to 24, 2006. The representative periods for the purpose of the referenda for both nectarines and peaches are March 1, 2005, through February 28, 2006.

FOR FURTHER INFORMATION CONTACT:

Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 1035, Moab, Utah; telephone: (435) 259-7988, Fax: (435) 259-4945; or Kathleen M. Finn, 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.

Small businesses may request information on this proceeding 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.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on January 25, 2005 and published in the January 28, 2005 issue of the **Federal Register** (70 FR 4041), and a Recommended Decision issued on November 18, 2005, and published in the November 29, 2005, issue of the **Federal Register** (70 FR 71734).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

The proposed amendments are based on the record of a public hearing held on February 15 and 16, 2005, in Fresno, California. The hearing was held to consider the proposed amendment of the orders. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*) hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900). The notice of hearing contained numerous proposed order changes jointly proposed by the

Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee (order 917), which are responsible for local administration of orders 916 and 917. Marketing order 917 regulates both California pears and peaches. However, the proposed amendments to order 917 only apply to peaches. The pear provisions of the order have been suspended since 1994. Because the Pear Commodity Committee and the pear provisions are suspended, the Pear Commodity Committee did not participate in any amendment discussions.

The proposed amendments to marketing orders 916 and 917 would:

1. Allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to such fruit be subject to marketing order regulations under both orders.

2. Specify that the act of packing be considered a handling function under both orders.

3. Change the marketing season for nectarines from May 1 through November 30 to April 1 through November 30.

4. Allow the duties and responsibilities of the Control Committee under order 917 to be transferred to one Commodity Committee if the provisions for the other commodity are suspended.

5. Increase membership on the NAC from eight to thirteen members and revise the procedures that constitute quorum and voting requirements to conform to the increased committee size. The proposal would also add to both orders that the Committees may vote by facsimile and set forth voting requirements for video conferencing.

6. Eliminate the Shippers' Advisory Committee under the nectarine order.

7. Modify the definition of grower under both orders to clarify that officers of grower corporations are eligible to serve as committee grower members.

8. Add a definition of "pure grower" for purposes of eligibility for membership on the Committees. This proposal would also allow alternative methods to conduct nominations, change the date for holding nominations, authorize positions for pure growers and add tenure requirements for Committee members.

9. Authorize nominees to state their willingness to serve on the Committees prior to the selection.

10. Change the district boundaries under the nectarine order and redefine the peach districts.

11. Change the names and the composition of the districts of the Peach Commodity Committee.

12. Allow for interest and/or late payments for assessments not paid timely under both orders and authorize the Peach Commodity Committee to borrow money.

13. Clarify that subcommittees may be established by the Peach Commodity Committee.

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the orders, if any of the proposed changes are adopted, so that all of the orders' provisions conform to the effectuated amendments. None were deemed necessary.

One proposed amendment was not recommended for adoption. That amendment would have provided authority to recommend different regulations for different market destinations of the products.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on November 18, 2005, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by December 19, 2005.

One exception was filed on behalf of the proponents during the exception period. The exception expressed general support for the proposals, including modifications to those proposals recommended by USDA in its recommended decision. This decision adopts these amendments as proposed in the recommended decision.

Small Business Considerations

Pursuant to the 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 initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural growers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000. Small agricultural service firms, which include handlers regulated under the order, were defined at the time of the hearing as those with annual receipts of less than \$5,000,000. The definition of small agricultural service firm has subsequently changed to one with annual receipts of \$6,000,000.

According to the record, there are approximately 207 California nectarine and peach handlers (combined) and approximately 1,500 growers (combined nectarines and peaches) in the production area, the State of California. A majority of these handlers and growers may be classified as small entities.

Based on calculations made by the Peach and Nectarine Committees' staff, witnesses indicated that about 26 handlers (13 percent) would qualify as large business entities under the SBA definition of a large agricultural service firm (\$5,000,000). For the 2004 season, it was estimated that the average handler price received was eight dollars per container or container equivalent of nectarines or peaches. Thus, a handler would have to ship at least 625,000 containers to have annual receipts of 5 million dollars. Given data on shipments presented at the hearing and the estimated 8 dollar average handler price received during the 2004 season, small handlers represented approximately 87 percent of all the handlers within the industry. Under the 6 million dollar definition, more than 87 percent of handlers would qualify as small handler entities.

