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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. FV02-916-1 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 is adopting, with changes, an interim final rule which revised the handling requirements for California nectarines and peaches by modifying the grade, size, maturity, container, container marking, and pack requirements for fresh shipments of these fruits, beginning with 2002 season shipments. This rule also continues in effect a modification of the requirements for placement of Federal-State Inspection Service lot stamps for the 2002 season only, a new standard container, and weight-count standards for Peento type peaches. 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 enables handlers to continue shipping fresh nectarines and peaches meeting consumer needs in the interests of producers, handlers, and consumers of these fruits.

**EFFECTIVE DATE:** September 16, 2002.

**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."

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 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.

Under the orders, lot stamping, grade, size, maturity, container, container marking, 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 November 29, 2001, and unanimously recommended that these handling requirements be revised for the 2002 season, which began on April 15. The changes: (1) Continue the lot stamping requirements which were in effect for the 2000 and 2001 seasons; (2) authorize shipments of "CA Utility" quality fruit to continue during the 2002 season; (3) establish weight-count standards for the Peento type peaches; (4) require shippers' names and addresses on all containers; (5) add the Euro five-down returnable plastic container as a standard container, establish a net weight for the container, and exempt the container from the "well-filled" requirement; and (6) revise varietal maturity, quality, and size requirements to reflect changes in growing and marketing practices. These changes continue 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. 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' meetings because the nectarine and peach trees were dormant. The committees adopted crop estimates at their May 1, 2002, meetings. They estimated that 2002 production would total about 23,248,000 containers of nectarines and 23,121,000 containers of peaches. Containers are equivalent to 25 pounds of fruit. This is similar in size to the 2001 crop, which totaled

20,951,000 containers of nectarines, and 21,408,000 containers of peaches.

### Lot Stamping Requirements

Sections 916.55 and 917.45 of the orders require inspection and certification of nectarines and peaches, respectively, handled by handlers. Sections 916.115 and 917.150 of the nectarine and peach orders' rules and regulations, respectively, require that all exposed or outside containers of nectarines and peaches, and at least 75 percent of the total containers on a pallet, be stamped with the Federal-State Inspection Service (inspection service) lot stamp number after inspection and before shipment to show that the fruit has been inspected. These requirements apply except for containers that are loaded directly onto railway cars, exempted, or mailed directly to consumers in consumer packages.

Lot stamp numbers are assigned to each handler by the inspection service, and are used to identify the handler and the date on which the container was packed. The lot stamp number is also used by the inspection service to identify and locate the inspector's corresponding working papers or field notes. Working papers are the documents each inspector completes while performing an inspection on a lot of nectarines or peaches. Information contained in the working papers supports the grade levels certified to by the inspector at the time of the inspection.

The lot stamp number has value for the industries, as well. The committees utilize the lot stamp number and date codes to trace fruit in the container back to the orchard where it was harvested. This information is essential in providing quick information for a crisis management program instituted by the industries. Without the lot stamp information on each container, the "trace back" effort, as it is called, would be jeopardized.

Over the last few years, several new containers have been introduced for use by nectarine and peach handlers. These containers are returnable plastic containers (RPCs). Use of RPCs may represent substantial savings to retailers for storage and disposal, as well as for handlers who do not have to pay for traditional, single-use, containers. Fruit is packed in the containers by the handler, delivered to the retailer, emptied, and returned to a central clearinghouse for cleaning and redistribution to the handler. However, because these containers are designed for reuse, RPCs do not support markings that are permanently affixed to the

container. All markings must be printed on cards that slip into tabs on the front or sides of the containers. The cards are easily inserted and removed, and further contribute to the efficient reuse of RPCs.

The cards are a concern for the inspection service and the industries because of their unique portability. There is some concern that the cards on pallets of inspected containers could easily be moved to pallets of uninspected containers, thus permitting a handler to avoid inspection on a lot or lots of nectarines or peaches. This would also jeopardize the use of the lot stamp numbers for the industries' "trace back" program.

To address this concern for the 2000 and 2001 seasons, the committees recommended that pallets of inspected fruit in RPCs be identified with a USDA-approved pallet tag containing the lot stamp number, in addition to the lot stamp number printed on the card on the container. In this way, noted the committees, an audit trail would be created, confirming that the lot stamp number on each container on the pallet corresponds to the lot stamp number on the pallet tag.

The committees and the inspection service presented their concerns to the manufacturers of these types of containers prior to the 2000 season. At that time, one manufacturer indicated a willingness to address the problem by offering an area on the principal display panel where the container markings would adhere to the container. Another possible improvement discussed was for an adhesive for the current style of containers which would securely hold the cards with the lot stamp numbers, yet would be easy for the clearinghouse to remove when the containers are washed. However, the changes were not in effect for the 2000 and 2001 seasons, but were anticipated to be in effect for the 2002 season.

In a meeting of the Returnable Plastic Container Task Force on November 15, 2001, it was determined that given the different styles and configurations of RPCs available, having a standardized display panel or a satisfactory adhesive for placement of the cards may not be realistic.

For those reasons, the task force recommended to the committees that the regulation in effect for the 2000 and 2001 seasons requiring lot stamp numbers on USDA-approved pallet tags, as well as on individual containers on a pallet, be again required for the 2002 season. The committees, in turn, recommended unanimously that such requirement be extended for the 2002 season, as well.

Thus, §§ 916.115 and 917.150, as amended, continue in effect the requirement that the lot stamp number be printed on a USDA-approved pallet tag, in addition to the requirement that the lot stamp number be applied to cards on all exposed or outside containers, and not less than 75 percent of the total containers on a pallet, during the 2002 season.

### Container and Pack Requirements

Sections 916.52 and 917.41 of the orders authorize establishment of container, pack, and marking requirements for shipments of nectarines and peaches, respectively. Under this rule, the revisions of the well-filled requirements, container marking requirements, and list of standard containers continue in effect in accordance with the recommendations of the NAC and PCC.

