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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. FV04-916/917-02 FIR]

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

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting as a final rule, with a change, an interim final rule revising the handling requirements for California nectarines and peaches by reducing the minimum net weight for shipments of nectarines and peaches in bulk bins under the marketing orders. The marketing orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative and Peach Commodity Committees (committees). This rule will enable packers to continue shipping fresh nectarines and peaches meeting customers' needs in the interests of producers, packers, and consumers of these fruits.

**DATES:** *Effective Date:* August 25, 2004.

**FOR FURTHER INFORMATION CONTACT:** Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California, 93721; telephone (559) 487-5901, Fax: (559) 487-5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237;

telephone: (202) 720-2491; Fax: (202) 720-8938.

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

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement Nos. 124 and 85, and Marketing Order Nos. 916 and 917 (7 CFR parts 916 and 917) regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the "orders." The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

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

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

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

This rule continues in effect the revisions of the handling requirements for California nectarines and peaches by reducing the minimum net weight for

shipments of nectarines and peaches in bulk bins under the marketing orders.

Under the orders, container and pack requirements are established for fresh shipments of California nectarines and peaches. Such requirements are in effect on a continuing basis. The Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC), which are responsible for local administration of the orders, met on February 25, 2004, and unanimously recommended that the handling requirements be further revised for the 2004 season, which began in April. The committees unanimously recommended that the minimum net weight for loose-filled bulk bin containers be reduced from 400 pounds to 100 pounds, and that change continues in effect.

The committees meet prior to and during each season to review the rules and regulations effective on a continuing basis for California nectarines and peaches under the orders. Committee meetings are open to the public and interested persons are encouraged to express their views at these meetings. The committees held such meetings on February 25, 2004.

USDA reviews committee recommendations and information, as well as information from other sources, and determines whether modification, suspension, or termination of the rules and regulations would tend to effectuate the declared policy of the Act.

No official crop estimate was available at the time of the committees' February 25, 2004, meetings because the nectarine and peach trees were dormant. The committees subsequently recommended a crop estimate at their meetings on April 28, 2004. The estimates indicate that the 2004 nectarine crop will be approximately 22,245,000 containers, and the 2004 peach crop will be approximately 22,601,000 containers. This crop is similar to the 2003 crop, which totaled 21,896,300 containers of nectarines and 22,306,300 containers of peaches.

#### Container and Pack Requirements

Sections 916.52 and 917.41 of the orders authorize establishment of container, pack, and container marking requirements for shipments of nectarines and peaches, respectively. Under §§ 916.350 and 917.442 of the orders' rules and regulations, container markings, net weights, well-filled requirements, weight-count standards

for various sizes of nectarines and peaches, and standard containers for nectarines and peaches, respectively, are specified. Included in the container and pack requirements are minimum net weight requirements for several containers, such as the bulk bin.

Previously, the minimum net weight for bulk bin containers was 400 pounds. At the request of a handler, the committees unanimously recommended that the minimum net weight be reduced to 100 pounds for bulk bin containers of loose-filled nectarines and peaches.

The committees' recommendations resulted from a recommendation by the Tree Fruit Quality Subcommittee. At the subcommittee meeting on February 4, 2004, a handler requested that the current minimum net weight be reviewed and possibly modified. The handler noted that he had increased shipments of bulk peaches during the 2003 season, but found the minimum net weight of 400 pounds too restrictive because the weight of the fruit in the bin damages the contents, especially the peaches at the bottom of the bin. The handler suggested that a minimum weight of 200 pounds might serve the industry better by ensuring the safe arrival of the fruit.

The subcommittee discussed shipments of nectarines and peaches in bulk bins, and reviewed the historical significance of the minimum net weight of 400 pounds. The subcommittee determined that the net weight was set in 1976 when there were few, if any, bulk bin shipments.

The subcommittee also deliberated the relative value of different minimum weights; e.g. 125 pounds, 200 pounds, or 100 pounds. They determined that since the weight constituted a minimum net weight rather than maximum net weight, it was prudent to use a weight that was lighter than the previously established minimum net weight, but still heavy enough to constitute a bulk shipment. Because it would be difficult for a handler to pack a 100-pound box for anything other than a bulk bin shipment, the 100 minimum net weight was determined to be the optimum net weight and was unanimously recommended. The subcommittee further unanimously recommended that the 100-pound minimum net weight be in place for the 2004 season only, with a review of the success of the modification at the end of the season.