Record evidence also indicated that less than 20 percent of the combined number of California nectarine and peach growers could be defined as other than small entities. The Committees estimated that the average 2004 grower price received for nectarines and peaches was 5 dollars per container or a container equivalent. A grower would have to produce at least 150,000 containers of nectarines and peaches to have annual receipts of 750,000 dollars. Given data maintained by the Committees' staff and the 5 dollar estimated average grower price received during the 2004 season, the staff estimates that more than 80 percent of growers can be classified as small growers.

Evidence presented at the hearing indicates an average 2004 grower price of 5 dollars per container or container equivalent for both nectarines and peaches, and a combined pack-out of approximately 40,422,900 containers.

Thus, the value of the 2004 pack-out is estimated to be \$202,114,500. Dividing this total estimated grower revenue by the estimated number of combined nectarine and peach growers (1,500) yields an estimate of 2004 average revenue per grower of about \$134,743. Because many growers produce both commodities, industry nectarine and peach production statistics were presented at the hearing as combined totals.

National Agricultural Statistical Service (NASS) data presented at the hearing provides the following production profile for California nectarines and peaches, respectively (all numbers are two-year averages for the 2003 crop year and preliminary data for 2004): bearing acres, 36,500 of nectarines and 37,000 of peaches; yield per acre of utilized production, 7.19 tons and 10.84 tons; annual utilized production, 262,500 tons and 401,000 tons. Utilized production of both nectarines and peaches was less than total production in 2004; utilized production data was therefore used in the computation. Two-year (2003 and 2004) average grower prices per ton for nectarines and peaches were \$391 and \$309.50 respectively. However, \$309.50 is the peach price per ton for both fresh and processed uses. Approximately one third of California freestone peaches are sold for processing at a price lower than growers receive for fresh market sales. Therefore, a better estimate of the price per ton for fresh peach sales is to use the U.S. estimated grower price for fresh peaches of 27 cents per pound (\$540 per ton) for 2003, the most recent year for which a U.S. fresh peach price was available from the Economic Research Service of the USDA.

This NASS and ERS data is used to compute an additional estimate of average annual sales revenue per producer. By assuming that growers of nectarines are also growers of peaches, the 2004 average acreage for these crops (dividing the sum of nectarine and peach bearing acres by 2) is equal to 36,750 acres. Dividing this number by the number of combined peach and nectarine growers reported by CTFA (1,500) yields an estimate of 24.5 acres as the average size of a sample nectarine or peach farm in 2004. If the sample farm's acreage was split evenly between nectarines and peaches (12.5 acres of each fruit) and production yields equal to the statewide average (reported above), that farm would have produced and sold 89.88 tons of nectarines and 134.42 tons of peaches. The value of production for that sample farm would have been \$35,143 for nectarines and \$72,587 for peaches, or \$107,730 total.

This figure is lower than the \$134,743 estimate using industry data. However, both computations confirm that the average nectarine or peach grower qualifies as a small grower under the SBA definition.

The proposed amendments would: update definitions and districts in both orders; increase membership of the Nectarine Administrative Committee from 8 to 13 members and modify sections of the order to conform to the increased membership; eliminate the Shippers Advisory Committee (M.O. No. 916); allow the Control Committee under M.O. No. 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; and authorize interest and late payment charges on assessments that are paid late.

All of the proposals are intended to streamline and improve the administration, operation, and functioning of the programs. Many of the proposed amendments would update the language of these two orders, thus better representing, and conforming with, current practices in these industries. The proposed amendments are not expected to result in any significant cost increases for growers or handlers. More efficient administration of program activities may result in cost savings for the Peach and Nectarine Committees.

Proposal 1 would amend the order to allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to nectarines and peaches to be subject to marketing order regulations. This proposed amendment provides a procedure for the Committees to recommend to USDA the specific hybrids to be included under the definitions and subject to order provisions.