#### *Well-Filled Requirements*

Under paragraphs (a)(1) of §§ 916.350 and 917.442, all containers of nectarines and peaches, respectively, are required to conform to the requirements of standard pack, and volume-filled containers are further required to be "well-filled." "Well-filled" means that nectarines and peaches in any volume-filled container must be filled to within one inch of the top of the container.

With the addition of the RPCs, handlers are frequently unable to well fill those containers without either damaging the fruit inside or making the container too heavy. For this reason, applying the requirements of "well-filled" to this container is impractical.

The Returnable Plastic Container Task Force discussed this issue at their meeting on November 15, 2001, and unanimously agreed that the requirement for the Euro five down box to meet the well-filled requirement was difficult for handlers utilizing that RPC, and such requirement should not be applied to that container.

For those reasons, the revisions to paragraphs (a)(1) of §§ 916.350 and 917.442 continue in effect the specification that the Euro five down box is not required to meet the well-filled requirement.

#### *Container Marking Requirements*

Sections 916.350 and 917.442 establish certain requirements for marking containers of nectarines and peaches, respectively. This rule continues in effect provisions requiring all containers of nectarines and peaches to be marked with the name and address of the shipper. Previously, all containers had to be marked with this information,

except for consumer containers mailed directly to consumers.

Requiring the handler to print his or her name and address on each container will ensure that all boxes are properly identified for handler responsibility. Such proper identification will also assist the industry's trace back program by providing additional information for beginning the trace.

The Returnable Plastic Container Task Force discussed this issue at its meeting on November 15, 2001, and unanimously voted to recommend to the NAC and PCC that the requirement for the name and address of the shipper be extended to all types of containers. When the committees met on November 29, 2001, they unanimously voted to do so.

#### *Addition of a New Standard Container*

In the rules and regulations for nectarines at § 916.350, paragraphs (a)(6), (a)(7) and (a)(8), and for peaches at § 917.442, paragraphs (a)(7), (a)(8), and (a)(9), standard containers, such as the Nos. 22D, 22E, 22G, and 32, are required to be marked with the net weight. Under paragraph (b) in §§ 916.350 and 917.442, such standard containers are defined. Once the use of a container has become common in the industry, such containers are determined to be standard containers. Standard containers represent container types that are recognized by the industry and adopted by the retail trade. As such, it is a practice of the committees to recommend that such containers be added to the list of standard containers together with container marking requirements.

At the November 29, 2001 meeting, the NAC and PCC, acting upon a recommendation from the Returnable Plastic Container Task Force, unanimously recommended that the Euro five down RPC be added to the list of standard containers and have a net weight of 31 pounds, which is to be printed on the end of the container.

*Nectarines:* For the reasons stated above, the redesignation of paragraph (a)(4) of § 916.350 as paragraph (a)(5), and the addition of a new paragraph (a)(4) of § 916.350 continues in effect to require all containers of nectarines to be marked with the name and address of the shipper. The markings shall be placed on one outside end of the container in plain sight and in plain letters. The redesignation of paragraphs (a)(5) and (a)(6) as paragraphs (a)(6) and (a)(7), and the addition of a new paragraph (a)(8) continues in effect the establishment of a 31-pound net weight for the Euro five down RPC. The net weight shall be marked on one outside

end in plain sight and plain letters. The redesignation of paragraphs (a)(7), (a)(8), and (a)(9) as paragraphs (a)(9), (a)(10) and (a)(11) also continues in effect. In a conforming change, the redesignation of paragraph (a)(4) to paragraph (a)(5) continues in effect the correction of the reference to paragraph (a)(4)(i) in former paragraph (a)(4)(ii), which currently reads "(a)(5)(i)."

*Peaches:* For the reasons stated above, the redesignation of paragraph (a)(4) of § 917.442 as paragraph (a)(5) continues in effect, and the addition of a new paragraph (a)(4) of § 917.442 continues in effect to require all containers of peaches to be marked with the name and address of the shipper. The markings shall appear on one outside end of the container in plain sight and plain letters. The redesignation of paragraphs (a)(5), (a)(6), and (a)(7) as paragraphs (a)(6), (a)(7), and (a)(8) also continues in effect. New paragraph (a)(9) continues in effect the establishment of a net weight of 31-pounds for the Euro five down RPC. The net weight shall appear on one outside end of the container in plain sight and plain letters. The redesignation of paragraphs (a)(8), (a)(9), and (a)(10) as paragraphs (a)(10), (a)(11), and (a)(12) similarly continue in effect. In a conforming change, the redesignation of paragraph (a)(4) to paragraph (a)(5) continues in effect the correction of the reference to paragraph (a)(4)(i) in former paragraph (a)(4)(ii), which currently reads "(a)(5)(i)."

In addition, the revision of paragraph (b) of §§ 916.350 and 917.442 continues in effect to add the Euro five down container to the list of standard containers. The California Department of Food and Agriculture is expected to assign this container a number, like the 22D or 32 nectarine and peach containers, once the container is added to the California Agricultural Code. At that time, the common name currently used, Euro five down, will be replaced by the assigned number.

#### **Weight-Count Standards for Peaches**

Under the requirements of § 917.41 of the order, containers of peaches are required to meet weight-count standards for a maximum number of peaches in a 16-pound sample when such peaches, which may be packed in tray-packed containers, are converted to volume-filled containers. Under § 917.442 of the order's rules and regulations, weight-count standards are established for all varieties of peaches as TABLES 1 and 2 of paragraph (a)(5)(iv).

According to the PCC, the Peento varieties of peaches have traditionally been packed in trays because they have

been marketed as a premium variety, which justified the added packing costs.

However, as the volume has increased, the value of the variety has diminished in the marketplace, and some handlers converted their tray-packed containers of Peento varieties to volume-filled containers. Originally, weight-count standards were established for round peaches and nectarines. Peento type peaches are shaped like donuts, and those weight-count standards are inappropriate. In an effort to standardize the conversion from tray-packing to volume-filling for Peento type peaches, the committee staff conducted weigh-count surveys during the 2001 season to determine the most optimum weight-counts for the varieties at varying fruit sizes.

