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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV98-916-2 IFR]

Nectarines and Peaches Grown in California; Relaxation of Quality Requirements for Fresh Nectarines and Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule relaxes "CA Utility" quality requirements for California nectarines and peaches for the remainder of the 1998 season. The "CA Utility" quality requirements are based on minimum quality requirements established under the California Agricultural Code, with a limitation on the amount of fruit meeting U.S. No. 1 or higher grade requirements that may be present in each container marked "CA Utility." Currently, the "CA Utility" quality requirement permits not more than 30 percent of nectarines or peaches in any container to meet or exceed the requirements of U.S. No. 1. This relaxation increases that limitation from 30 percent to not more than 40 percent except that at least one-quarter of the fruit grading U.S. No. 1 in such containers must have non-scoreable blemishes. A non-scoreable blemish is a defect that does not cause the fruit to fail U.S. No. 1 grade requirements. This rule will allow more U.S. No. 1 nectarines and peaches to be packed in containers marked "CA Utility," and is expected to benefit growers, handlers, and consumers.

DATES: Effective September 23, 1998. Comments received by October 7, 1998 will be considered prior to issuance of any final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this final rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456; Fax: (202) 205-6632; or E-mail: moabdocket_clerk@usda.gov.

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 in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT:

Terry Vawter, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (209) 487-5901; Fax: (209) 487-5906 or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, D.C. 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632.

SUPPLEMENTARY INFORMATION: This interim final 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 (Department) is issuing this final rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12866, Civil Justice Reform. This final rule is not intended to have retroactive effect. This final 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 the Secretary 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 the Secretary 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 the Secretary'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 interim final rule relaxes, for the remainder of the 1998 season, the "CA Utility" quality requirement to allow more U.S. No. 1 grade nectarines and peaches in containers marked "CA Utility". Currently, the term "CA Utility" means that not more than 30 percent of the nectarines and peaches in any container meet or exceed the requirements of the U.S. No. 1 grade, and meet other specified requirements. This interim final rule increases that percentage to 40 percent except that at least one-quarter of the fruit grading U.S. No. 1 in such containers must have non-scoreable blemishes. A non-scoreable blemish is a defect that will not cause the fruit to fail to meet the requirements of U.S. No. 1. This relaxation will be in effect for the remainder of the 1998 season, and will allow more U.S. No. 1 grade fruit to be packed as "CA Utility" quality.

The Nectarine Administrative Committee (NAC) and Peach Commodity Committee (PCC) (committees) met on September 15, 1998, to discuss this relaxation. At that time, the NAC voted without opposition to recommend the increased percentage of U.S. No. 1 nectarines with non-scoreable blemishes. The PCC voted with eight in favor and one opposed to recommend a similar change. The member opposed believed that it was too late in the season to make such a change, that such a change would

disadvantage those who had already shipped "CA Utility" fruit in 1998, and that more study and analysis of the situation was needed.

Sections 916.52 and 917.41 of the orders authorize the establishment of grade and quality requirements for nectarines and peaches, respectively. Prior to the 1996 season, § 916.356 of the order's rules and regulations required nectarines to meet a modified U.S. No. 1 grade. Specifically, nectarines were required to meet U.S. No. 1 grade requirements, except there was a slightly tighter requirement for scarring and a more liberal allowance for misshapen fruit. Under § 917.459 of the order's rules and regulations prior to the 1996 season, peaches were also required to meet the requirements of U.S. No. 1, except there was a more liberal allowance for open sutures that were not "serious damage."

The minimum grade, size, and maturity requirements in § 916.356 applicable to shipments of California nectarines apply during the period April 1 through October 31 each year. The minimum grade, size, and maturity requirements in § 917.459 applicable to shipments of California peaches apply during the period April 1 through November 23 each year.

Since the 1996 shipping season, the nectarine and peach regulations have allowed "CA Utility" quality to be shipped during the regulatory periods. Utility quality is a lower quality fruit than U.S. No. 1.

Containers marked as "CA Utility" must be inspected by the Federal or Federal-State Inspection Service and certified as meeting the "CA Utility" quality requirements. Part of the inspection process is to evaluate the fruit in accordance with the requirements of the U.S. Standards for Grades of Nectarines, the U.S. Standards for Grades of Peaches, and the orders. In conducting inspections, inspectors are required to evaluate various blemishes. Some blemishes are serious or severe enough to be "scored" as defects which are damaging to the grade of the fruit, while some other blemishes are either not serious or severe enough to affect the grade of the fruit. In the first instance, the blemishes are termed "scoreable" defects; and in the second instance, the blemishes are termed "non-scoreable." It is the recommendation of the committees that such non-scoreable blemishes must be present on at least one-quarter of the 40 percent of the fruit grading U.S. No. 1 in boxes marked "CA Utility."