The cultivation of hybrid fruit has been a practice of the nectarine and peach industries. The improvement in breeding technology provides for the development of fruit and fruit trees with more favorable characteristics, such as disease resistance. As breeding technology becomes more sophisticated, it is anticipated that nectarines and peaches will be crossbred with other tree fruit, such as apricots and plums.

The proposal would require that all hybrids for which regulation is contemplated would need to be recommended to USDA by the Committees. If this amendment is adopted, the Committees would identify hybrids currently in production that have characteristics of nectarines or

peaches. The characteristics of the fruit would help determine whether the hybrid should be regulated. The Committees would also consider the cultural practices used on that specific hybrid, as cultural practices differ among various fruit trees. USDA would then proceed with rulemaking, as appropriate, as to what hybrids would be included under the order.

The proposed amendment would provide flexibility in including hybrids as they are developed and provides sufficient safeguards to ensure compliance of order provisions. Incorporating specific reference to hybrid fruit into the definitions of "nectarine" and "peach" is not expected to result in any significant increase in costs to growers or handlers. There may be slight increases in the administration costs of the nectarine and peach orders in terms of program oversight, but it is expected that any increases would be offset by the benefits of including hybrids under the orders' provisions.

Proposal 2 would specify that the act of "packing" nectarines and peaches would be a handling function under the orders. Most packers already assume all of the responsibilities of a handler, except the selling of the fruit and thus, this proposal is not expected to result in any significant increases in costs and would likely result in efficiencies that would benefit the administration of marketing orders 916 and 917.

Proposal 3, which seeks to extend the marketing season for nectarines, would more accurately reflect the nectarine industry's current production and marketing season and would conform to current handling regulations. The proposed amendment would change the current marketing season from May 1 through November 30 to April 1 through November 30. According to record evidence, aligning the marketing year with current production would not result in any increases in costs.

Proposal 4 would allow for the temporary suspension of the Control Committee, the oversight committee for peaches and pears under marketing order 917, when one of the commodity programs is suspended. Since the pear program has been suspended, the duties of the Control Committee have been lessened, as there is only one Commodity Committee that is active under the marketing order program. In the Pear Commodity Committee's absence, the Peach Commodity Committee has continued to operate in conjunction with the Control Committee. The proposed amendment would also allow the Control Committee to become active again if both

commodity groups were to become active under the order. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 5 would increase the membership on the NAC from eight to thirteen members and revise quorum requirements. Proposal 5 would also provide for voting by facsimile and holding meetings via video teleconference for both the Nectarine and Peach Commodity Committees. Record evidence indicated that these amendments were necessary in order to update the business practices of the Nectarine and Peach Committees to include current day technology. The increase in Committee members from 8 to 13 would allow for greater industry participation and would provide for a larger pool of committee members to attend meetings and meet quorum requirements. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Regarding the increase in committee membership, this proposal would benefit growers by allowing more growers to be appointed to the Committee, thereby increasing industry participation in the marketing order program functions.

Regarding the use of facsimile and video teleconference, this provision would allow both the Nectarine and Peach Committees to take advantage of technology that is available currently, but was not known when the orders were promulgated. Amendments proposed under this material issue are not expected to result in any significant increases in costs to growers or handlers.

Proposal 6 would eliminate the Shipper's Advisory Committee under the nectarine marketing order and bring the language of the order into conformance with current day operations of the program. Record evidence indicates that the Shipper's Advisory Committee has not been active for over 30 years and, while it once served a function under the marketing order program, it is no longer necessary. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 7 would modify the definition of grower to specify that both employees of growers and corporate officers of growers are eligible to serve on the Nectarine and Peach Committees in grower positions. This proposed amendment would be a clarifying change and would bring the language of the order into conformance with current-day operations of the program. This amendment is not expected to

result in any increases in costs to growers or handlers.

Proposal 8 would add a definition for pure grower to both the nectarine and peach orders. If implemented, pure growers would be defined as growers that grow their own product (and are not employees or officers of a packing business) or, that grow and pack primarily their own product. If they do pack for other growers, the total production packed from other growers cannot exceed 25 percent of the total production packed for that marketing season for that pure grower's packing facility. Pure growers, who only pack a limited amount of fruit for other growers, are still essentially dependent on their own production, which is the essential component of being a pure grower.