As a result, the staff prepared a new weight-count table applicable to only the Peento varieties. The Grade and Size Subcommittee reviewed the weight-counts at their November 15, 2001, meeting and recommended to the PCC that they be implemented for the 2002 season.

The committee staff will continue to conduct further weight-count surveys to ensure that the Peento varieties, which are packed in volume-filled containers, meet the weight-count standards established for tray-packed fruit.

For those reasons, the addition of a new Table 3 to paragraph (a)(5)(iv) of § 917.442, following Tables 1 and 2 continues in effect. The revised titles of the Tables 1 and 2 continue in effect by adding the words "(except Peento variety peaches)" between the words "peaches" and "packed."

In addition, a correction was published in the **Federal Register** on May 29, 2002 (67 FR 37319), to exempt Peento type peaches from the weight-count standards for round varieties of peaches, given that such weight counts are not applicable to Peento type peaches. This language ensures that the newly-developed standards outlined in Table 3 of paragraph (a)(5)(iv) are the sole basis for the weight-count sampling of Peento type peaches. This rule also continues in effect that correction.

#### **Grade and Quality Requirements**

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 required nectarines to meet a modified U.S. No. 1 grade. Specifically, nectarines were required to meet U.S. No. 1 grade requirements, except for a slightly tighter requirement for scarring and a more liberal allowance for misshapen fruit. Prior to the 1996

season, § 917.459 required peaches to meet the requirements of a U.S. No. 1 grade, except for a more liberal allowance for open sutures that were not "serious damage."

This rule continues in effect the revisions to §§ 916.350, 916.356, 917.442, and 917.459 to permit shipments of nectarines and peaches meeting "CA Utility" quality requirements during the 2002 season. ("CA Utility" fruit is lower in quality than that meeting the modified U.S. No. 1 grade requirements.) Shipments of nectarines and peaches meeting "CA Utility" quality requirements have been permitted each season since 1996.

Studies conducted by the NAC and PCC in 1996 indicated that some consumers, retailers, and foreign importers found the lower-quality fruit acceptable in some markets. When shipments of "CA Utility" nectarines were first permitted in 1996, they represented 1.1 percent of all nectarine shipments, or approximately 210,000 containers. Shipments of "CA Utility" nectarines reached a high of 5 percent (1,131,000 containers) during the 2001 season, but usually represent approximately 4 percent of total nectarine shipments. Shipments of "CA Utility" peaches totaled 1.9 percent of all peach shipments, or approximately 366,000 containers, during the 1996 season. Shipments of "CA Utility" peaches reached a high of 5 percent of all peach shipments (1,031,000 containers) during the 2001 season, but usually represent approximately 4 percent of total peach shipments.

Handlers have also commented that the availability of "CA Utility" lends flexibility to their packing operations. They have noted that they now have the opportunity to remove marginal nectarines and peaches from their U.S. No. 1 containers and place this fruit in containers of "CA Utility." This flexibility, the handlers note, results in better quality U.S. No. 1 packs without sacrificing fruit.

The Grade and Size Subcommittee met on November 15 and did not make a recommendation to the NAC and PCC to continue shipments of "CA Utility" quality nectarines and peaches. Several subcommittee members raised a number of concerns about "CA Utility" quality fruit, including that the fruit is not reaching its intended low income consumer markets and that there are reduced returns to growers on "CA Utility" quality fruit. The authorized tolerance of 40 percent U.S. No. 1 fruit in each container of "CA Utility" quality was raised, and a suggestion was made that the tolerance should be

eliminated so that no U.S. No. 1 fruit would be in a box.

At the full committee meeting, committee staff discussed the benefits of having a "CA Utility" quality for nectarines and peaches. Such benefits included improved quality of packed fruit, improved compliance of marketing order requirements, and increased assessments. Further, elimination of the tolerances for U.S. No. 1 fruit in each container of "CA Utility" quality fruit was discussed. It was noted that this would likely result in higher inspection costs to handlers.

Accordingly, based upon the recommendations, the revisions to paragraph (d) of §§ 916.350 and 917.442, and paragraph (a)(1) of §§ 916.356 and 917.459 continue in effect to permit shipments of nectarines and peaches meeting "CA Utility" quality requirements during the 2002 season, on the same basis as the 2000 and 2001 seasons.

#### Maturity Requirements

In §§ 916.52 and 917.41, authority is provided to establish maturity requirements for nectarines and peaches, respectively. The minimum maturity level currently specified for nectarines and peaches is "mature" as defined in the standards. For most varieties, "well-matured" determinations for nectarines and peaches are made using maturity guides (e.g., color chips). These maturity guides are reviewed each year by the Shipping Point Inspection Service (SPI) to determine whether they need to be changed, based upon the most-recent information available on the individual characteristics of each nectarine and peach variety.

These maturity guides established under the handling regulations of the California tree fruit marketing orders have been codified in the Code of Federal Regulations as TABLE 1 in §§ 916.356 and 917.459, for nectarines and peaches, respectively.

The requirements in the 2002 handling regulations are the same as those that appeared in the 2001 handling regulations with a few exceptions. Those exceptions are explained in this rule.

*Nectarines:* Requirements for "well-matured" nectarines are specified in § 916.356 of the order's rules and regulations. This rule continues in effect the revision to TABLE 1 of paragraph (a)(1)(iv) of § 916.356 to add maturity guides for ten varieties of nectarines. Specifically, SPI recommended adding maturity guides for the Fire Sweet, Honey Blaze, Ruby Sweet, September Free, and Spring Sweet varieties to be

regulated at the J maturity guide; and the Flame Glo, Gran Sun, Prima Diamond XIII, Red Jewel, and Spring Ray to be regulated at the L maturity guide.

The NAC recommended these maturity guide requirements based on SPI's continuing review of individual maturity characteristics and identification of the appropriate maturity guide corresponding to the "well-matured" level of maturity for nectarine varieties in production.