While containers marked "CA Utility" fruit are subject to relaxed quality

requirements, all other requirements of the orders must be met.

In addition to the grade requirements, §§ 916.350 and 917.442 require each package or container of nectarines and peaches meeting the requirements of "CA Utility," to be conspicuously marked with the words "CA Utility" on a visible display panel.

Through August 31 of the 1998 season, shipments of "CA Utility" quality nectarines and peaches have averaged about 4 percent of total shipments. In prior seasons, utility quality shipments have been less than 2 percent. The increase this season is attributed to quality problems resulting from heavy early season rains. Also, hail storms later during the season damaged some fruit rendering it unsalable, while some fruit sustained only moderate scarring. This is especially true for nectarines, whose smooth skin does not provide the same protection as the fuzzy exterior of peaches.

Preliminary studies conducted by the NAC and PCC indicate that some consumers, retailers, and foreign buyers found the lower-quality fruit acceptable in some markets. Shipments of "CA Utility" nectarines represented 1.1 percent of all nectarine shipments, or approximately 210,000 boxes in 1996. In 1997, shipments of "CA Utility" nectarines represented 1.1 percent of all nectarine shipments, or approximately 230,000 boxes. Shipments of "CA Utility" peaches represented 1.9 percent of all peach shipments, or 366,000 boxes in 1996. In 1997, shipments of "CA Utility" peaches represented 1.0 percent of all peach shipments, or approximately 217,000 boxes. By contrast, shipments of "CA Utility" nectarines represents 4.0 percent of all nectarine shipments, or approximately 694,881 boxes by August 31 of the 1998 season. Shipments of "CA Utility" peaches represents 4.0 percent of all peach shipments, or approximately 544,065 boxes by August 31 of the 1998 season.

This rule amends §§ 916.356 and 917.459 by revising paragraph (a)(1) under each section to allow not more than 40 percent U.S. No. 1 grade fruit to be packed in containers marked as "CA Utility" except that at least one-quarter of the fruit grading U.S. No. 1 in such container must have non-scoreable blemishes.

At the September 15, 1998, committee meetings, comments supporting the recommendation were made by handlers who had experienced incidents where the percentage of U.S. No. 1 fruit contained in their "CA Utility" boxes was found to be higher than permitted by the orders' rules and

regulations. In those instances, they were forced to repack the boxes, move blemished fruit to boxes containing U.S. No. 1 fruit, or discard or donate the fruit.

At least one handler complained that the fruit with non-scoreable blemishes was unsightly in the type of U.S. No. 1 box he offered to the marketplace and to his customers. His preference was to place the fruit with non-scoreable blemishes in boxes marked "CA Utility." The limitation of not more than 30 percent U.S. No. 1 fruit in boxes marked "CA Utility" became a greater hindrance as the season progressed. The handler noted that an unseasonable morning rain had recently caused dark stains on the skin of nectarines, rendering them unsuitable for inclusion in his U.S. No. 1 boxes. He preferred including such fruit in the "CA Utility" boxes, but doing so caused the "CA Utility" boxes to contain more than the 30 percent U.S. No. 1 fruit permissible.

A niche market exists for utility quality fruit and an opportunity should be made available to market somewhat better quality "CA Utility" fruit to meet demand. Allowing ten percent more U.S. No. 1 grade fruit to be packed as "CA Utility" quality requirements would allow more fruit to be marketed as "CA Utility" if handlers prefer to do so. "CA Utility" quality fruit is generally made available at lower prices to especially benefit lower-income consumers.

Some committee members initially continued to support limiting the amount of U.S. No. 1 grade fruit that can be included in a utility pack to 30 percent of the total in any container to maintain differences between U.S. No. 1 containers and "CA Utility" containers. However, after further discussion, it was agreed that a greater percentage of U.S. No. 1 in a "CA Utility" container would not be confusing if such fruit is also blemished. It was, therefore, agreed that an additional 10 percent U.S. No. 1 should be permitted except that every piece of fruit in that 10 percent must possess a non-scoreable blemish. This relaxation will be in effect for the remainder of the 1998 season. The boxes marked "CA Utility" would be clearly distinct from boxes containing U.S. No. 1 grade. Failure to provide a clear distinction could cause confusion in the marketplace and would not meet the goal of providing low-cost fruit to low-income consumers. It is the opinion of the committees that this relaxation will not cause confusion among buyers.

Data on recent production and shipments of California nectarines and peaches appear to indicate that "CA Utility" quality fruit can be marketed

successfully without interfering with sales of higher quality fruit. In fact, some handlers noted that they used the "CA Utility" box as a "safety net." Fruit which was not good enough to meet their own criteria for packing in U.S. No. 1 boxes could be better utilized in boxes of "CA Utility." The advent of "CA Utility" quality requirements has given handlers increased flexibility to improve the overall appearance of their U.S. No. 1 shipments.