Proposal 8 would also modify the current nomination procedures for the Committees, as well as modify the deadline for conducting the nominations, add a 50-percent pure grower membership requirement for the Committees and establish tenure requirements for members. According to the hearing record, nomination procedures would be modified to provide for mailings of ballots and would change the beginning date of the nomination period from February 15 to January 31. The change in the beginning date would be necessary in order to provide extra time for the mailing of ballots.

While some increases in administration costs could arise as a result of the mailing of ballots, record evidence indicates that the benefit of increased industry participation would merit that expense.

Proposal 9 would modify the current acceptance procedure for persons nominated to serve on the Nectarine and Peach Committees. Currently, the acceptance procedure for persons nominated and selected to serve on the Committees involves a two-step process. If this amendment were implemented, the two steps could be combined into one, thus resulting in less paperwork, a shorter acceptance procedure and improved efficiency in the acceptance process. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 10 would modify the Fresno and Tulare districts under the peach marketing order by moving Kings County from the Fresno district to the Tulare district and by including all of Tulare County in the Tulare district, and would also modify district boundaries under the nectarine order. This change would also serve as the basis for modifying committee representation for

the Tulare district under the peach order, as discussed under Proposal 11. These amendments are not expected to result in any significant increases in costs to growers or handlers.

Proposal 11 would modify the names of the peach producing districts under that marketing order and change district representation on the Peach Commodity Committee to reflect the modified districts discussed under Proposal 10. This proposal would provide for more accurate representation of current-day peach production. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Proposal 12 would provide for interest and penalty provisions for late payment of assessments to be added to both the nectarine and peach orders and would authorize the borrowing of funds for administration of the peach order. These amendments would strengthen the assessment collection functions of the orders and, in the case of peaches, allow access to additional funds. The implementation of interest and late payments would serve as an incentive for handlers to pay their assessments in a timely manner. The authority to borrow funds under marketing order 917 would allow the Control and Peach Committees access to additional funds to administer the order when the carry forward of assessment monies is inadequate. While these amendments are expected to result in some costs under the marketing orders, the more timely assessment payments and the authority to borrow funds (for peaches) are expected to benefit the industries.

Lastly, Proposal 14 would clarify that "other committees" established by the Peach Committee would be referred to as "subcommittees." This amendment is not expected to result in any increases in costs to growers or handlers.

The proposals put forth at the hearing would streamline program operations, but are not expected to result in a significant change in industry production, handling or distribution activities. In discussing the impacts of the proposed amendments on growers and handlers, record evidence indicates that the changes are expected to be positive because the administration of the programs would be more efficient, and therefore more effective, in executing Committee duties and responsibilities. There would be no significant cost impact on either small or large growers or handlers.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record

evidence is that the amendments are designed to increase efficiency in the functioning of the orders.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of marketing orders 916 and 917 to the benefit the California nectarine and peach industries.

Paperwork Reduction Act

Current information collection requirements for Parts 916 and 917 have been previously approved by the Office of Management and Budget (OMB) under OMB number 0581-0189, "Generic Fruit Crops." The proposed changes would have an insignificant impact on total burden hours currently approved under this information collection.

Specifically, the proposed amendment to increase the Nectarine Administrative Committee (committee) from 8 to 13 members would require an additional 5 members and 5 alternates to complete existing confidential background and acceptance statements every 2 years. Increasing committee members from 16 (8 members and 8 alternates) to 26 (13 members and 13 alternates) would result in an increase of .43 burden hours, or 26 minutes. In addition, because the Shipper's Advisory Committee is being recommended to be abolished, form FV-75, "Confidential California Tree Fruit Agreement Questionnaire", which is currently approved under OMB No. 0581-0189 for 1.99 burden hours, would no longer be needed. Removing this form would result in an overall decrease of 1.56 burden hours.

Also, the proposal would authorize nominees under the nectarine order to state their willingness to serve on the committee prior to their selection, which would result in the combining of Confidential Background statement and the acceptance statement, which are already approved by OMB. There would be no change in the burden hours by combining these forms.

