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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV03-916-2 IFR-A]

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

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule amends a prior interim final rule that revised the handling requirements for California nectarines and peaches beginning with 2003 season shipments. This amended rule revises the minimum net weight for five down Euro containers, exempts Peento type peaches from all weight-count standards applicable to round varieties, and clarifies the provisions on the use of variety names. 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 amended rule would enable handlers to continue shipping fresh nectarines and peaches meeting consumer needs in the interests of producers, handlers, and consumers of these fruits.

DATES: Effective August 14, 2003. Comments received by September 12, 2003 will be considered prior to issuance of any final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or E-mail:

moab.docketclerk@usda.gov. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection at the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

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*.

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

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

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under

section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule 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.

This rule amends an interim final rule published in the **Federal Register** on April 9, 2003 (68 FR 17257). That rule, which was based on a unanimous recommendation from the committees made at meetings on December 3, 2002, changed the handling requirements under the orders by establishing a 31-pound minimum net weight for all five down Euro containers used by the industry, among other changes.

This amended interim final rule is based upon recommendations from the Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC) at meetings on May 1, 2003. The vote on the recommendation by the NAC was 7 to 1 and the vote on the recommendation by the PCC was unanimous. This amended interim final rule also incorporates changes requested on May 27, 2003, by a commenter on the previous interim final rule.

This amended rule revises the net weight for five down Euro containers as recommended by the NAC and PCC. In response to the comment received, this rule also exempts Peento type peaches from all round peach weight-count standards. In addition, this rule clarifies the provisions regarding how packages or containers must be marked with the name of the variety if known, and "unknown variety" when the variety is not known. This clarification is based on recommendations of the NAC and

PCC, although their recommendations that the term "variety" be defined is not adopted because this change should be implemented following notice and comment rule making procedures.

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, such as the May 1, 2003 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.

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 §§ 916.350 and 917.442 of the orders, the specifications of container markings, net weights, well-filled requirements, weight-count standards for various sizes of nectarines and peaches, and lists of standard containers are provided.

The committees recommended that a revised minimum net weight be established for all "five down" boxes (commonly referred to as "Euro" boxes) that are volume-filled. Currently, the minimum net weight requirement for "five down" boxes is 31 pounds, as established by the prior interim final rule. The committees have now recommended that the minimum net weight for five down containers be revised to include a 29-pound net weight for five down containers for the 2003 season only.

"Five down" boxes are containers that lay in a pattern of five containers per layer on each pallet. In other words, each layer of boxes on a pallet contains only five Euro boxes. Other container sizes and "footprints" may result in nine boxes per layer, etc.

The committees met on May 1, 2003 and recommended that the current net weights for five down Euro containers be revised to include both a 29-pound box and a 31-pound box. The 29-pound box will be permitted for the 2003 season only, after which time the Grade and Size Subcommittee will review the results from the season and make a recommendation to establish either a 29-pound box or a 31-pound box or other appropriate weight.

Containers used in the nectarine and peach industry have largely resulted from retailer demands. Many retailers want all of their suppliers to provide them with commodities in containers of the same footprint (length and width dimensions), thereby creating consistency and ease of transportation, storage, etc., for the retailer. Euro containers meet those demands, but require the industry to make changes in pack styles and package weights to conform to the evolving demands of the retail sector.

This recommendation resulted from a request by a handler who wanted to respond to a demand from one of his larger retail customers. The customer wanted volume-filled containers of nectarines and peaches of the same weight as tray-packed containers, which currently weigh 29 pounds.

At the meeting, the handler advised the committees that the current minimum net weight of 31 pounds for volume-filled Euro containers is not flexible enough to afford him the opportunity to meet the demands of his buyer.

Nectarines: For the reasons stated above, paragraph (a)(8) of § 916.350 is revised to include a 29-pound net weight for all volume-filled, five down Euro containers of nectarines, in addition to the current 31 pounds. The 29-pound container will be permitted during the 2003 season only. At the end of the 2003 season, the committees will recommend either a 29-pound, 31-pound container, or other appropriate weight. The container markings shall be placed on one outside end of the container in plain sight and in plain letters.

