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; Recommended Decision and Opportunity To File Written Exceptions To Proposed Amendments To Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions on proposed 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. 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, jointly proposed the amendments. The proposed amendments to order 917 only apply to peaches. The amendments included in this recommended decision would: Update definitions for ''handle'', ''grower'', and the commodities covered in both orders; add a definition for ''pure grower''; increase committee membership of the NAC from eight to thirteen members and modify sections of the order to conform to the increased membership; eliminate the Shippers Advisory Committee (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; and authorize interest and late payment charges on assessments paid late; and other related amendments. All of the proposals are intended to streamline and improve the administration, operation, and functioning of the orders.

DATES: Written exceptions must be filed by December 19, 2005.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1081–S, Washington, DC 20250–9200, Facsimile number (202) 720–9776 or *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

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).

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

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreements Nos. 124 and 85 and Order Nos. 916 and 917, which regulate the handling of nectarines and peaches grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Melissa Schmaedick, whose address is listed above.

This recommended decision is issued 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 orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held on February 15 and 16, 2005, in Fresno, California. Notice of this hearing was published in the **Federal Register** on January 28, 2005 (70 FR 4041). The notice of hearing contained proposed order changes jointly proposed by the Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee (part of order 917), which are responsible for local administration of orders 916 and 917. 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 recommendations are the result of a task force appointed by the Committees to conduct a review of the orders. The task force met several times in 2003 and drafted proposed amendments to the orders and presented the recommendations at industry meetings. The recommendations were then forwarded to the Commodity Committees and the Control Committee, each of which unanimously approved the proposed amendments. The Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee believe that the proposed changes would improve the administration, operation, and functioning of the programs in effect for nectarines and peaches grown in California. The Committees' request for a hearing was submitted to USDA on January 5, 2004.

The Committees' proposed amendments are summarized below. This recommended decision makes modifications to some of the proposals and does not recommend one proposal.

The Committees' 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.

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

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 the peach order to be transferred to one Commodity Committee if the provisions for the other commodity are suspended.

5. Increase membership on the nectarine committee 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 definitions of grower to clarify that officers of grower corporations are eligible to serve as grower members the Committee.

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 and authorize the Peach Committee to borrow money.

13. Provide authority to recommend different regulations for specific market destinations (not recommended herein).

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

Twenty-two witnesses testified at the hearing. These witnesses represented fresh nectarine and peach growers and handlers. All witnesses with the exception of one supported the Committees' recommended changes. The one opposing witness spoke against proposal 13 which would allow the Committees to recommend different regulation for different market destinations of peaches and nectarines.

Witnesses speaking in favor of the proposed changes addressed the need to improve the administration, operation, and functioning of the programs in effect for nectarines and peaches grown in California. The California nectarine and peach industries are regulated under federal marketing orders 916 and 917, respectively. Both programs were established over 70 years ago and were most recently amended in the 1970's.

Marketing orders 916 and 917 are administered by marketing order administrative committees, each of which have contracted with the California Tree Fruit Agreement (CTFA) for management of marketing, promotion and certain administrative functions. CTFA also manages the California State Marketing Order for plums.

Witnesses at the hearing stated that the amendments being considered were designed to streamline the operation of the orders based on accepted business procedures in the 21st century. Witnesses also stated that many of the proposed amendments would provide the programs with the necessary flexibility for the future. Most importantly, the proposed amendments, if implemented, would result in improved consistency between and more efficient administration of the orders.

At the conclusion of the hearing, the Administrative Law Judge stated that the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing would be April 12, 2005. The deadline was subsequently extended to May 12, 2005. One hundred and forty six briefs and comments were filed. The majority of comments filed were in opposition to Proposal 13, which would add authority to orders 916 and 917 for the Committees to recommend different regulations for different market destinations for California peaches and nectarines. The Committees also filed a joint brief requesting that Proposal 13 be withdrawn. Accordingly, Proposal 13 has been removed from consideration and will not be discussed further in this decision.