The Peach Commodity Committee proposed to amend the provisions relating to the Control Committee under marketing order 917 to allow the duties and responsibilities of the Control Committee to be transferred to one commodity committee if the provisions of the other commodity committee are suspended. If this change was implemented, and the Peach Commodity Committee was to assume the duties and responsibilities of the Control Committee, some forms used by the Control Committee would require a

modification in the name of the committee using those forms. However, the functioning of the forms and the current burden would remain the same.

In addition, any changes to forms, or increased burden generated in nominating and selecting pure growers on the Committees would be submitted to OMB for approval prior to implementation.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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. Witnesses stated that existing forms could be adequately modified to serve the needs of the Nectarine and Peach Commodity Committees.

Civil Justice Reform

The amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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 the date of the entry of the ruling.

Findings and Conclusions

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in

the November 29, 2005, issue of the **Federal Register** are hereby approved and adopted.

Marketing Agreements and Orders

Annexed hereto and made a part hereof is the document entitled "Order Amending the Orders Regulating the Handling of Nectarines and Peaches Grown in California." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered. That this entire decision be published in the **Federal Register**.

Referenda Order

It is hereby directed that referenda be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400 *et seq.*) to determine whether the annexed order amending the orders regulating the handling of nectarines and peaches grown in California is approved or favored by growers, as defined under the terms of the orders, who during a representative period were engaged in the production of nectarines and peaches in the production areas.

The representative period for the conduct of such referenda is hereby determined to be March 1, 2005 through February 28, 2006.

The agents of the Secretary to conduct such referenda are hereby designated to be Laurel May and Kurt Kimmel, 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.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

Order Amending the Orders Regulating the Handling of Nectarines and Peaches Grown in California¹

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreements and orders; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict

with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, regulate the handling of nectarines and peaches grown in the production areas in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreements and orders upon which a hearing has been held;

(3) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production areas which are practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production areas would not effectively carry out the declared policy of the Act;

(4) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production areas as are necessary to give due recognition to the differences in the production and marketing of nectarines and peaches grown in the production areas; and

(5) All handling of nectarines and peaches grown in the production area as defined in the marketing agreements and orders is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

¹ These orders shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of nectarines and peaches grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreements and order amending the orders contained in the Recommended Decision issued by the Administrator on November 18, 2005, and published in the **Federal Register** on November 29, 2005, will be and are the terms and provisions of this order amending the orders and are set forth in full herein.

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.

1. The authority citation for 7 CFR part 916 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

2. Revise § 916.5 to read as follows:

§ 916.5 Nectarines.

Nectarines means: (a) All varieties of nectarines grown in the production area; and

(b) Hybrids grown in the production area that exhibit the characteristics of a nectarine and are subject to cultural practices common to nectarines, as recommended by the committee and approved by the Secretary.

3. Revise § 916.9 to read as follows:

§ 916.9 Grower.

Grower is synonymous with producer and means any person who produces nectarines for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing nectarines are eligible to serve in grower positions on the committee.

4. Revise § 916.11 to read as follows:

§ 916.11 Handle.

Handle and ship are synonymous and mean to pack, sell, consign, deliver, or transport nectarines, or to cause nectarines to be packed, sold, consigned, delivered, or transported, between the production area and any

point outside thereof, or within the production area: *Provided*, That the term handle shall not include the sale of nectarines on the tree, the transportation within the production area of nectarines from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such nectarines to such packing facility for such preparation.

5. Revise paragraphs (a) and (b) of § 916.12 to read as follows:

§ 916.12 District.

* * * * *

(a) *District 1* shall include the counties of Madera and Fresno.

(b) *District 2* shall include the counties of Kings and Tulare.

* * * * *

6. Revise § 916.15 to read as follows:

§ 916.15 Marketing season.

Marketing season means the period beginning on April 1 and ending on November 30 of any year.

7. Add a new § 916.16 to read as follows:

§ 916.16 Pure Grower or Pure Producer.