The committees discussed the Tree Fruit Quality subcommittee's recommendation at the February 25, 2004, meetings and reviewed the current industry practices regarding shipping in bulk bin containers. While

use of bulk bins appears to be in its infancy, the committees appreciate that such shipments could constitute a new trend, and that relaxing the current minimum net weight for those containers provides yet another marketing opportunity for handlers. Moreover, the reduced minimum net weight will provide another container option for handlers and safeguard the fruit in the container from damage. However, the committees disagreed with the subcommittee's recommendation that the change should be in place for the 2004 season only, and did not believe it necessary to review the use of these containers at the end of the 2004 season.

For the reasons stated above, the committees recommended that the minimum net weight for loose-filled bulk bin containers of nectarines and peaches be decreased from 400 pounds to 100 pounds. That change continues in effect.

*Nectarines:* For the reasons stated above, the revision of paragraph (a)(9) of § 916.350 continues in effect to modify the minimum net weight of bulk bin containers of loose-filled nectarines from 400 pounds to 100 pounds. The required container markings shall be placed on one outside end of the container in plain sight and in plain letters.

*Peaches:* For the reasons stated above, the revision of paragraph (a)(10) of § 917.442 continues in effect to modify the minimum net weight of bulk bin containers of loose-filled peaches from 400 pounds to 100 pounds. The required container markings shall be placed on one outside end of the container in plain sight and in plain letters.

#### **Final Regulatory Flexibility Analysis**

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

#### **Industry Information**

There are approximately 250 California nectarine and peach packers subject to regulation under the orders regulating nectarines and peaches grown in California, and about 1,800 producers of these fruits in California. The Small Business Administration [13 CFR 121.201] defines small agricultural service firms as those whose annual receipts are less than \$5,000,000. The Small Business Administration also defines small agricultural producers as those having annual receipts of less than \$750,000. A majority of these packers and producers may be classified as small entities.

The committees' staff has estimated that there are less than 20 handlers in the industry who could be defined as other than small entities. In the 2003 season, the average handler price received was \$7.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 714,286 containers to have annual receipts of \$5,000,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2003 season, the committees' staff estimates that small handlers represent approximately 94 percent of all the handlers within the industry.

The committees' staff has also estimated that less than 20 percent of the producers in the industry could be defined as other than small entities. In the 2003 season, the average producer price received was \$4.00 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 187,500 containers of nectarines and peaches to have annual receipts of \$750,000. Given data maintained by the committees' staff and the average producer price received during the 2003 season, the committees' staff estimates that small producers represent more than 80 percent of the producers within the industry.

With an average producer price of \$4.00 per container or container equivalent, and a combined packout of nectarines and peaches of 44,202,600 containers, the value of the 2003 packout value (total estimated grower revenue) is estimated to be \$176,810,400. Dividing this total estimated grower revenue figure by the estimated number of producers (1,800) yields an estimated average revenue per producer of approximately \$98,228 from the sales of nectarines and peaches.

*Discussion of the Change in Minimum Net Weight*

Under §§ 916.52 and 917.41 of the orders, pack and container requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect on a continuing basis. The NAC and PCC met on February 25, 2004, and unanimously recommended that the minimum net weight for loose-filled bulk bin containers be reduced from 400 to 100 pounds. This recommendation was presented to the committees by the Tree Fruit Quality Subcommittee after a thorough discussion at their February 4, 2004, meeting. A handler requested that the subcommittee review the current minimum net weight of bulk bin containers used for loose-filled shipments of nectarines and peaches.

The subcommittee discussed the historical significance of the current minimum net weight of 400 pounds and deliberated the relative value of recommending various lighter net weights, as well. They determined that the optimum net weight for bulk bin containers was 100 pounds. Until recently, they noted, there were few, if any, shipments of nectarines and peaches in bulk bins. However, changes in the industry, improvements in containers, shipments of increasingly more mature fruit, and the demands of their retail customers have apparently improved the prospects for such shipments.