*Peaches:* Requirements for "well-matured" peaches are specified in § 917.459 of the order's rules and regulations. This rule continues in effect the revision of TABLE 1 of paragraph (a)(1)(iv) of § 917.459 to add maturity guides for eleven varieties of peaches. Specifically, SPI recommended adding maturity guides for the Spring Delight variety to be regulated at the G maturity guide; the Super Rich variety to be regulated at the H maturity guide; the 60EF32 variety to be regulated at the I maturity guide; the Brittney Lane, Joanna Sweet, Madonna Sun, Morning Lord, Sweet Dream, Sweet Gem, and Sweet Mick varieties to be regulated at the J maturity guide; and the Sprague Last Chance variety to be regulated at the L maturity guide.

In addition, SPI requested that the Sugar Lady variety of peaches be removed from the maturity guide listing in TABLE 1 of paragraph (a)(1)(iv) of § 917.459. This rule continues in effect that removal. According to SPI, white-fleshed peaches and nectarines would be more accurately assessed by other criteria, including cutting the fruit. The committees unanimously recommended such a change at their meetings.

The Joanna Sweet peach variety was also recommended to have a one hundred percent surface color requirement for meeting the assigned color chip rather than the current ninety percent. This recommendation is based upon SPI's experience with the maturity characteristics of this variety.

Thus, the revision of paragraph (a)(1)(iv) of § 917.459 to reflect this requirement continues in effect.

The PCC recommended these maturity guide requirements based on SPI's continuing review of individual maturity characteristics and identification of the appropriate maturity guide corresponding to the "well-matured" level of maturity for peach varieties in production.

*Size Requirements:* Both orders provide (in §§ 916.52 and 917.41) authority to establish size requirements. Size regulations encourage producers to leave fruit on the tree longer, which improves both size and maturity of the

fruit. Acceptable fruit size provides greater consumer satisfaction and promotes repeat purchases; and, therefore, increases returns to producers and handlers. In addition, increased fruit size results in increased numbers of packed containers of nectarines and peaches per acre, also a benefit to producers and handlers.

Varieties recommended for specific size regulations have been reviewed and such recommendations are based on the specific characteristics of each variety. The NAC and PCC conduct studies each season on the range of sizes attained by the regulated varieties and those varieties with the potential to become regulated, and determine whether revisions and additions to the size requirements are appropriate.

*Nectarines:* Section 916.356 of the order's rules and regulations specifies minimum size requirements for fresh nectarines in paragraphs (a)(2) through (a)(9). This rule continues in effect the revision to § 916.356 establishing variety-specific minimum size requirements for 13 varieties of nectarines, which were produced in commercially-significant quantities of more than 10,000 containers for the first time during the 2001 season. This rule also continues in effect the removal of the variety-specific minimum size requirements for 3 varieties of nectarines whose shipments fell below 5,000 containers during the 2001 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Arctic Ice variety of nectarines, recommended for regulation at a minimum size 80. Studies of the size ranges attained by the Arctic Ice variety revealed that 100 percent of the containers met the minimum size of 80 during the 2001 season. Sizes ranged from size 30 to size 80, with 3 percent of the packages in the 30 sizes, 47 percent of the packages in the 40 sizes, 41 percent of the packages in the 50 sizes, 5.4 percent in the 60 sizes, 3.5 percent in the 70 sizes, and .2 percent at size 80. Due to rounding, these numbers add up to slightly more than 100 percent.

A review of other varieties with the same harvesting period indicated that the Arctic Ice variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to handle the variety confirm this information regarding minimum size and harvesting period, as well. Thus, the recommendation to place the Arctic Ice variety in the variety-specific minimum

size regulation at a minimum size 80 is appropriate.

Historical data such as this provides the NAC with the information necessary to recommend the appropriate sizes at which to regulate various nectarine varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at both NAC and subcommittee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, the revision of the introductory text of paragraph (a)(4) of § 916.356 to include the Prima Diamond VI and the Prince Jim 1 nectarine varieties continues in effect; and the revision of the introductory text of paragraph (a)(6) of § 916.356 to include the Arctic Ice, Bright Sweet, Grand Sweet, June Lion, Kay Pearl, Prima Diamond XXVIII, Regal Red, September Bright (26P-490), Summer Jewel, Sun Valley Sweet, and Sweet White nectarine varieties continues in effect.

This rule also continues in effect the revision of the introductory text of paragraphs (a)(4) and (a)(6) of § 916.356 to remove 3 varieties from the variety-specific minimum size requirements specified in these paragraphs because less than 5,000 containers of each of these varieties were produced during the 2001 season. Specifically, the revision of the introductory text of paragraph (a)(4) of § 916.356 to remove the Arctic Glo nectarine variety continues in effect; and the revision of the introductory text of paragraph (a)(6) of § 916.356 to remove the Cole Red and Mid Glo nectarine varieties continues in effect.

Nectarine varieties removed from the nectarine variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (a)(7), (a)(8), and (a)(9) of § 916.356.

*Peaches:* Section 917.459 of the order's rules and regulations specifies minimum size requirements for fresh peaches in paragraphs (a)(2) through (a)(6), and paragraphs (b) and (c). This rule continues in effect the revision of § 917.459 establishing variety-specific minimum size requirements for 19 peach varieties that were produced in commercially-significant quantities of more than 10,000 containers for the first time during the 2001 season. This rule also continues in effect the removal of the variety-specific minimum size requirements for 1 variety of peaches

whose shipments fell below 5,000 containers during the 2001 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Bev's Red variety of peaches, which was recommended for regulation at a minimum size 80. Studies of the size ranges attained by the Bev's Red variety revealed that 100 percent of the containers met the minimum size of 80 during the 2001 season. The sizes ranged from the 30 sizes to the 80 sizes, with 3.4 percent of the containers meeting the 30 sizes, 15.9 percent meeting the 40 sizes, 53.8 percent meeting the 50 sizes, 20.4 percent meeting the 60 sizes, 5.5 percent meeting the 70 sizes, and 1.1 percent meeting the size 80.

A review of other varieties with the same harvesting period indicated that the Bev's Red variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to handle the variety confirm this information regarding minimum size and harvesting period, as well. Thus, the recommendation to place the Bev's Red variety in the variety-specific minimum size regulation at a minimum size 80 is appropriate.