Material Issues

The material issues presented on the record of hearing are as follows:

1a. Whether to amend the order to allow hybrid fruit that exhibits the characteristics of nectarines and is subject to cultural practices common to nectarines to be subject to marketing order regulations;

1b. Whether to amend the order to allow hybrid fruit that exhibits the characteristics of peaches and is subject to cultural practices common to peaches to be subject to marketing order regulations;

2a. Whether to amend the order by specifying that the act of packing nectarines be considered a handling function;

2b. Whether to amend the order by specifying that the act of packing peaches be considered a handling function;

3. Whether to amend the nectarine order by changing the marketing season from May 1 through November 30 to April 1 through November 30;

4. Whether to amend the provisions relating to the Control Committee under marketing order No. 917 by allowing 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;

5a. Whether to amend the nectarine order by increasing membership from 8 members to 13 members and revising the procedures that constitute quorum and voting requirements to conform to the increased Committee size. The proposal would also add that the Committee may vote by facsimile and would specify that voting requirements for video conferencing would be the same as those for assembled meetings;

5b. Whether to amend the peach order by adding that the Peach Commodity Committee may vote by facsimile or video teleconference;

6. Whether to amend the nectarine order by eliminating the Shippers' Advisory Committee;

7a. Whether to amend the nectarine order by modifying the definition of grower to clarify that officers of corporations would be eligible to serve in grower positions on the Committee;

7b. Whether to amend the order by modifying the definition of grower to clarify that, for peaches, officers of corporations would be eligible to serve in grower positions on the Committees;

8a. Whether to amend the order by adding a definition of ''pure producer'' and ''pure grower'' for purposes of eligibility for membership on the Committee;

8b. Whether to amend the order by adding a definition for peaches of ''pure producer'' and ''pure grower'' for purposes of eligibility for membership on the Committee;

8c. Whether to amend the nectarine order by allowing alternative methods to conduct nominations, changing the date by which the nomination procedure should be held from February 15 to January 31, requiring at least 50 percent of the positions be held by pure growers and adding tenure requirements for Committee members;

8d. Whether to amend the peach provisions of the order by allowing alternative methods to conduct nominations, changing the date by which the nomination procedure should be held from February 15 to January 31, requiring at least 50 percent of the positions be held by pure growers, and adding tenure requirements for Committee members;

9a. Whether to amend the order by authorizing the nominees to state their willingness to serve on the Committee prior to the selection;

9b. Whether to amend the order by authorizing the peach nominees to state their willingness to serve on the Committees prior to the selection;

10a. Whether to amend the order by changing the district boundaries under the nectarine order;

10b. Whether to amend the order by redefining the peach growing Fresno and Tulare districts under the order;

11. Whether to amend the order by changing the names and the composition of the districts of the Peach Commodity Committee;

12a. Whether to amend the order to allow for interest and/or late payments for assessments not paid timely;

12b. Whether to amend the order to allow for interest and/or late payments for peach assessments not paid timely and to authorize the Committee to borrow money for administration of peach provisions of the order;

13a. Whether to amend the order to provide authority to recommend specific regulations for specific market destinations of the product;

13b. Whether to amend the order to provide authority to recommend specific regulations for specific market destinations of peaches; and,

14. Whether to amend the order to clarify that subcommittees may be established by the Peach Commodity Committee.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1a and 1b—Hybrid Fruit

Sections 916.5 and 917.4 of the orders should be amended to allow hybrid fruit that exhibits the characteristics of nectarines (916.5) or peaches (917.4) and is subject to cultural practices common to nectarines or peaches be subject to marketing order regulations.

Currently, nectarines are defined in marketing order number 916 as all varieties of *Prunus Amygdalus Nectarina,* commonly called nectarines, grown in the production area. Peaches are defined in marketing order number 917 as the edible portion of all varieties of peach trees.

These proposed amendments would provide a procedure for the Committees to recommend to USDA specific hybrids to be included under the definitions and become subject to order provisions.

The proposed definitions provide that the hybrids must exhibit the characteristics of a nectarine or peach and be subject to cultural practices common to nectarines and peaches to be considered for inclusion under the orders.

According to the hearing record, the cultivation of hybrids has been a practice in the nectarine and peach industry. Hybrid crosses between peaches and nectarines already exist. This 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 or plums.

The proposal would require that in order to be subject to order requirements, all hybrids would need to be recommended to USDA by the Committees for inclusion under the orders. If these amendments are 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 hybrids 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 orders.

It is recommended that the definitions of the products regulated under the orders be amended to include hybrids. The procedure for the Committees to recommend to USDA the inclusion of hybrids would allow for industry deliberations on what hybrids should be included. The proposed amendments would provide flexibility in including hybrids as they are developed and provides sufficient safeguards to ensure compliance with order provisions. For the reasons above, it is recommended that sections 916.5 and 917.4 be amended to provide that all hybrids exhibiting the characteristics of nectarines or peaches be classified as a nectarine or peach under the respective marketing order program, if recommended by the Committees and approved by USDA. There was no opposition testimony on this issue.

Material Issue Number 2a and 2b—Addition of ''Packing'' as a Handling Function

Section 916.11 of the nectarine marketing order and § 917.6 of the peach marketing order should be amended to specify that the act of packing nectarines and peaches is a handling function.

