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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket No. FV93-353]

RIN 0581-AB28

Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930 (PACA)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture is revising the Regulations (other than Rules of Practice) Under the Perishable Agricultural Commodities Act (PACA) to include oil-blanching frozen fruits and vegetables as a commodity covered under the PACA. This rule will grant dealers in frozen oil-blanching products the same rights afforded dealers whose frozen product is water-blanching.

EFFECTIVE DATE: April 26, 1996.

FOR FURTHER INFORMATION CONTACT: J.R. Frazier, Assistant Chief, PACA Branch, Room 2095-So., Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC 20250, Phone (202) 720-4180.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule is issued under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*), as amended, hereinafter referred to as the "PACA." The Department of Agriculture is issuing this final rule in conformance with Executive Order 12866.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil

Justice Reform. It is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulation, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), (5 U.S.C. 601 *et seq.*), the Administrator of the Agricultural Marketing Service (AMS) has certified that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. This is an action that is brought about at the request of the frozen fruit and vegetable industry and would benefit producers and small businesses that process and supply frozen fruits and vegetables by making available to them new remedies under the PACA.

This rule extends PACA coverage to include frozen fruits and vegetables that are oil-blanching, especially frozen french fried potato products. Under previous regulations, suppliers of these commodities suffered considerable financial losses because oil-blanching products were excluded by regulation from PACA coverage. This rule grants dealers in frozen oil-blanching products the same rights afforded dealers whose frozen product is water-blanching.

It is therefore not unduly or disproportionately burdensome on small businesses and in fact, rectifies the previous situation in which processors and suppliers were closed out of remedies with respect to oil-blanching product.

The PACA establishes a code of fair trading by prohibiting certain unfair practices in the marketing of fresh or frozen fruits and vegetables. The law requires that parties fulfill their contractual obligations including prompt pay, and provides a forum wherein persons who suffer damages can recover their losses.

The PACA also impresses a statutory trust for the benefit of unpaid sellers or suppliers on all perishable agricultural commodities received by a commission

merchant, dealer or broker and all inventories of food or other products derived from the sale of such commodities or products. Sellers who preserve their eligibility are entitled to payment ahead of other creditors, from trust assets, of money owed on past due accounts.

Information submitted to this Agency by the Frozen Potato Products Institute indicates that frozen potato products represent the largest single frozen commodity shipped in the United States. This information further indicates that potatoes cannot be economically frozen and shipped long distances unless they first undergo oil blanching. As pointed out by the American Frozen Food Institute, oil blanching, like water and steam blanching inactivates enzymes without cooking the product. Water and steam blanching frozen fruits and vegetables are covered under the current regulations, oil-blanching frozen fruits and vegetables are not. To exclude such a substantial portion of the frozen food industry is inconsistent with the intent of the PACA to protect dealers in fresh or frozen fruits and vegetables.

Retailers who buy in interstate or foreign commerce must obtain a PACA license if they buy more than \$230,000 of fruits and vegetables during a calendar year. Including oil-blanching product in the calculation of the \$230,000 exemption may result in a marginal increase in retailers becoming subject to PACA, requiring them to purchase a PACA license at an annual cost of \$400. However, the license fee for retailers is being phased out under the provisions of the Perishable Agricultural Commodities Act Amendments of 1995. By calendar year 1999, retailers will no longer be obligated to pay license fees though they must still be licensed. A marginal increase in the number of retailers subject to the PACA, is not significant compared to the benefits derived in the industry by including these commodities under the PACA.

The proposed rule was published in the Federal Register (59 FR 35487) on July 12, 1994. On September 12, 1994, Notice was given in the Federal Register (59 FR 46772) re-opening the comment period. That notice provided another comment period which ended October 12, 1994. Ten comments were received,

six in favor and four opposed to the proposed rule.

Three commentators representing retailers and wholesale grocers opposed the rule claiming that it would expand the PACA program.

It is true that the rule does expand the PACA program to a product line that is not currently covered, but only because the current regulations restrict the application of the meaning of "perishable agricultural commodity" as provided in the Act. Oil-blanching product is well within the definition of a perishable agricultural commodity as defined by the statute and is consistent with the industry view of the scope of the Act and the nature of the product. Including oil-blanching frozen fruits and vegetables does not unduly or disproportionately burden retailers. With this final rule, all sales of potato products, whether to wholesale distributors, or retailers, would be covered by the term "perishable agricultural commodity." Further, retailers would be less likely than other dealers to be affected by the rule because frozen oil-blanching product would be a small portion of their total business. However, continuing to exclude (frozen french fried potatoes) the largest single frozen commodity in the United States poses substantial risk to farmers, shippers, and processors who are extending credit without the trust protection the Act affords to other dealers.

Another commentator representing a major restaurant chain opposed the proposed rule because he thought the change might bring restaurants under the jurisdiction of the PACA, and argued that therefore, the economic impact of the rule has been underestimated. Restaurants traditionally have not been considered subject to the PACA by USDA or Congress unless the buying arm of the restaurant is a separate legal entity, and is buying for and/or reselling the product to another entity. Since restaurants are not subject to the PACA, this change in the regulation will not impact restaurants.

For the reasons stated, we are not making any changes to this final rule based on the above comments.

The commentators in favor of the proposal claimed that frozen potatoes cannot be shipped practically and commercially without being oil-blanching and that extending PACA to cover these products would protect processors and shippers and enhance the protection to farmers. They also pointed out that incorporating oil-blanching products into the regulations was consistent with the current policy

of including water-blanching and steam-blanching product and would streamline the administration of PACA because it would no longer be necessary to distinguish oil-blanching from water or steam-blanching products. They also claimed that the proposed rule would improve marketing efficiency, thereby benefitting consumers and the potato industry.

After thoroughly analyzing the comments received and all other available information, the Department has concluded that issuing this rule is appropriate.

Based on the above, the Administrator of the AMS has determined that the issuance of this final rule will not have a significant economic effect on a substantial number of small entities.

After consideration of all relevant material presented, the comments received, and other available information, it is found that this regulation, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 46 of the Code of Federal Regulations is amended as follows:

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

1. The authority citation for part 46 continues to read as follows:

Authority: Sec. 15, 46 Stat. 537; 7 U.S.C. 499o.

2. In section 46.2, paragraph (u) is revised to read as follows:

§ 46.2 Definitions.

* * * * *

(u) *Fresh fruits and fresh vegetables* include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but do not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seeds,

pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents used to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruits or vegetables for packaging in any type of containers; or comparable methods of preparation.

* * * * *

Dated: March 20, 1996.

Lon Hatamiya,

Administrator.

[FR Doc. 96-7437 Filed 3-26-96; 8:45 am]

BILLING CODE 3410-02-P

7 CFR Parts 916 and 917

[Docket No. FV95-916-4-IFR]

Nectarines and Peaches Grown in California; Revision of Handling Requirements for Fresh Nectarines and Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule revises the handling requirements for California nectarines and peaches by modifying the grade, size, maturity, container, and pack requirements for fresh shipments of these fruits, beginning with 1996 season shipments. This rule enables handlers to continue shipping fresh nectarines and peaches meeting consumer needs in the interest of producers, handlers, and consumers of these fruits.

DATES: Effective April 1, 1996.

Comments which are received by April 26, 1996 will be considered prior to issuance of any final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523-S, Washington, DC 20090-6456; or by facsimile at 202-720-5698. All comments should reference the docket number and the date and page number of this issue of the Federal Register and will be made available for public inspection at the office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street,