Peaches: For the reasons stated above, paragraph (a)(9) of § 917.442 is revised to include a 29-pound net weight for all volume-filled, five down Euro containers of peaches, in addition to the current 31 pounds. The 29-pound container will be permitted during the 2003 season only. At the end of the 2003 season, the committees will recommend either a 29-pound, 31-pound container, or other appropriate weight. The markings shall be placed on one outside end of the container in plain sight and in plain letters.

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, 2, and 3 of paragraph (a)(5)(iv).

According to the PCC, the Peento type peaches were initially packed in trays because they were marketed as a premium variety, whose value justified the added packing costs. However, as the volume has increased, the value of this peach has diminished in the marketplace, and some handlers converted their tray-packed containers of Peento type peaches to volume-filled containers.

Prior to the 2002 season, weight-count standards established for peaches and nectarines were developed solely for round fruit. Peento type peaches are shaped like donuts, and weight-count standards for round fruit were inappropriate. In an effort to standardize the conversion from tray-packed containers to volume-filled containers for Peento type peaches, the committee staff conducted weigh-count surveys to determine the most optimum weight-counts for the varieties at varying fruit sizes.

As a result of those surveys, a new weight-count table applicable to only the Peento type peaches was added for the 2002 season and amended for the 2003 season. The new weight-count tables accommodate very large Peento type peaches that were not previously converted from tray-packs to volume-filled containers, but were being packed in volume-filled containers and required weight-count standards specifically for those sizes.

However, Peento peaches, which are subject to weight-count standards in TABLE 3 of paragraph (a)(5)(iv) in § 917.442, were not exempted from weight-count standards in the non-listed variety size requirements specified in paragraphs (b)(3) and (c)(3) of § 917.459, according to the commenter. This was an inadvertent omission in the previous interim final rule and requires this conforming change in this amended interim final rule. Therefore, the words "except for Peento type peaches" will be added at the end of paragraphs (b)(3) and (c)(3) of § 917.459.

Variety Nomenclature

In §§ 916.350 and 917.442 of the orders' rules and regulations, specifications of container markings, net weights, well-filled requirements, weight-count standards for various sizes of fruit, and lists of standard containers are provided.

In §§ 916.356 and 917.459 of the orders' rules and regulations, specifications of grade, maturity, and size regulations for nectarines and peaches, respectively, are provided for

each variety by the variety's name. These variety-specific requirements are applied based upon the name of the variety, the size each variety is known to attain, the appropriate maturity guide (e.g., color chip) for the variety, and the historic harvest period specific to each named variety.

In §§ 916.60 and 917.50, handlers are required to report on shipments of nectarines and peaches. Sections 916.160 and 917.178 of the orders' rules and regulations specify the types of reports that handlers must file with the committees. Among the requirements, handlers must report the total shipments of nectarines and peaches by variety by November 15 of each year.

Thus, ensuring that each variety is regulated and reported on using the appropriate name is important to the operation of the nectarine and peach marketing orders.

Some handlers are using trademark names in place of the variety name. Thus, inspection service may not be able to provide appropriate inspection for a variety with an unfamiliar name. Accordingly, paragraphs (a)(2) of §§ 916.350 and 917.442 are amended by adding that a marketing name, trademark or brand name may be associated with the variety name, but cannot be substituted for a variety name.

This amended rule establishes 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 each season meet the handling requirements established under each of these orders. This amended rule will also help the California nectarine and peach industries continue to provide fruit desired by consumers. This amended rule is designed to establish and maintain orderly marketing conditions for these fruit in the interests of producers, handlers, and consumers.

Initial 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 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 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. For the 2002 season, the committees' staff estimated that 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 2002 season, the committees' staff estimates that small handlers represent approximately 94 percent of all the handlers within the industry.