Currently, ''pack'' is not specified as a handling function in §§ 916.11 and 917.6, the definitions of ''Handle''. The current definitions include selling, consigning, delivering, or transporting fruit between the production area and any point outside, or within the production area. Selling the fruit on the tree, transporting the fruit within the production area from the orchard to the packing facility within the area for preparation for market or the delivery of the fruit to the packing facility are activities that are not considered handling.

In its proposal, the Committees recommended modifications of §§ 916.10 and 917.7, the definitions of ''Handler.'' Currently, these definitions state that ''Handler'' means any person, except a common or contract carrier transporting fruit owned by another person, that handles fruit. USDA is not recommending that these sections of the orders be amended. However, USDA recommends adding the term ''pack'' to the functions that constitute handling as specified in the definitions of ''Handle''. As the evidence established, packing is a function that handlers perform. The addition of the term pack to the definition of handler would clarify which functions are covered. Therefore, by adding ''pack'' as a handling function under the definitions of ''Handle'', the general intent of the Committees' proposal would be met.

Witnesses testified that in the industry, the packer is the party that generally assumes all of the responsibilities of a handler, except the selling of the fruit. In most cases, the packer is responsible for inspecting the product and is responsible for paying assessments and abiding by the regulatory provisions of the orders. While there may be more than one handler involved in the preparation for marketing and marketing the product, the first handler is the party that is responsible for abiding by the provisions of the orders. This proposal would clarify that packing is considered a handling function, and thus, most packers would be considered the first handler and the entity regulated by the orders.

USDA recommends that the proposed amendments be modified. The proposed amendment as presented by the Committees includes the statement that ''Handle'' and ''pack'' are synonymous. Because there could be situations where a handler performs functions other than packing, these terms are not always synonymous. However, ''pack'' is an important function of handlers.

Thus, USDA recommends adding the word ''pack'' as a handling function among the other handling functions of selling, consigning, delivering or transporting under the nectarine order. Specifically, the modification would add the word ''pack'' before ''sell'' and the word ''packed'' before ''sold'' in § 916.11. For peaches, the proposed change cannot impact the pear provisions. Therefore, USDA recommends that a proviso be added to

§ 917.6 to state that packing is a handling function of peaches.

There was no opposition testimony on this issue. For the above reasons, it is recommended that the proposed amendments of §§ 916.11 and 917.6 be modified to specify that ''pack'' is a handling function under the nectarine and peach orders. The proposed amendments to §§ 916.10 and 917.7, as presented by the Committees, are not being recommended in this decision.

Material Issue Number 3—Change in the Nectarine Marketing Season

Section 916.15 of the nectarine marketing order should be amended by changing the marketing season from May 1 through November 30 to April 1 through November 30. Record evidence indicates that this amendment would more accurately reflect the nectarine industry's current marketing season and conform to the current handling regulations.

Witnesses testified that due to new methods used in plant breeding, the industry now has nectarine varieties that mature earlier than the previous generations of nectarines. There are varieties that are harvested earlier than in the past and thus, marketed in early April of each year, rather than May. The current handling regulations in effect for nectarines begins April 1.

Because the current marketing season begins in May, fruit harvested in the month of April is attributed to the prior year's marketing season but is regulated by the present year's regulations. The proposed amendment would conform the term of the marketing season to the regulatory period.

The record supports changing the marketing season for nectarines from May 1 through November 30 to April 1 through November 30. There was no opposition testimony on this issue. For the above reasons, it is recommended that § 916.15 be amended to include an earlier beginning date of April 1 for the order's marketing period.

Material Issue Number 4—Marketing Order 917 Control Committee

Section 917.18, Nomination of Commodity Committee members of the Control Committee of the California peach marketing order should be amended. The proposed amendment would 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.

Section 917.18 of the marketing order currently provides for the establishment of a Control Committee to oversee and coordinate the joint activities of the Peach and Pear Commodity Committees under Marketing Order 917. The order does not contain, however, provisions for the Control Committee if only one Commodity Committee is operational. Since 1994, when the California pear industry suspended their order provisions, California peaches have been the only active commodity under marketing order 917. This proposed amendment would address the administrative needs of the current situation.

Record evidence indicates that since the pear program has been suspended, the duties of the Control Committee have lessened. In the Pear Commodity Committee's absence, the Peach Commodity Committee has continued to operate in conjunction with the Control Committee. However, in recent years the Control Committee has held meetings infrequently and only to carry out duties that the Peach Commodity Committee cannot perform.