In considering possible alternatives to this action, the subcommittee discussed varying minimum net weights, and the types and sizes of bulk bin containers currently available to the industry. While other alternatives were not rejected out of hand, the subcommittee reasoned that decreasing the current 400-pound minimum net weight to 100 pounds was a prudent option since the weight of the container constituted a minimum net weight, rather than a maximum net weight. Such a weight afforded increased protection of the fruit in the bin while providing increased flexibility for handlers who might want to experiment with varying weights, as their customers demanded. If a handler had customer requests for 125 pounds, that option would be available under the recommendations. If another handler had a request for 250 pounds, that option would also be available.

The committees agreed with the Tree Fruit Quality Subcommittee's recommendation, except for establishing a trial period during the 2004 season. The committees voted unanimously to establish the revised minimum net weight of 100 pounds for bulk bin

containers without the requirement for a trial during the 2004 season or an industry review at the end of the season.

The committees make recommendations regarding all the revisions in handling requirements after considering all available information, including recommendations by various subcommittees, comments of persons at subcommittee and committee meetings, and comments received by committee staff. Such subcommittees include the Tree Fruit Quality and Research Subcommittees, and the Executive Committee.

At the meetings, the impact of and alternatives to these recommendations are deliberated. These subcommittees, like the committees themselves, frequently consist of individual producers and packers with many years' experience in the industry, who are familiar with industry practices and trends. Like all committee meetings, subcommittee meetings are open to the public and comments are widely solicited. In the case of the Tree Fruit Quality Subcommittee, many growers and handlers who are affected by the issues discussed by the subcommittee attend and actively participate in the public deliberations. In fact, if a specific producer or handler is known to have an interest in one or more topics to be discussed, committee staff specifically invites him or her to the meetings to participate in the debate and provide information not already available to staff and the subcommittee, including information which may refute the staff's findings. This recommendation, in fact, resulted from a request made by a handler who was specifically invited by staff to take his concerns to the Tree Fruit Quality Subcommittee.

In addition, minutes of all subcommittee and committee meetings are distributed to committee members and others who have requested them, thereby increasing the availability of information within the industry. The staff has surveyed committee members and others in the industry to determine each person's preference in receiving committee communications. Each person was given the opportunity to specify how he or she would like meeting agendas and other committee communications to be delivered: facsimile, electronic mail, and/or mailed hard copy. The staff is also preparing to make meeting minutes available on the committees' Web site, as well, where meeting agendas are currently available.

This rule does not impose any additional reporting and recordkeeping requirements on either small or large packers. As with all Federal marketing order programs, reports and forms are

periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

In addition, the committees' meetings are widely publicized throughout the nectarine and peach industry and all interested parties are encouraged to attend and participate in committee deliberations on all issues. These meetings are held annually during the fall, late winter, and early spring. Like all committee meetings, the February 25, 2004, meetings were public meetings, and all entities, large and small, were encouraged to express views on these issues. These regulations were also reviewed and thoroughly discussed at a subcommittee meeting held on February 4, 2004.

An interim final rule concerning this action was published in the **Federal Register** on April 14, 2004. Copies of the rule were provided to interested parties through the committees' Web site and through the Internet by USDA and the Office of the **Federal Register**. That rule provided for a 60-day comment period which ended June 14, 2004. One comment was received.

The commenter stated that the revisions to the handling requirements for nectarines and peaches grown in California as presented in the interim final rule will allow handlers to better serve their buyers.

He also asked that an exception for blush or red color for U.S. No. 1 nectarines currently permitted under the marketing order handling regulations be removed. According to the comment, recent revisions to § 51.3147 of the U.S. Standards for Grades of Nectarines (69 FR 9189, February 27, 2004) have eliminated the color requirement for U.S. No. 1 nectarines, making the exception in the nectarine marketing order regulations obsolete. For that reason, the exception in paragraph (a)(1) of § 916.356 will be removed.

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

After consideration of all relevant matters presented, the information and recommendations submitted by the committees, and other information, it is found that finalizing the interim final

rule, with a change, as published in the **Federal Register** (69 FR 19753, April 14, 2004) will tend to effectuate the declared policy of the Act.