(a) Pure grower means any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided*, That a pure grower can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year for that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

8. Revise § 916.20 to read as follows:

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of thirteen members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he/she is an alternate. The members and their alternates shall be growers or authorized employees of growers. Six of the members and their respective alternates shall be growers of nectarines in District 1. Four members and their respective alternates shall be growers of nectarines in District 2; two of the members and their respective alternates shall be growers of nectarines in District 3; and one member and his/her alternate shall be growers of nectarines in District 4;

Provided, That at least 50% of the nominees from each representation area shall be pure growers. Furthermore, no person shall serve more than three consecutive two-year terms of office or a total of six consecutive years; *Provided further*, That an appointment to fill less than a two year term of office, or serving one term as an alternate, shall not be included in determining the three consecutive terms of office; *Provided further*, That time served prior to the effective date of this section shall not be counted toward consecutive term limits.

9. Revise paragraph (b) of § 916.22 to read as follows:

§ 916.22 Nomination.

* * * * *

(b) *Successor members.* (1) The committee shall appoint a nominating committee, which will hold or cause to be held, not later than January 31 of each odd numbered year, a nomination procedure or a meeting or meetings of growers in each district for the purpose of designating nominees for successor members and alternate members of the committee. Meetings may be supervised by the nominating committee that shall prescribe such procedure as shall be reasonable and fair to all persons concerned. After the nomination procedure or meetings have concluded, the nominating committee by February 15 will verify consent to place the nominee's name on the ballot and will cause a ballot listing all of the nominees for a given district to be mailed to all growers within the district. Members and their alternates will be chosen based on a descending ranking of votes received. Once ballots have been tabulated, the Nectarine Administrative Committee will announce to the growers the nominees that have been selected and recommended to the Secretary.

(2) Nominations may only be by growers, or by duly authorized employees. At meetings, only growers who are present at such nomination meetings may participate in the nomination of nominees for members and their alternates. All known growers will then receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of the nominees in another district provided the grower is producing in the district for which he/she wants to participate. Employees of such grower shall be eligible for membership as principal or alternate to fill only one position on the committee.

(3) A particular grower, including authorized employees of such grower,

shall be eligible for membership as principal or alternate to fill only one position on the committee.

10. Revise § 916.25 to read as follows:

§ 916.25 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

11. Revise § 916.32 to read as follows:

§ 916.32 Procedure.

(a) Nine members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: *Provided*, That actions of the committee with respect to expenses and assessments, or recommendations for regulations pursuant to §§ 916.50 to 916.55, shall require at least nine concurring votes.

(b) The committee may vote by telephone, telegraph, or other means of communication, such as facsimile, and any votes so cast shall be confirmed promptly in writing: *Provided*, That if an assembled meeting is held, all votes shall be cast in person. A videoconference shall be considered an assembled meeting and all votes shall be considered as cast in person.

12. Remove § 916.37.

13. Add three new sentences at the end of paragraph (b) of § 916.41 to read as follows:

§ 916.41 Assessments.

* * * *

(b) * * * Furthermore, any assessment not paid by a handler within a period of time prescribed by the committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

14. The authority citation for part 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

15. Revise § 917.4 to read as follows:

§ 917.4 Fruit.

Fruit means the edible product of the following kinds of trees:

(a) All varieties of peaches grown in the production area;

(b) All hybrids grown in the production area exhibiting the characteristics of a peach and subject to cultural practices common to peaches as recommended by the committee and approved by the Secretary; and

(c) All varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau.

16. Revise § 917.5 to read as follows:

§ 917.5 Grower.

Grower is synonymous with producer and means any person who produces fruit for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing peaches are eligible to serve in grower positions on the committee.

17. Revise § 917.6 to read as follows:

§ 917.6 Handle.

Handle and ship are synonymous and mean to sell, consign, deliver or transport fruit or to cause fruit to be sold, consigned, delivered or transported between the production area and any point outside thereof, or within the production area: *Provided*, That for peaches, packing or causing the fruit to be packed also constitutes handling; *Provided further*, That the term handle shall not include the sale of fruit on the tree, the transportation within the production area of fruit from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such fruit to such packing facility for such preparation.