Witnesses testified that the proposed amendment would allow the duties of the Control Committee to be transferred to a Commodity Committee when only one Commodity Committee was operational under marketing order 917. The proposed amendment would not terminate the Control Committee. The Control Committee would become active if the California pear industry were to vote to re-activate the pear provisions of marketing order 917. Thus, the proposed amendment, if adopted, would allow marketing order 917 to operate efficiently, yet would also allow for flexibility if the commodities active under the order were to change.

There was no opposition testimony on this issue and the record supports this change. For the above reasons, it is recommended that § 917.18 be amended 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.

Material Issue 5a and 5b—Increase in Membership of the Administrative Committee for Nectarines and Addition of Authority To Vote Via Facsimile for Both the Nectarine and Peach Commodity Committees

Section 916.20 of the nectarine order should be amended to increase the membership on the Nectarine Administrative Committee from 8 members to 13 members. Order provisions relating to quorum and voting requirements should also be amended to conform to the increased Committee size. Section 916.32 of the nectarine order and § 917.29 (d) of the peach order should also be amended to add the authority for the Committees to vote by facsimile, as well as to specify that voting requirements for video conferencing would be the same as those for assembled meetings.

Record evidence supports the increase in the Nectarine Administrative Committee size. Currently, with only a membership of 8, the Nectarine Administrative Committee frequently does not have enough members present at meetings to constitute a quorum or meet the requirements for a super-majority vote. As a result, decision-making is often delayed until the next Committee meeting. Such delays make the functioning of the NAC less efficient, especially when emergency decisions need to be made.

Witnesses testified that the proposal to increase membership would address the quorum shortage by providing for a larger pool of committee members to attend meetings. It would also result in greater industry participation in marketing order activities by allowing more persons to be appointed to the Committee.

Record evidence indicates that if the proposed amendment were implemented, a quorum of 9 out of 13 Committee members would be needed in order to maintain roughly the same ratio that is currently in place. The current Committee requires 6 out of 8 members to constitute a quorum.

This proposed amendment would also provide authority for voting by facsimile and holding meetings via video teleconference for both the Nectarine and Peach Commodity Committees. Use of this technology would result in timesavings while still allowing the Committees to conduct their business. For example, this technology would be helpful in providing flexibility during harvest season when Committee members find it more challenging to take time away from the field.

According to the record, voting requirements for meetings held via videoconference would be the same as those currently in place for conventional committee meetings. Because video conferencing involves technology that allows each member to see the other members in attendance at the meeting, any voting would be verified through visually accounting for the votes made. Votes made by conference call would need to be followed by the submission of signed votes submitted to the Committee offices by mail or fax. Votes made by fax would need to be unanimous.

Record evidence also supports including authority to make use of any

new technology that might be developed in the future as part of this proposed amendment. For this reason, USDA recommends adding the phrase, ''or any other means of communication recommended by the Committee and approved by the Secretary,'' to the proposed amendatory language. The addition of this language would increase the flexibility of this authority and is commonly found in other federal marketing orders.

There was no opposition testimony given against this proposed amendment. For the reasons stated above, it is recommended that § 916.20 be amended to increase the membership on the Nectarine Administrative Committee from 8 members to 13 members. Section 916.32 of the nectarine order and section 917.29 (d) of the peach order should also be amended to add the authority for the Committees to vote by facsimile and to establish voting requirements.

USDA also recommends adding language that would allow the Committees to adopt the usage of any new technology that would be helpful in facilitating committee meetings in the future.

Material Issue Number 6—Elimination of the Shippers' Advisory Committee

Section 916.37, Shipper's Advisory Committee, should be removed from the California nectarine marketing order language.

The Shipper's Advisory Committee (SAC) was originally established to advise the Nectarine Administrative Committee on marketing conditions and to suggest the level of regulation believed to be necessary to affect an orderly marketing of the crop.

Upon implementation, the SAC was intended to have five handler members and five alternate handler members. The role of the SAC was exclusively an advisory one, as the SAC did not have any voting rights under the marketing order. With regard to their role under the marketing order, the industry believed that handlers/shippers would be in a better position to furnish the Committee with information regarding market conditions and preferences than growers.

However, record evidence indicates that the SAC has not been active for over 30 years. According to the record, removal of order language in § 916.37 would remove obsolete language from the order provisions.

There was no opposition testimony given against this proposed amendment. For the reasons stated above, the record supports removing § 916.37 as it currently serves no useful purpose.