Historical data such as this provides the PCC with the information necessary to recommend the appropriate sizes at which to regulate various peach varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at both PCC and subcommittee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, the revision of the introductory text of paragraph (a)(2) of § 917.459 to include the 91002 peach variety continues in effect; the revision of the introductory text of paragraph (a)(3) of § 917.459 to include the Snow Kist peach variety continues in effect; the revision of the introductory text of paragraph (a)(5) of § 917.459 to include the Bev's Red, May Sweet, and Sunlit Snow (172LE81) peach varieties continues in effect; and the revision of the introductory text of paragraph (a)(6) of § 917.459 to include the Flaming Dragon, Jillie White, Joanna Sweet, July Flame, Prima Peach XXV, Prima Peach XXVII, Princess Gayle, Red Sun, September Flame, Snow Fall, Snow Gem, Spring Gem, Sweet Gem, and 24-SB peach varieties continues in effect.

This rule also continues in effect the revision of the introductory text of

paragraph (a)(6) of § 917.459 removing the Carnival peach variety from the variety-specific minimum size requirements specified in the section because less than 5,000 containers of this variety were produced during the 2001 season.

Peach varieties removed from the peach variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (b) and (c) § 917.459.

This rule also continues in effect the correction of the spelling of the peach variety "Brittney Lane," incorrectly spelled as "Brittany Lane" in paragraph (a)(5) of § 917.459.

The NAC and PCC recommended these changes in the minimum size requirements based on a continuing review of the sizing and maturity relationships for these nectarine and peach varieties, and the consumer acceptance levels for various fruit sizes. This rule continues in effect the established minimum size requirements for fresh nectarines and peaches consistent with expected crop and market conditions.

This rule reflects the committees' and USDA's appraisal of the need to revise the handling requirements for California nectarines and peaches, as specified. USDA believes that this rule will have a beneficial impact on producers, handlers, and consumers of fresh California nectarines and peaches.

This rule continues in effect the establishment of handling requirements for fresh California nectarines and peaches consistent with expected crop and market conditions, and will help ensure that all shipments of these fruits made each season will meet acceptable handling requirements established under each of these orders. This rule will also help the California nectarine and peach industries provide fruit desired by consumers. This rule continues in effect the establishment and maintenance of orderly marketing conditions for these fruits in the interests of producers, handlers, and consumers.

#### 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.

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 include handlers, are defined by the Small Business Administration [13 CFR 121.201] as those whose annual receipts are less than \$5,000,000. Small agricultural producers are defined by the Small Business Administration as those having annual receipts of less than \$750,000. A majority of these handlers 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 2001 season, the average handler price received was \$9.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 556,000 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 2001 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 more than 80 percent of the producers in the industry could be defined as small entities. In the 2001 season, the average producer price received was \$5.50 per container or container equivalent for nectarines, and \$5.25 per container or container equivalent for peaches. A producer would have to produce at least 136,364 containers of nectarines and 142,858 containers of peaches to have annual receipts of \$750,000. Given data maintained by the committees' staff and the average producer price received during the 2001 season, the committees' staff estimates that small producers represent more than 80 percent of the producers within the industry.

Under §§ 916.52 and 917.41 of the orders, grade, size, maturity, container, container marking, and pack 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 November 29, 2001, and

unanimously recommended that these handling requirements be revised for the 2002 season. These recommendations had been presented to the committees by various subcommittees, each charged with review and discussion of the changes. The changes: (1) Continue the lot stamping requirements which were in effect for the 2000 and 2001 seasons; (2) authorize shipments of "CA Utility" quality fruit to continue during the 2002 season; (3) establish weight-count standards for Peento type peaches; (4) require shippers' names and addresses on all containers; (5) add the Euro five-down returnable plastic container as a standard container, establish a net weight for that container, and exempt that container from the "well-filled" requirement; and (6) revise varietal maturity, quality, and size requirements to reflect changes in growing and marketing practices. These changes continue in effect.

This rule continues in effect the authority for the continuation of the lot stamping requirements for returnable plastic containers under the marketing orders' rules and regulations that were in effect for such containers during the 2001 season for nectarine and peach shipments. The modified requirements of §§ 916.115 and 917.150 mandated that the lot stamp numbers be printed on a USDA-approved pallet tag, in addition to the requirement that the lot stamp number be applied to cards on all exposed or outside containers, and not less than 75 percent of the total containers on a pallet. Continuation of such requirements for the 2002 season would help the inspection service safeguard the identity of inspected and certified containers of nectarines and peaches, and would help the industry by keeping in place the information necessary to facilitate their "trace-back" program.

The Returnable Plastic Container Task Force and Grade and Size Subcommittee met on November 15, 2001, and considered possible alternatives to this action. Other alternatives were rejected because it was determined that given the different styles and configurations of RPCs available, having a standardized display panel or a satisfactory adhesive for placement of the cards may not be realistic, at least for the time being.

For those reasons, the task force recommended to the committees, and the committees voted unanimously, to extend the requirement for the lot stamp number to be printed on the cards on each container and for each pallet to be marked with a USDA-approved pallet tag, also containing the lot stamp number. Such safeguards were put in place to ensure that all the containers on

each pallet had been inspected and certified in the event a card on an individual container or containers was removed, misplaced, or lost.

The Returnable Plastic Container Task Force met on November 15 to discuss issues relating to RPCs. At that time, they discussed volume filling of RPCs and its ramifications, specifically of the Euro five down container. They noted that RPCs are favored by many retailers and demanded by others, and that this particular container has become a standard container within the industry. In an effort to meet the demands and preferences for their customers, the Euro five down container has been used in increasing numbers in recent years. However, they noted, to maintain efficient packing operations, some container requirements needed to be reviewed, especially the requirement that all volume-filled RPC containers must be well filled. While the well-filled requirement may work for traditional boxes, the requirement may increase the amount of damage to fruit in RPCs or make the containers unwieldy and heavy. The task force considered leaving the requirement in place. However, given the potential for increased utilization of RPCs, and this container in particular, and the need to provide a quality product to customers, the alternative was rejected.