For these reasons, the NAC and PCC recommended that for the remainder of the 1998 season that the percentage of U.S. No. 1 nectarines and peaches permitted in containers marked as "CA Utility" quality be increased from 30 percent to 40 percent except that at least one-quarter of the fruit grading U.S. No. 1 in such containers must have non-scoreable blemishes. This relaxation will be in effect for the remainder of the 1998 season. The committees also voted to review the percentages during the winter.

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 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.

There are approximately 300 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 1,800 producers of these fruits in California. Small agricultural service firms, which includes handlers, are defined by the Small Business Administration [13 CFR 121.601] as those whose annual receipts are less than \$5,000,000. Small agricultural producers have been defined as those having annual receipts of less than \$500,000. A majority of these handlers and producers may be classified as small entities.

Under §§916.356 and 917.459 of the orders, grade and size requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect during the period April 1 through October 31 each year for nectarines, and April 1 through November 23 for

peaches. This rule relaxes, for the remainder of the 1998 season, the definition of the "CA Utility" quality for California nectarines and peaches. The "CA Utility" quality requirement is based on minimum quality requirements established under the California Agricultural Code, with a limitation on the amount of fruit meeting U.S. No. 1 or higher grade requirements that may be contained in the utility pack. Currently, the "CA Utility" quality requirement, permits not more than 30 percent of the peaches in any container to meet or exceed the requirements of a U.S. No. 1. This relaxation increases that percentage to not more than 40 percent except that at least one-quarter of the fruit grading U.S. No. 1 in such container must have non-scoreable blemishes. A non-scoreable blemish is a defect that does not cause the fruit to fail to meet U.S. No. 1 grade requirements. This rule is expected to benefit growers, handlers, and consumers.

Since the 1996 shipping season, the nectarine and peach regulations have allowed "CA Utility" fruit to be shipped during the regulatory periods. Prior to the 1996 season, §916.356 of the order's rules and regulations required nectarines to meet a modified U.S. No. 1 grade. Specifically, nectarines were required to meet U.S. No. 1 grade requirements, except there was a slightly tighter requirement for scarring and a more liberal allowance for misshapen fruit. Under §917.459 of the order's rules and regulations prior to the 1996 season, peaches were also required to meet the requirements of a U.S. No. 1 grade, except there was a more liberal allowance for open sutures that were not "serious damage." "CA Utility" quality is a lower-quality fruit than U.S. No. 1 and has been regulated since its inception in 1996. Through August 31 of the 1998 season, shipments of utility quality for both nectarines and peaches have averaged about 4 percent of total shipments. In prior seasons, utility quality shipments have been in the 1 to 2 percent range. The increase so far this season is mostly attributed to quality problems resulting from heavy early season rains.

A niche market exists for "CA Utility" quality fruit and the opportunity should be made available to market somewhat better-quality "CA Utility" fruit to meet demand.

According to comments made at the meeting on September 15, 1998, changing the requirements now to allow additional U.S. No. 1 fruit to be packed in "CA Utility" containers would not disadvantage those handlers who have already finished for the season. Those

handlers were able to put fruit grading U.S. No. 1 into their U.S. No. 1 containers. Since they would have likely wanted to pack such fruit in these containers to receive the higher return anticipated for U.S. No. 1 fruit, they have not been harmed economically. Therefore, no harm has been done by implementing this relaxation this late in the season.

Therefore, the NAC and PCC recommended changing the "CA Utility" quality at their September 15, 1998, meetings by modifying the percentage of U.S. No. 1 fruit in each box. The committees also voted to review the percentages during the winter.

In §§916.350 and 917.442 of the orders regulating nectarines and peaches, respectively, lower-quality nectarines and peaches were authorized for shipment as "CA Utility" as an experiment for the 1996 season only. Such authorization was continued during the 1997 and 1998 seasons. This rule changes the percentage of U.S. No. 1 nectarines and peaches which can be packed in a container marked "CA Utility" for the remainder of the 1998 season except that the fruit grading U.S. No. 1 must have a specified percentage of non-scoreable blemishes.