Material Issue Number 7a and 7b—Eligibility of Corporate Officers for Committee Membership

Section 916.9, Grower, of the California nectarine order and § 917.5, Grower, of the California peach order, should be amended to clarify that officers of corporations would be eligible to serve in grower positions.

The term ''grower'' under both marketing orders is currently defined as a grower of nectarines or peaches for the fresh market who has a proprietary interest therein. The nomination procedures in § 916.20 and 917.24 specify that employees of growers are eligible to serve as committee members or alternates on the nectarine and peach marketing order administrative committees. However, the nomination procedures and the current definition of grower do not specify that officers of grower corporations are eligible to serve in grower positions. The proposed amendment would clarify that corporate officers, as well as employees of growers, are eligible to serve on the Committee in grower positions.

Witnesses testified that the proposed amendment would specify that that corporate officers would be eligible to serve on the Committees, to participate in nomination procedures as growers, and to cast referenda votes on behalf of their corporations. However, any corporate officer who is also a grower independent of the corporation would be allowed to serve and vote in only one capacity.

Record evidence supports amending the definitions of grower to include officers of corporations for purposes of eligibility for membership in the Nectarine and Peach Committees. These amendments would clarify the definitions of grower when the entity is a corporation.

In order to provide clarity, USDA recommends modifying the proposed definitions to state that both employees of growers and corporate officers of growers are eligible to serve on the Committees in grower positions. The modified definitions would read as follows:

''Grower is synonymous with producer and means any person who produces fruit (or nectarines) 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.''

There was no opposition testimony given against this proposed amendment. For the reasons stated above, it is recommended that § 916.9, Grower, of the California nectarine order and § 917.5, Grower, of the California peach order, should be amended as modified by USDA.

Material Issue Number 8a and 8b—Addition of Definitions for ''Pure Producer'' and ''Pure Grower''

A new § 916.16, Pure grower or pure producer, should be added to the California nectarine order. Additionally, a new § 917.8, Pure grower or pure producer, should be added to the California peach order.

The nectarine and peach marketing orders do not currently distinguish pure growers from all other growers. The proposed definitions of ''pure grower'' would be used in conjunction with the proposed amendments discussed in Material Issue 8(c) and 8(d) that would require a minimum number of pure grower seats on each administrative Committee.

The proposed amendments would identify pure growers as 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 by that pure grower's packing facility. Regarding the second situation, at least 75 percent of that grower's total amount packed must involve his or her own fruit. This threshold would make allowances for pure growers who pack their own fruit and also pack small quantities of fruit for other growers.

According to the record, witnesses believe that a distinction is needed because pure growers are considered by the industry to be more financially at risk than other growers. The record indicates that a pure grower's total business and financial activities are primarily reliant on their own production.

Witnesses stated that, in the industry, there are growers who handle their own product. Some of these growers also pack other growers' products. The record indicated that growers who also pack a significant amount of fruit from other growers should not be considered pure growers because their risks as a grower are offset by their packing operations. However, some of these grower/packers pack small quantities of fruit for a few other growers. Accordingly, 25 percent (represented as the grower/packer's total pack-out) is considered a reasonable threshold to determine whether a grower/packer

should be considered a pure grower for eligibility purposes on the Committees.

Record evidence also indicates that any grower who also operates as a handler could be eligible to qualify as either a grower member or a handler member on the Committees. However, that person must select and may only participate in one nomination process: either as a grower or as a handler, but not both.

In order to provide clarity, USDA recommends modifying the proposed definition. The modified definition would read as follows:

''Pure grower means any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); (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 by that pure grower's packing facility. A pure producer is synonymous with pure grower.''

USDA recommends that authority be added to this provision allowing the Committees to recommend to USDA, rules and regulations for the implementation and operation of these sections.

According to the record, the proposed definitions of ''pure grower'' would be used in conjunction with the proposed amendments discussed in Material Issue 8(c) and 8(d) that would require a minimum number of pure growers seats on each administrative committee. Evidence suggests that representation of pure growers on the administrative committees is important to Committee decision-making as they offer a different industry perspective than growers whose financial interests are not limited to growing only.

Record evidence supports the conclusion that the representation of pure grower interests on the orders' administrative committees should be added. No opposition to this proposal was presented at the hearing. Therefore, it is recommended that § 916.16 and § 917.8, Pure grower and pure producer, be added, as modified by USDA, to the marketing orders.

Material Issue Number 8c and 8d—Modification of Nomination Procedures and Addition of Tenure Requirements

Marketing order 916 regulating California nectarines should be amended to allow alternative methods for conducting nominations to be used, to change the date by which the nomination procedure should be held from February 15 to January 31, to require that at least 50 percent of the positions be held by pure growers, and to add tenure requirements for Committee members.