The Grade and Size Subcommittee met on November 15, 2001, to discuss container-marking requirements, among other things. At that time, it was noted by staff that not all containers are required to have the shipper's name and address printed on them. The subcommittee voted unanimously to recommend to the NAC and PCC that marking requirements be changed to require the shipper's name and address be placed on all containers.

Sections 916.350 and 917.442 establish certain requirements for marking containers of nectarines and peaches, respectively. This rule continues in effect provisions requiring all containers of nectarines and peaches to be marked with the name and address of the shipper. Previously, consumer packages of these fruits mailed directly to consumers did not have to be marked with that information.

Requiring the handler to print his or her name and address on each container will ensure that all boxes are properly identified for handler responsibility. Such proper identification will also assist the industry's trace back program by providing additional information for beginning the trace.

In addition, the Returnable Plastic Container Task Force also deliberated the issue of making the Euro five down

container a standard container and recommending a net weight for that container. It has been the practice of the committees to study the trends in containers used by the industry. Traditionally, corrugated containers have been the shippers' container of choice. However, in recent years, the growth of RPCs has increased dramatically. In keeping with that practice, the Task Force determined that the Euro five down container has become an industry standard and may continue to be used by greater numbers of shippers. As such, any other alternative would not be viable.

Coupled with the recommendation to add the Euro five down container to the list of standard containers is the need to recommend an applicable net weight for the container. Assigning an appropriate net weight would foreclose other alternatives.

In 1996, §§ 916.350 and 917.442 were revised to permit shipments of "CA Utility" quality nectarines and peaches as an experiment during the 1996 season only. Such shipments have subsequently been permitted each season. Since 1996, shipments of "CA Utility" have ranged from 1 to 5 percent of total nectarine and peach shipments. This rule continues in effect the authority for continued shipments of "CA Utility" quality nectarines and peaches during the 2002 season.

The Grade and Size Subcommittee met on November 15, 2001, and considered one alternative to this action. They considered not authorizing continued shipments of "CA Utility" quality nectarines and peaches. The subcommittee, ultimately, did not make a recommendation to the NAC and PCC on continued shipments of "CA Utility" quality nectarines and peaches.

However, the NAC and PCC unanimously recommended implementation of the authority for continued shipments of "CA Utility" quality nectarines and peaches at their November 29, 2001, meeting. The committees voted to continue all requirements that were in effect at that time, and then individually discussed any proposed changes, such as grade and size changes. There was discussion regarding shipments of "CA Utility" quality nectarines and peaches, based upon information from the Grade and Size Subcommittee, but the committees voted to continue such shipments along with all other requirements in effect at that time.

Sections 916.350 and 917.442 establish container, pack, and marking requirements for shipments of nectarines and peaches, respectively. This rule continues in effect the changes

to the pack and container marking requirements of the order's rules and regulations to exempt RPCs from the well-filled requirement and add the requirement that all types of containers be marked with the shipper's name and address.

Section 917.442 also establishes minimum weight-count standards for containers of peaches. Under these requirements, containers of peaches are required to meet weight-count standards for a maximum number of peaches in a 16-pound sample when such peaches are packed in a tray-packed container. That same maximum number of peaches is also applicable to volume-filled containers, based upon the tray-packed standard. In other words, the weight-count standard is developed so handlers may convert tray-packed peaches to volume-filled containers and be assured that the fruit in the volume-filled container will meet the maximum number of peaches in the 16-pound sample.

When the Grade and Size Subcommittee met on November 15, 2001, they discussed the recent changes in the packing and marketing of Peento type peaches. When these varieties were first introduced and marketed, they were generally tray-packed because they were a novel and premium product. As production has increased, the value of the varieties has diminished in the marketplace, and some handlers have converted their tray-packed containers of Peento varieties to volume-filled containers.

The staff conducted weight-count studies during the 2001 season so that weight-count standards could be developed, thus ensuring that all handlers are packing a standard maximum number of peaches in a 16-pound sample. Since weight-count standards provide a basis for volume filling of containers of other varieties of peaches, the subcommittee recommended that the NAC and PCC establish such standards for these unique varieties.

Sections 916.356 and 917.459 establish minimum maturity levels. This rule continues in effect the annual adjustments to the maturity requirements for several varieties of nectarines and peaches. Maturity requirements are based on maturity measurements generally using maturity guides (e.g., color chips), as recommended by Shipping Point Inspection. Such maturity guides are reviewed annually by SPI to determine the appropriate guide for each nectarine and peach variety. These annual adjustments reflect changes in the maturity characteristics of nectarines

and peaches as experienced over the previous season's inspections. Adjustments in the guides ensure that fruit has met an acceptable level of maturity, ensuring consumer satisfaction while benefiting nectarine and peach producers and handlers.

In § 916.356 of the nectarine order's rules and regulations, and in § 917.459 of the peach order's rules and regulations, minimum sizes for various varieties of nectarines and peaches, respectively, are established. This rule continues in effect the adjustments to the minimum sizes authorized for various varieties of nectarines and peaches for the 2002 season. Minimum size regulations are put in place to encourage producers to leave fruit on the trees for a longer period of time. This increased growing time not only improves maturity, but also increases fruit size. Increased fruit size increases the number of packed containers per acre; and coupled with heightened maturity levels, also provides greater consumer satisfaction, fostering repeat purchases. Such improved consumer satisfaction and repeat purchases benefit both producers and handlers alike. Annual adjustments to minimum sizes of nectarines and peaches, such as these, are recommended by the NAC and PCC based upon historical data, producer and handler information regarding sizes attained by different varieties, and trends in consumer purchases.

An alternative to such action would include not establishing minimum size regulations for these new varieties. Such an action, however, would be a significant departure from the committees' practices and represent a significant change in the regulations as they currently exist, would ultimately increase the amount of less acceptable fruit being marketed to consumers, and, thus, would be contrary to the long-term interests of producers, handlers, and consumers. For these reasons, this alternative was not recommended.