#### List of Subjects

##### 7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

##### 7 CFR Part 917

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

#### PART 916—NECTARINES GROWN IN CALIFORNIA

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

■ Accordingly, the interim final rule amending 7 CFR parts 916 and 917, which was published at 69 FR 19753 on April 14, 2004, is adopted as a final rule with the following change to 7 CFR part 916:

■ 1. The authority citation for 7 CFR parts 916 and 917 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. In § 916.356, paragraph (a)(1), the introductory text is revised to read as follows:

#### **§ 916.356 California Nectarine Grade and Size Regulation.**

(a) \* \* \*

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided*, That nectarines 2 inches in diameter or smaller, shall not have fairly light-colored, fairly smooth scars which exceed an aggregate area of a circle  $\frac{3}{8}$  inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light-colored, fairly smooth scars which exceed an aggregate area of a circle  $\frac{1}{2}$  inch in diameter: *Provided further*, That an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen: *Provided further*, That during the period April 1 through October 31, 2004, any handler may handle nectarines if such nectarines meet “CA Utility” quality requirements. The term “CA Utility” means that not more than 40 percent of the nectarines in any container meet or exceed the requirements of the U.S. No. 1 grade, except that when more than 30 percent of the nectarines in any container meet or exceed the requirements of the U.S. No. 1 grade, the additional 10 percent shall have non-

scoreable blemishes as determined when applying the U.S. Standards for Grades of Nectarines; and that such nectarines are mature and are:

\* \* \* \* \*

Dated: July 21, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–16940 Filed 7–23–04; 8:45 am]

BILLING CODE 3410–02–P

#### DEPARTMENT OF AGRICULTURE

#### Agriculture Marketing Service

##### 7 CFR Part 983

[Docket No. FV02–983–1 FR]

#### **Pistachios Grown in California; Delay of the Effective Date for Aflatoxin, Size and Quality Requirements**

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

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** This document delays the effective date for aflatoxin, size and quality requirements established under Marketing Order No. 983 (order). The order regulates the handling of pistachios produced in California. Sections 983.38 through 983.46 of the order establish maximum aflatoxin along with minimum size and quality requirements for California pistachios. The delayed effective date was requested by members of the California pistachio industry. Postponing the effective date of the regulations will provide pistachio handlers with preparation time needed to meet the aflatoxin, size and quality requirements of the order.

**DATES:** The effective date for §§ 983.38 through 983.46 is delayed from August 1, 2004, to February 1, 2005.

#### **FOR FURTHER INFORMATION CONTACT:**

Melissa Schmaedick, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, PO Box 1035, Moab, Utah 84532; telephone: (435) 259–7988, Fax: (435) 259–4945; or Rose Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901, Fax: (559) 487–5906.

Small businesses may request information on complying with this regulation by contacting Jay Guerber,

Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: Jay.Guerber@usda.gov.

**SUPPLEMENTARY INFORMATION:** This document delays the effective date from August 1, 2004, to February 1, 2005, for aflatoxin, size and quality provisions established under Marketing Order No. 983 (order) (69 FR 17844, April 5, 2004). The order, which became effective in April 2004, regulates the handling of pistachios produced in California. Sections 983.38 through 983.46 of the order establish maximum aflatoxin along with minimum size and quality requirements for California pistachios, and were scheduled to become effective on August 1, 2004. The delay was requested by members of the California pistachio industry. Postponing the effective date of the aflatoxin, size and quality requirements will provide pistachio handlers with preparation time needed to comply with these requirements. For example, additional time is needed for handlers to arrange for accredited laboratories to test their pistachios and certify that they meet the order’s aflatoxin requirements.

In addition, administrative rules and regulations needed to implement the program (for example, handler reporting requirements) have not been established. These should be considered and recommended by the committee established to locally administer the order. The committee is in the process of being appointed by the Department. Postponing the effective date of the order’s regulatory provisions would allow the new committee time to become established and actively participate in implementing the order.

Thus, the effective date of §§ 983.38 through 983.46 should be delayed until February 1, 2005. A 6-month delay should provide adequate time for pistachio handlers to prepare to meet the aflatoxin, size and quality requirements. It should also allow sufficient time for an administrative committee to be appointed and recommend any implementing rules and regulations deemed necessary.

#### **List of Subjects in 7 CFR Part 983**

Marketing agreements, Pistachios, Reporting and recordkeeping requirements.

**Authority:** 7 U.S.C. 601–674.