The committees' staff has also estimated that less than 20 percent of the producers in the industry could be defined as other than small entities. For the 2002 season, the committees' staff estimated the average producer price received was \$4.00 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 187,500 containers of nectarines and peaches to have annual receipts of \$750,000. Given data maintained by the committees' staff and the average producer price received during the 2002 season, the committees' staff estimates that small producers represent more than 80 percent of the producers within the industry. With an average producer price of \$4.00 per container or container equivalent, and a combined packout of nectarines and peaches of 45,354,000 containers, the value of the 2002 packout level is estimated to be \$181,416,000. Dividing this total estimated grower revenue figure by the estimated number of producers (1,800) yields an estimate of average revenue per producer of about \$101,000 from the sales of peaches and nectarines.

This rule amends a prior interim final rule that changed the handling

requirements under the orders. The prior interim final rule was published in the **Federal Register** on April 9, 2003 (68 FR 17257). That rule modified §§ 916.115, 916.350, 916.356, 917.150, 917.442, and 917.459, which regulate handling of nectarines and peaches, respectively, under the orders.

In addition, this interim final rule revises the net weight for five down Euro containers, exempts Peento type peaches from all round variety weight-count standards, and clarifies provisions relating to the use of variety names.

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 May 1, 2003, and recommended that these handling requirements be revised for the 2003 season. These recommendations had been presented to the committees by the Stone Fruit Grade and Size Subcommittee, which is charged with review and discussion of such changes.

The Stone Fruit Grade and Size Subcommittee discussed the 31-pound net weight requirement for volume-filled five down Euro containers at its meeting on April 8, 2003. At that time, one handler advised that the current net weight of 31 pounds is not flexible enough to afford him the opportunity to meet the demands of his buyers. The handler noted that one large customer has begun demanding volume-filled boxes of nectarines and peaches in a 29-pound box rather than a 31-pound box, which makes the volume-filled container weight consistent with the tray-packed container weight. The handler added that he was unable to provide what his customer wanted, given that the current requirements limit him to a box with a 31-pound minimum weight. In the absence of change, the handler would be forced to ship 31 pounds to the customer, and risk receiving payment for only the 29 pounds the customer wanted.

The subcommittee agreed that the 31-pound box did not provide enough flexibility for all handlers and unanimously recommended that the minimum 31-pound requirement for volume-filled containers be revised. The alternative would have meant that this handler at least would have been unable to meet the demands of a buyer without pricing considerations. In an effort to enhance each handler's ability to provide what the market demands, such an alternative was unacceptable.

The NAC and PCC discussed the subcommittee's recommendation at their meeting on May 1, 2003. They debated the value of simply making 29 pounds the sole minimum net weight for volume-filled Euro containers, but opted to maintain the 31-pound container and add the 29-pound container for the 2003 season, contingent upon review at the end of the season by the Grade and Size Subcommittee. At that time, the subcommittee is expected to recommend only one net weight for five down, volume-filled Euro containers of nectarines and peaches for the 2004 season.

The NAC voted 7 in favor and one opposed to this recommendation, while the PCC voted unanimously in favor of the recommendation. The NAC member opposed to the recommendation noted that additional box styles are costly to the industry and should be avoided, if possible. However, the large majority of committee members disagreed, opting instead to take steps to be responsive to buyers.

Weight-counts for Peento Type Peaches

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. Those same maximum numbers of peaches are also applicable to volume-filled containers, based upon the tray-packed standard. The weight-count standard was developed so handlers may convert tray-packed peaches to volume-filled containers and be assured that fruit of a specific size in the volume-filled container will be the same as that in the tray-packed container.

When Peento type peach 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 type peaches to volume-filled containers. Weight-count standards provide a basis for volume filling containers of other varieties of peaches. Currently, Peento type peaches are regulated under a new table of weight-count standards applicable to only these uniquely-shaped peaches.