The committees made recommendations regarding all the revisions in handling and lot stamping requirements after considering all available information, including comments of persons at several subcommittee meetings and comments received by committee staff. Such subcommittees include the Grade and Size Subcommittee, the Inspection and Compliance Subcommittee, the Returnable Plastic Container Task Force, and the Management Services Committee.

At the meetings, the impact of and alternatives to these recommendations were deliberated. These subcommittees

and the task force, like the committees themselves, frequently consist of individual producers (and handlers, where authorized) with many years' experience in the industry who are familiar with industry practices. Like all committee meetings, subcommittee meetings are open to the public and comments are widely solicited. In the case of the Returnable Plastic Container Task Force, RPC manufacturers also were invited, as well as those handlers currently using such boxes. Information from these sources assists the committees, subcommittees, and the task force in thoroughly examining and deliberating the issues that affect the entire industry in a public setting.

This rule 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 addition, as noted in the final regulatory flexibility analysis, USDA 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 CFR 1621 *et seq.*). Standards issued under the Agricultural Marketing Act of 1946 are otherwise voluntary.

Further, the committees' meetings are widely publicized through the nectarine and peach industries and all interested parties are encouraged to attend and participate in committee deliberations on all issues. These meetings are held annually during the last week of November or first week of December. Like all committee meetings, the November 29, 2001, meetings were public meetings, and all entities, large and small, were encouraged to express views on these issues.

Also, various subcommittee meetings were held on November 15, 2001, and these regulations were reviewed and discussed publicly at that time.

An interim final rule concerning this action was published in the **Federal Register** on April 5, 2002 (67 FR 16286), and a correction was published in the **Federal Register** on May 29, 2002 (67 FR 37319). Copies of a summary of the rules were provided to all handlers upon publication of the interim final rule. In addition, the rules were made available through the Internet by the Office of the Federal Register and USDA and interested persons were invited to

submit information on the regulatory and informational impacts of these actions on small businesses. The interim final rule provided a 60-day comment period, which ended on June 4, 2002. Twelve comments were received; eleven opposed the continuation of "CA Utility" quality nectarines and peaches, and one requested clarification of the regulations regarding "Peento type peaches."

One commenter contended that continuation of the authority to ship "CA Utility" quality nectarines and peaches in its current form would be costly to growers. The commenter believes that allowing up to 40 percent U.S. No. 1 fruit in a box of "CA Utility" quality nectarines and peaches reduces returns to growers because the higher quality U.S. No. 1 fruit is sold for lower "CA Utility" prices. He favored allowing only 8 percent U.S. No. 1 fruit in "CA Utility" packages. However, the committees have discussed changing the percentage of U.S. No. 1 nectarines and peaches required in "CA Utility" quality containers, and have consistently recommended allowing 40 percent U.S. No. 1 fruit in each container, because a smaller tolerance, such as 8 percent, is more difficult for the handler to pack, given all the other available tolerances already affecting individual lots and packages.

Several commenters noted, too, that a survey of growers conducted by the committees indicated that 42 percent of the growers favored continuing the authority for "CA Utility" shipments, while 58 percent did not favor continuation. However, as several growers and handlers explained at the Grade and Size Subcommittee meeting, each handler chooses whether to pack and ship "CA Utility" quality nectarines and peaches. Also, growers can choose to request that "CA Utility" quality nectarines and peaches from their own orchards not be packed. Handlers, too, base their decisions on whether or not to pack and ship "CA Utility" quality fruit on market conditions and prices.

Even some growers who opposed continued authority to ship "CA Utility" quality fruit suggested in the survey that it should be available on an emergency or temporary basis, such as in a hail year or a year of short production. In fact, in late May 2002, hail damaged crops in the production area.

Several commenters suggested that "CA Utility" quality nectarines and peaches are merely cull fruit. However, as stated earlier, "CA Utility" quality nectarines and peaches are a modified U.S. No. 1 grade, not culls.

Commenters also contended that since the inception of "CA Utility" quality regulations, the financial condition of growers has worsened. Additionally, some growers at industry meetings have indicated that they have profited by selling their "CA Utility" quality fruit.

In addition, another commenter stated that regulations for "CA Utility" quality fruit have created a large market for uninspected cull fruit through sales to cash buyers and fruit peddlers. However, staff advised the committees at the NAC and PCC meetings in November that the existence of "CA Utility" has actually decreased compliance problems at terminal markets by reducing the need for vendors to sell cull fruit. The availability of the higher-quality "CA Utility" fruit at more favorable prices appears to provide an incentive for vendors in those markets to comply with marketing order requirements. Also, since such sales may displace cull fruit sales, the availability of "CA Utility" quality fruit may actually increase total fruit sales because buyers are not dissatisfied as they might be after purchasing low-quality cull fruit.

In addition, the staff advised that no assessments are collected on cull fruit, while "CA Utility" quality fruit is assessed at the same rate as U.S. No. 1 nectarines and peaches. Also, shipments of "CA Utility" are subject to the "trace-back" program discussed earlier, while cull fruit no longer maintains an identity.

Another commenter suggested that shipments of "CA Utility" quality nectarines and peaches represent four percent of all tree fruit shipments or nearly three million containers. However, only about 2.1 million containers of nectarines and peaches were shipped during 2001 as "CA Utility" and those shipments represented approximately five percent of total nectarine and peach shipments.

An additional commenter suggested that "CA Utility" requirements were created to benefit the handler at the expense of the grower since the handler gets his costs for pre-cooling, packaging, palletizing, etc., before the grower gets a return for each container sold. In 1996, "CA Utility" quality requirements were implemented to provide an outlet for nectarines and peaches that would be acceptable in lower-income markets. As noted earlier, "CA Utility" quality nectarines and peaches are acceptable in some domestic and foreign markets. In fact, a May 17, 2002, newsletter published by the committees recounting marketing activities in international markets quotes a supportive South

American marketing representative. The representative noted that due to initial high prices of California nectarines and peaches, the first arrivals in Colombia and Venezuela are "CA Utility" quality fruit.