18. Add a new § 917.8 to read as follows:

§ 917.8 Pure grower or pure producer.

(a) For peaches, pure grower means any grower:

(1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided*, That a pure producer can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year by that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

19. Revise paragraphs (n) and (o) of § 917.14 to read as follows:

§ 917.14 District.

* * * *

(n) *Fresno District* includes and consists of Madera County, Fresno County, and Mono County.

(o) *Tulare District* includes and consists of Tulare County and Kings County.

* * * *

20. Revise § 917.18 to read as follows:

§ 917.18 Nomination of commodity committee members of the Control Committee.

Nominations for the 13 members of the Control Committee to represent the commodity committees shall be made in the following manner:

(a) A nomination for one member shall be made by each commodity committee selected pursuant to § 917.25. Nominations for the remaining members shall be made by the respective commodity committees as provided in this section. The number of remaining members which each respective commodity shall be entitled to nominate shall be based upon the proportion that the previous three fiscal periods' shipments of the respective fruit is of the total shipments of all fruit to which this part is applicable during such periods. In the event provisions of this part are terminated as to any fruit, the members of the commodity committee of the remaining fruit shall have all of the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be terminated. In the event provisions of this part are suspended as to any fruit, the members of the commodity committee of the remaining fruit shall have all the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be suspended.

(b) A person nominated by any commodity committee for membership on the Control Committee shall be an individual person who is a member or alternate member of the commodity committee that nominates him/her. Each member of each commodity committee shall have only one vote in the selection of nominees for membership on the Control Committee.

21. Revise § 917.22 to read as follows:

§ 917.22 Nomination of Peach Commodity Committee members.

Nominations for membership on the Peach Commodity Committee shall be made by growers of peaches in the

respective representation areas, as follows:

(a) *District 1* composed of the Fresno District: seven nominees.

(b) *District 2* composed of the Tulare District: three nominees.

(c) *District 3* composed of the Tehachapi District and Kern District: one nominee.

(d) *District 5* composed of the South Coast District and Southern California District: one nominee.

(e) *District 4* composed of the Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d) of this section: one nominee.

22. Revise § 917.24 to read as follows:

§ 917.24 Procedure for nominating members of various commodity committees.

(a) The Control Committee shall hold or cause to be held not later than January 31 for peaches and not later than February 15 for pears of each odd numbered year a nomination procedure or a meeting or meetings of the growers of the fruits in each representation area set forth in §§ 917.21 and 917.22 for purposes of designating nominees for successor members and alternate members of the commodity committees. These meetings shall be supervised by the Control Committee, which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.

(b) With respect to each commodity committee only growers of the particular fruit who are present at such nomination meetings or represented at such meetings by duly authorized employees may participate in the nomination and election of nominees for commodity committee members and alternates. For peaches, those who may receive nomination forms if the nominations are conducted via a mail process may also participate in the nomination and election of nominees for Peach Commodity Committee members and alternates. All peach growers, or authorized employees, will receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A peach grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of nominees in another district provided the grower is producing in the district for which he/she wants to participate. For both commodity committees, each such grower, including employees of such grower, shall be entitled to cast but one vote for each position to be filled for the

representation area in which he/she produces such fruit.

(c) A particular grower, including employees of such growers, shall be eligible for membership as principle or alternate to fill only one position on a commodity committee. A grower nominated for membership on the Pear Commodity Committee must have produced at least 51 percent of the pears shipped by him/her during the previous fiscal period, or he/she must represent an organization that produced at least 51 percent of the pears shipped by it during such period. The members and alternates of the Peach Commodity Committee shall be growers, or shall be authorized employees of such growers and at least 50% of the nominees from each representation area shall be pure growers.

(d) For peaches, no person shall serve more than three (3) consecutive two-year terms of office or a total of six (6) consecutive years; *Provided*, That an appointment to fill less than a two year term of office, or serving one (1) term as an alternate, shall not be included in determining the (3) consecutive terms of office; *Provided further*, That time served prior to the effective date of this section shall not be counted toward consecutive term limits. The members shall serve until their respective successors are selected and have qualified.