Similarly, the peach provisions under marketing order 917 regulating California peaches should be amended. The proposed amendments would allow alternative methods to conduct nominations for the Peach Commodity Committee, would change the date by which the nomination procedure should be held from February 15 to January 31, would require that at least 50 percent of the positions be held by pure growers, and would add tenure requirements for Peach Commodity Committee members.

Currently, nominations for the nectarine and peach administrative committees are made at grower industry meetings. 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. Mailing of ballots would provide every grower more opportunity to vote in the nomination of members by making it easier for growers to participate.

Witnesses testified that for the past 20 years, many growers do not attend industry nomination meetings. This proposal would modify the nomination process by allowing mail balloting in the nomination process. It is intended that this will result in greater industry participation in the nomination process.

Record evidence also indicated an overriding concern within the industry for representation of pure grower interests in the decision-making functions of the administrative committees. Witnesses contrasted pure-grower interests with larger corporate grower interests and indicated that meetings are more accessible to corporate growers represented by employees. In contrast, a pure grower would likely attend industry meetings him or herself.

Nomination ballots would be mailed to all growers based on the district where their primary production base is located. While growers would be allowed to exchange their ballot for those of another district if they had production in said district (regardless of the volume that they produced in each district), they would be limited to filing just one ballot in the selection process. This would afford all growers the opportunity to vote for the nomination of Committee members regardless of whether they could attend industry meetings. Since the mailing of ballots would extend the balloting process, this amendment would also move the deadline for nominations from February 15 to January 31.

If implemented, the proposed amendment would also require that 50 percent of the grower membership seats of each Committee be allocated to pure grower seats. This requirement would ensure that pure nectarine and peach growers are participating in marketing order program deliberations. This proposal would be implemented in conjunction with the proposed amendments discussed above in Material Issue 8a and 8b, the addition of a definition for ''pure grower.''

Record evidence also supports the implementation of tenure requirements on the nectarine and peach administrative committees. The proposed tenure requirements would limit the amount of time a Committee member could serve to 2 consecutive 3-year terms. This provision would allow for broader industry participation in the Committees and would allow new industry leaders to be developed. The involvement of new members would allow for the introduction of new ideas and innovation in the direction of the nectarine and peach programs.

If implemented, any past time served on the Committee prior to this amendment being implemented would not count toward the tenure requirements. USDA recommends modifying the proposal to specify that tenure does not apply to time served prior to the effective date of this amendment. If a member were appointed to fill a vacancy or unexpired term, that time in service would not count toward the six-year limit. Also, once a member has completed his or her third term, it would be possible for that person to be nominated into an alternate's position. After one term as an alternate, that person would be eligible to be appointed as a member again.

Record evidence supports the conclusion that the above-proposed amendments would assist the Nectarine and Peach Committees in generating broader industry participation in Committee nominations, would provide for representation of pure grower interests on the Committees, would promote rotation in the service of Committee members, and would encourage participation of new members on the Committee. Record evidence also indicates that changing the deadline for nominations from February 15 to January 31 is necessary since the mailing of ballots would extend the balloting process.

No opposition to the above proposals was received at the hearing. For the

reasons outlined in this material issue, §§ 916.20 and 916.22 should be amended. Similarly, the peach provisions in § 917.24 should be amended, as modified by USDA.

Material Issue Number 9a and 9b—Modification of the Acceptance Procedure for Persons Nominated To Serve on the Nectarine and Peach Committees

Section 916.25, Acceptance, of the California nectarine order should be amended to authorize nominees to the Nectarine Administrative Committee to state their willingness to serve on the Committee prior to selection by USDA.

Similarly, § 917.25 of the California peach order should be amended to authorize nominees to the Peach Commodity Committee to state their willingness to serve prior to selection.

This proposed amendment 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. First, persons nominated for consideration and possible appointment to the Committee by USDA are required to complete a form indicating their eligibility to sit as a member of the Committee. Once appointed by USDA, nominees must then sign an additional form indicating their acceptance of the appointment. 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.

Record evidence supports this proposed change. No opposition to this proposed amendment was presented at the hearing. For the reasons outlined above, § 916.25, Acceptance, of the California nectarine order should be amended. Section 917.25, Selection of members of various commodity committees, of the California peach order should also be amended.

Material Issue Number 10a and 10b—Modification of Marketing Order 916 District Boundaries and Modification of Marketing Order 917 Fresno and Tulare Representation Area Boundaries

Section 916.12 of the California nectarine order and § 917.14 of the California peach marketing order should be amended. Section 916.12 should be amended to change the district boundaries for Districts 1 and 2 under the nectarine order (referred to as the Fresno and Tulare districts). Section 917.14 should be amended to redefine the Fresno and Tulare Peach Commodity Committee representation areas under the peach provisions of order 917.