Another commenter echoed previous concerns about the percentage of U.S. No. 1 grade fruit required in containers of "CA Utility" quality nectarines and peaches. The commenter suggested that if a market exists for lower-quality fruit, U.S. No. 1 fruit should not be packed with the lower-quality fruit. However, it is not practical to completely separate U.S. No. 1 fruit from "CA Utility" quality fruit.

Yet another commenter suggested that the committees are composed of handlers or their employees who do not care about the plight of the growers. However, § 916.20 requires nectarine committee members to be growers or employees of growers. In the case of peaches, growers are similarly situated in terms of committee membership.

Accordingly, no changes to the "CA Utility" quality requirements will be made based upon the comments received.

A final commenter noted that references to "Peento (Donut) peaches" should be corrected to read "Peento type peaches" since the term "Donut" has been patented by a broker. He also suggested exempting all Peento type peaches from the weight-count standards applicable to round varieties of peaches. In the correction published in the **Federal Register** on May 29, 2002 (67 FR 37319), the exemption from weight counts was applied to size 72 peaches regulated under § 917.459(a)(6)(iii) only. However, Peento type peaches regulated under sizes 96, 88, 84, and 80 should be similarly exempt from the weight counts applicable to round varieties of peaches. This is consistent with the committees' intent to provide a separate weight-count table applicable only to Peento type peaches, which continues in effect as a result of the interim final rule.

The commenter also noted that references to the "Earli Rich" peach variety should be corrected to read "Earlirich," consistent with the patented name recently acquired by the nursery that handles the rootstock for the variety.

Accordingly, changes will be made to the interim final rule, based on this comment received.

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 comments received, including the committees' recommendation and other information, it is found that finalizing the interim final rule, with changes, as published in the **Federal Register** (67 FR 16286, April 5, 2002), and the correction, as published in the **Federal Register** (67 FR 37319, May 29, 2002) 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.

Accordingly, the interim final rule amending 7 CFR parts 916 and 917, which was published at 67 FR 16286 on April 5, 2002, is adopted as a final rule with the following changes:

#### PART 917—PEACHES GROWN IN CALIFORNIA

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

**Authority:** 7 U.S.C. 601–674.

##### § 917.442 [Amended]

2. In § 917.442, paragraph (a)(5)(iv), the table headings for Tables 1 and 2 are amended by removing the words "(Donut) Varieties" and adding the words "Type Peaches" in their place;

3. In § 917.442, paragraph (a)(5)(iv), the heading for Table 3 is amended by removing the words "(Donut) Varieties of" and adding the word "Type" in their place;

##### § 917.459 [Amended]

4. In § 917.459, Table 1 of paragraph (a)(1)(iv) is amended by revising the words "Earli Rich" to read "Earlirich"

5. In § 917.459, paragraph (a)(2)(ii) is amended by adding the words "except for Peento type peaches" after the words "96 peaches"

6. In § 917.459, paragraph (a)(3)(ii) is amended by adding the words "except for Peento type peaches" after the words "92 peaches"

7. In § 917.459, paragraph (a)(4)(iii) is amended by adding the words "except for Peento type peaches" after the words "83 peaches"

8. In § 917.459, paragraph (a)(5)(iii) is amended by adding the words "except for Peento type peaches" after the words "76 peaches"

9. In § 917.459, paragraph (a)(6) is amended by revising the words "Earli Rich" to read "Earlirich;" and

10. In § 917.459, paragraph (a)(6)(iii) is amended by removing the words "(Donut) Varieties of" and adding the word "Type" in their place.

Dated: August 8, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 02-20684 Filed 8-14-02; 8:45 am]

**BILLING CODE 3410-02-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 967

[Docket No. FV98-967-1 FR]

#### **Celery Grown in Florida; Termination of Marketing Order No. 967**

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

**ACTION:** Final rule.

**SUMMARY:** This rule terminates the Federal marketing order regulating the handling of celery grown in Florida (order) and the rules and regulations issued thereunder. The Florida celery industry has not operated under the order since its provisions were suspended January 12, 1995. The celery industry has experienced a loss of market share; a significant reduction in the number of producers and handlers has diminished the need for regulating Florida celery; and there is no industry support for reactivating the order. Therefore, there is no need to continue this order.

**EFFECTIVE DATE:** September 16, 2002.

**FOR FURTHER INFORMATION CONTACT:** Doris Jamieson, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 799 Overlook Drive, Suite A, Winter Haven, Florida 33884; telephone (863) 324-3375, Fax: (863) 325-8793; or Anne M. Dec, 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 final rule is issued under the provisions of section 8(16)(A) of 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 final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This 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 8c(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 final rule terminates the order covering celery grown in Florida.

The order was initially established in 1965 to help the Florida celery industry solve specific marketing problems and maintain orderly marketing conditions. It was the responsibility of the Florida Celery Committee (committee), the agency established for local administration of the marketing order, to periodically investigate and assemble data on the growing, harvesting, shipping, and marketing conditions of Florida celery. The committee tried to achieve orderly marketing and improve acceptance of Florida celery through the establishment of volume regulations and promotion activities.

The Florida celery industry has not operated under the marketing order for a number of years. The order and all of

its accompanying rules and regulations were suspended on January 12, 1995 (60 FR 2873). Regulations have not been applied under the order since that time, and no committee has been appointed since then.

In 1965, when the marketing order was issued, there were over 40 producers of Florida celery. The earliest handling figures available indicate that in 1983 there were 11 handlers. As of the date of suspension of the order (January 12, 1995), there were six handlers of Florida celery who were subject to regulation under the marketing order and five celery producers within the production area. Currently, there is one producer who is also a handler.

When the order was suspended, all of the committee members and their alternates were named as trustees to oversee the administrative affairs of the order. USDA contacted as many of these trustees as it could with respect to the need for reinstating the marketing order. All of the individuals contacted (10 of the 18 trustees) were in favor of terminating the order.

#### **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.

There is one handler of Florida celery who would be subject to regulation under the marketing order. This handler is also a producer within the production area. Small agricultural service firms have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. The Florida celery producer-handler may be classified as a small entity.

This final rule terminates the order regulating the handling of celery grown in Florida. The order and its accompanying rules and regulations were suspended on January 12, 1995.