23. Revise § 917.25 to read as follows:

§ 917.25 Acceptance.

(a) The Secretary shall select the members of each commodity committee, except for the Peach Commodity Committee, from nominations made by growers, as provided in §§ 917.21 through 917.24, or from among other eligible persons. Any person selected as a member of the Pear Commodity Committee shall qualify by filing with the Secretary a written acceptance of the appointment.

(b) For the Peach Commodity Committee, each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

24. Revise paragraph (d) of § 917.29 to read as follows:

§ 917.29 Organization of committees.

* * * * *

(d) The Control Committee or any commodity committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph or telephone: *Provided*, That any member voting by telephone shall

promptly thereafter confirm in writing his/her vote so cast. The Peach Commodity Committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph, telephone, facsimile, video teleconference, or any other means of communication recommended by the committee and approved by the Secretary; *Provided*, That any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast.

25. Add a sentence at the end of paragraph (d) of § 917.35 to read as follows:

§ 917.35 Powers and duties of each commodity committee.

* * * * *

(d) * * * To establish subcommittees to aid the Peach Commodity Committee in the performance of its duties under this part as may be deemed advisable.

* * * * *

26. Revise § 917.37 to read as follows:

§ 917.37 Assessments.

(a) As his/her pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand, assessments on all fruit handled by him/her. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment, which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses, which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period. Furthermore, any assessment not paid by a peach handler within a period of time prescribed by the Control Committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments for peaches not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower. The Control Committee may also borrow money for such purposes for peaches.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 945

[Docket No. FV06-945-1 PR]

Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon; Proposed Modification of Handling Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule invites comments on removing the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption paragraph of the handling regulations issued under the Idaho-Eastern Oregon potato marketing order. The marketing order regulates the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, and is administered locally by the Idaho-Eastern Oregon Potato Committee (Committee). A minimum quantity shipment exemption of up to 200 hundredweight is provided for yellow fleshed Finnish-type potatoes. Because yellow fleshed Finnish-type potatoes are no longer produced in the production area covered under the marketing order, the exemption is no longer necessary.

DATES: Comments must be received by April 24, 2006.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400

Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; E-mail:

moab.docketclerk@usda.gov; or Internet: <http://www.regulations.gov>. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.ams.usda.gov/fv/moab.html>.

FOR FURTHER INFORMATION CONTACT:

Barry Broadbent, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Suite 385, Portland, OR 97204; Telephone: (503) 326-2724, Fax: (503) 326-7440; or George J. Kelhart, Technical Advisor, 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.

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.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement No. 98 and Marketing Order No. 945, both as amended (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This proposed rule would 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 the date of the entry of the ruling.

This proposed rule invites comments on removing the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption paragraph of the handling regulations issued under the order. The minimum quantity exemption in the regulation allows handlers to ship up to five hundredweight of potatoes without regard to the inspection and assessment requirements of the order. Included in the minimum quantity exemption is an exception for yellow fleshed Finnish-type potatoes which allows up to 200 hundredweight to be shipped without regard to inspection or assessment requirements. The Committee unanimously recommended the removal of the exception at its meeting on November 2, 2005.

Section 945.42 of the order provides the authority to assess first handlers of potatoes to provide funds to cover the expenses of the Committee. Sections 945.51 and 945.52 provide the authority for the establishment and modification of regulations applicable to the handling of potatoes, including required inspections. Section 945.54 provides the authority to establish exemptions from the regulations based on shipment size.

Section 945.341 establishes minimum quality, maturity, pack, and inspection requirements for potatoes handled subject to the order. Paragraphs (e), (f), and (g) of § 945.341 delineate the circumstances in which the shipment of potatoes subject to the order may be granted an exemption from the regulation. Paragraph (g) of that section specifies that shipments of potatoes, except yellow fleshed Finnish-type, weighing five hundredweight or less may be shipped without regard to the inspection or assessment requirements of the order. An exception included in that paragraph increases the minimum quantity exemption threshold to 200 hundredweight for yellow fleshed Finnish-type potatoes.

At its meeting on November 2, 2005, the Committee unanimously recommended the removal of the special