Witnesses stated that nectarine and peach production has shifted over time such that current day production patterns are more in line with each other than they were previously. For this reason, district boundaries for nectarines and the Peach Commodity Committee representation areas should be redefined to better reflect current production trends.

According to the hearing record, two key elements would comprise this change. First, the Tulare District (District 2 under the nectarine order) would have as its northern boundary the Tulare County line instead of Avenue 384, which is formally defined as the fourth standard parallel south of the Mount Diablo Baseline of the general land office. This area is currently part of the Fresno District (District 1 under the nectarine order).

Secondly, Kings County would shift from the Fresno District to the Tulare District. This change in the allocation of counties among districts would better reflect current day production within the nectarine and peach production areas, as the Tulare and Kings Counties have been increasing in their peach production in recent years.

According to the record, 2003 nectarine production totaled 21,613,927 containers. Under the current definitions for Districts 1 and 2 (Fresno and Tulare Districts, respectively) the former is credited with a production of 20,716,073 containers (96 percent) and the later is credited with 497,772 containers (2 percent). If the proposed amendment were implemented, 2003 production for the Fresno District would equal 14,602,037 containers (68 percent) and Tulare District production for that year would equal 6,611,808 containers (31 percent).

In 2003, total California peach production equaled 22,534,252 containers. Of that amount, 20,754,501 containers (90 percent) were produced in the current Fresno District and 604,438 containers (3 percent) were produced in the current Tulare District. If the proposed boundary changes were implemented, production attributed to Fresno District would equal 14,602,037 containers (65 percent) and production attributed to Tulare District would equal 6,611,808 containers (30 percent).

The proposed modification in district boundaries would alter the production base used to define the Nectarine and Peach Commodity Committee representation and would result in better representation of grower interests in the Tulare District for each industry. This would result in a more equitable representation of both production and grower interests on the nectarine and Peach Commodity Committees.

Record evidence supports the modification of district boundary lines for Districts 1 and 2 under the nectarine order and the Fresno and Tulare Districts under the peach program. For the reasons stated above, it is recommended that § 916.12 of the California nectarine order and § 917.14 of the California peach marketing order be amended.

Material Issue Number 11—Modification of Marketing Order 917 Peach Commodity Committee Representation Areas

Section 917.22, Nomination of the Peach Commodity Committee members, should be amended to reflect conforming changes in representation that would result if the amendments discussed in Material Issue 10b were implemented. Furthermore, the Peach Commodity Committee representation areas should be renamed so that they are consistent with the district nomenclature of the nectarine order.

The current peach representation area names and the corresponding Committee representation for each peach producing district, or groups of districts, under order 917 are as follows:

(a) South Coast District and Southern California District: one nominee.

(b) Tehachapi District and Kern District: one nominee.

(c) Tulare District: one nominee.

(d) Fresno District: eight nominees.

(e) Stanislaus District and Stockton District: one nominee.

(f) All of the production area not included in the above: one nominee.

If the proposed amendment were implemented, the new distribution would place three member seats in the newly defined Tulare District and would reduce the member seats in the newly defined Fresno District to seven. The representation area defined as, ''(f) All of the production area not included in the above'' in the current language of § 917.22 (above) would be removed. Membership seats for the remaining districts would remain as they are currently allocated, with one seat for each of the following: The combined Tehachapi and Kern Districts, the combined South Coast and Southern California Districts, and the combined Stanislaus and Stockton Districts plus all remaining production. Total membership for the Peach Commodity Committee would remain at 13.

In addition to the redistricting and reallocation, record evidence supports

renaming the peach representation areas with the comparable district nomenclature that is currently used in the nectarine order. While the names for the peach representation areas remain tied to their geographic descriptions, common references to those areas rely on numeric names. Thus, the proposed name change, combined with the proposed reallocation in district representation and redefinition of district boundaries discussed in Material Issue 10b, would result in the following:

(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): One nominee.

The proposed renaming of the above representation areas as published in Notice of Hearing and as presented by witnesses had proposed Districts 4 and 5 reversed. However, with District 4 originally listed as (d) and defined as ''Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d),'' followed by paragraph District 5, or paragraph (e), the definition of District 4 would have been incorrect. USDA recommends reversing the order of paragraphs (d) and (e) published in the Notice so that the language reads as outlined above.