During the 1996 season, the Department authorized the shipment of nectarines and peaches which were of a lower quality than the minimum permitted for previous seasons. During 1996, there were approximately 210,000 boxes of nectarines and approximately 366,000 boxes of peaches packed as "CA Utility," or 1.1 percent and 1.9 percent of fresh shipments, respectively. During 1997, there were approximately 230,000 boxes of nectarines and 217,000 boxes of peaches packed as "CA Utility," or 1.1 percent and 1.0 percent of fresh shipments, respectively. By contrast, shipments of "CA Utility" nectarines represents 4.0 percent of all nectarine shipments, or approximately 694,881 boxes by August 31 of the 1998 season. Shipments of "CA Utility" peaches represents 4.0 percent of all peach shipments, or approximately 544,065 boxes by August 31 of the 1998 season. Continued availability of "CA Utility" quality fruit with the new relaxations is expected to have a positive impact on producers, handlers, and consumers by permitting more nectarines and peaches to be shipped into fresh market channels, without adversely impacting the market for higher quality fruit.

The committees considered several alternatives at the meeting. One alternative was to leave the percentage of U.S. No. 1 nectarines and peaches permitted in "CA Utility" containers

unchanged. It was determined that alternative would not address the problem which faced the industry. The NAC and PCC also considered increasing the 30 percent U.S. No. 1 tolerance to not more than 40 percent or to not more than 50 percent, but determined that such a relaxation could render "CA Utility" boxes less distinctive from U.S. No. 1 and create confusion in the marketplace. Another alternative included a requirement that at least 90 percent of the individual fruits in all boxes marked with "CA Utility" possess defects. Such a requirement would create a box of fruit which would be distinct from U.S. No. 1 due to a greater number of defects present. However, this alternative was determined to be unacceptable because it represented too radical a change of "CA Utility" quality given the emergency nature of the recommendation. This alternative fails to offer a sound basis for comparison with the current requirement of not more than 30 percent U.S. No. 1 because it does not reference the U.S. No. 1 grade. Such comparison may be necessary as the committees continue to study marketplace reaction to changes in quality requirements of "CA Utility" fruit.

This action does not impose any additional reporting and recordkeeping requirements on either small or large handlers.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements that are contained in Parts 916 and 917 have been previously approved by the Office of Management and Budget (OMB) and have been assigned OMB Nos. 0581-0072 and 0581-0080, respectively.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule. However, as previously stated, nectarines and peaches under the orders have to meet certain requirements set forth in the standards issued under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 through 1627). Standards issued under the Agricultural Marketing Act of 1946 are otherwise voluntary.

In addition, the committees' meetings were widely publicized throughout the nectarine and peach industries and all interested parties were invited to attend the meetings and participate in committee deliberations on all issues.

Like all committee meetings, the September 15, 1998, meetings were public meetings and all entities, both large and small, were able to express views on these issues. The committees themselves are composed of producers, the majority of whom are small entities. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This rule reflects the Department's appraisal of the need to revise the quality requirements for California nectarines and peaches. The Department believes that this rule will have a beneficial impact on producers, handlers, and consumers of California nectarines and peaches.

After consideration of all relevant matter presented, including the information and recommendations submitted by the Committees, and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because this rule should apply to as many shipments of California nectarines and peaches as possible. The shipping seasons for both California nectarines and peaches began on April 1, 1998. To maximize the effectiveness of this relaxation prior to the end of the season, this rule needs to be in place as soon as possible. Further, handlers are aware of this rule, which was recommended and discussed in public meetings of the committees and no additional time is needed for those handlers to comply with the relaxed quality requirements. Finally, a 15-day comment period is provided for in this interim final rule, and any written comments received will be considered in the finalization of this interim final rule. A 15-day comment period is appropriate because the end of the season is quickly approaching.

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 forth in the preamble, 7 CFR Parts 916 and 917 are amended as follows:

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

Authority: 7 U.S.C. 601-674.

PART 916—NECTARINES GROWN IN CALIFORNIA

2. In § 916.356, paragraph (a)(1) introductory text, the last proviso in the first sentence and the last phrase are revised to read as follows:

§ 916.356 California Nectarine Grade and Size Regulation.

(a) * * *

(1) * * * *Provided further*, That, during the period September 23, 1998, through October 31, 1998, 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 at least one-quarter of the fruit grading U.S. No. 1 grade 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:

* * * * *

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

3. In § 917.459, paragraph (a)(1) introductory text, the last proviso in the first sentence and the last phrase are revised to read as follows:

(a) * * *

(1) * * * *Provided further*, That during the period September 23, 1998, through November 23, 1998, any handler may handle peaches if such peaches meet "CA Utility" requirements. The term "CA Utility" means that not more than 40 percent of the peaches in any container meet or exceed the requirements of the U.S. No. 1 grade, except that at least one-quarter of the fruit grading U.S. No. 1 grade shall have non-scoreable blemishes as determined when applying the U.S. Standards for Grades of Peaches; and that such peaches are mature and are:

* * * * *

Dated: September 18, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 98-25398 Filed 9-21-98; 8:45 am]

BILLING CODE 3410-02-P