Record evidence supports this amendment. No opposition to these amendments was presented at the hearing. For the reasons outlined above, it is recommended that § 917.22, Nomination of the Peach Commodity Committee members, be amended. Also, USDA recommends modifying the proposed amendatory language for § 917.22 by reversing the order of paragraphs (d) and (e) as published in the Notice.

Material Issue Number 12a and 12b—Addition of Interest and Penalties for Late Payments and Authority To Borrow Funds

Section 916.41 of the nectarine order and § 917.37 of the peach order should be amended to allow for interest and/or late payments for assessments not paid on time. Section 917.37 should be further amended to authorize the Committee to borrow money for administration of peach provisions of the order.

Currently there are no provisions providing for penalties or interest charges on late assessment payments under either the nectarine or peach order.

Record evidence indicates that the proposed amendment would strengthen the assessment collection functions of the orders and, in the case of peaches, allow access to additional funds. Implementation of interest and late payments would serve as an incentive for handlers to pay their assessments in a timely manner. And, adding the authority to borrow funds to 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.

There was no opposition testimony given against this proposed amendment. For the reasons stated above, it is recommended that § 916.41 and § 917.37 be amended.

Material Issue Number 13a and 13b—Authority To Recommend Regulations by Market Destination

This proposed amendment would have provided authority under the nectarine and peach programs to recommend specific regulations for specific market destinations. Over 100 comments in opposition to this proposed amendment were filed during the briefing period following the public hearing on proposed amendments to marketing orders 916 and 917. Comments stated concerns that the proposed authority would negatively impact the distribution of fruit to certain markets and would unfairly disadvantage certain handlers who ship utility-grade product overseas. The Nectarine and Peach Commodity Committees, in their brief, requested that this proposal be withdrawn. Accordingly, proposal 13 is not being considered in this recommended decision.

Material Issue Number 14—Establishment of Subcommittees Under the Peach Commodity Committee

Section 917.35 of the order should be amended to clarify that the Peach Commodity Committee may establish subcommittees.

Witnesses at the hearing explained that the order does not currently specify that the Peach Commodity Committee can establish subcommittees. However, the language in § 917.35 does state that ''other committees'' can be established. This proposal would specify that ''other committees'' established by Peach Committee could be referred to as ''subcommittees.'' The proposed amendment is intended as a clarifying change needed to update the order. Record evidence indicates that the subcommittee structure is already in place for the peach industry, and that the proposed amendment would result in a simple name change for all sub-groups currently existing under the Control and Peach Commodity Committees.

No opposition to this amendment was presented at the hearing. For the reasons outlined above, it is recommended that § 917.35 be amended.

Conforming Changes

The Agricultural Marketing Service proposed to make such changes as may be necessary to the order to conform with any amendment that may result from the hearing. Necessary conforming changes have been identified and discussed in this Recommended Decision under the pertinent material issues.

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.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact on growers and handlers of the proposed amendments, and in particular the impact on small businesses. The record evidence shows that most of the proposed amendments are designed to enhance industry

efficiencies and streamline administrative operations of the marketing order Committees. The amendments are not expected to have any direct cost impacts on growers or handlers, whether small or large. Improved operating efficiencies of the marketing order programs and their administrative committees are expected to positively benefit the nectarine and peach industries.

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 eight-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 five 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 five 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 two) 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 Committee membership of the Nectarine Administrative Committee from eight to thirteen 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 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 in order to be subject to order requirements, all hybrids would need to be recommended to USDA by the Committees for inclusion under the order. 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 marketing season and 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 only 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 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 organization, 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 most of 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.

Committee meetings regarding these proposals as well as the hearing dates were widely publicized throughout the California nectarine and peach industries. All interested persons were invited to attend the meetings and the hearing and participate in deliberations on all issues. All Committee meetings (the NAC, the PCC, the Control Committee and the CTFA) and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 20-day comment period is provided to allow interested persons to respond to this proposal. Twenty days is deemed appropriate so that this rulemaking may be completed and nominations can be conducted prior to the next crop year, which begins in March. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

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 California 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.

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; 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.

(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 area (the State of California) 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 is 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 area; and

(5) All handling of nectarines and peaches grown in the production areas 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.

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.

For the reasons set out in the preamble, 7 CFR parts 916 and 917 are proposed to be amended as follows:

PART 916—NECTARINES GROWN IN CALIFORNIA

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

Authority: 7 U.S.C. 601–674.

2. Revise § 916.5 to read as follows:

§ 916.5 Nectarines.

Nectarines means: (1) All varieties of nectarines grown in the production area; and

(2) 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.

Dated: November 18, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

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