However, due to an inadvertent omission, Peento type peaches were not exempted from the weight-count standards for round peaches in the non-listed (blanket) variety sizes in

paragraph (b)(3) and (c)(3) of § 917.459, as noted by the commenter. Thus, under the rules and regulations in the orders, varieties of Peento type peaches that are not regulated by name would be regulated by date of harvest in the blanket regulations. To correct that omission, the words "except Peento type peaches" will be added to the end of each of those paragraphs, in response to the concerns of the commenter.

The alternative to this conforming change would be to have Peento type peaches in non-listed variety sizes subject to the same weight-count standards assigned to round varieties, treating these Peento type peaches differently than other varieties of Peento type peaches. Clearly, that is not an acceptable alternative, given that these donut-shaped peaches cannot meet the requirements established for round peaches, and require their own weight-count standards.

The Grade and Size Subcommittee also discussed the issue of variety nomenclature at its meeting on April 8, 2003. Several members expressed concern that use of different marketing names by different handlers for the same variety was causing mismarking situations, which affect inspections, size and maturity assignments, and data collection. The current regulations require that containers bear the name of the variety. This is clarified by adding that trademarks, marketing names, and brand names may be associated with the variety name, but cannot be substituted for the variety name. This is expected to foster consistent variety identification within the industries, and uniform application of maturity and size requirements.

The committees voted unanimously to define "variety" as part of the orders' rules and regulations and to specify more detailed identification requirements. A commenter also recommended changes to the names of several peach varieties to bring them into conformity with the recommendations of the PCC. However, because these recommendations limit how handlers must identify the variety names, USDA plans to issue a proposed rule on these recommendations. USDA recognizes that there may be a need for consistency in naming the various peach and nectarine varieties to prevent misleading variety markings, but believes that notice and comment rulemaking, rather than an interim final rule, should be used for implementing such changes.

The committees make recommendations regarding all the revisions in handling requirements after considering all available information,

including recommendations by various subcommittees, comments of persons at subcommittee meetings, and comments received by committee staff. Such subcommittees include the Stone Fruit Grade and Size Subcommittee, the Inspection and Compliance Subcommittee, and the Executive Committee.

At the meetings, the impact of and alternatives to these recommendations are deliberated. These subcommittees, like the committees themselves, frequently consist of individual producers and handlers with many years of experience in the industry who are familiar with industry practices and trends. Like all committee meetings, subcommittee meetings are open to the public and comments are widely solicited. In the case of the Stone Fruit Grade and Size Subcommittee, many growers and handlers who are affected by the issues discussed by the subcommittee attend and actively participate in the public deliberations. In addition, minutes of all subcommittee meetings are distributed to committee members and others who have requested them, thereby increasing the availability of information within the industry.

Each of the recommended handling requirement changes for the 2003 season is expected to generate financial benefits for producers and handlers through increased fruit sales, compared to the situation that would exist if the changes were not adopted. Both large and small entities are expected to benefit from the changes, and the costs of compliance are not expected to be substantially different between large and small entities.

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.

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.

In addition, the committees' meetings are widely publicized throughout the nectarine and peach industry and all interested parties are encouraged to attend and participate in committee

deliberations on all issues. Like all committee meetings, the May 1, 2003, meetings were public meetings, and entities of all sizes were encouraged to express views on these issues. These regulations were also reviewed and thoroughly discussed at a subcommittee meeting held on April 8, 2003. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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.

As stated previously, an interim final rule regarding changes to the handling requirements for nectarines and peaches grown in California was published in the **Federal Register** on April 9, 2003 (68 FR 17257). A 60-day comment period was provided to allow interested persons to respond to the rule. Committee staff provided copies of the rule to all committee members. In addition, the rule was made available through the Internet by the Office of the Federal Register and USDA. One comment was received, as noted, and has been addressed herein.

This amended interim final rule invites further comments on changes to the handling requirements currently prescribed under the marketing orders for California fresh nectarines and peaches. Any comments received will be considered prior to finalization of this rule.

Thirty days are provided for interested persons to submit comments. A period of 30 days is deemed appropriate because 2003 crop shipments are now being made and the changes made by interim final rule and this amended interim final rule should be finalized by the end of the shipping season. The nectarine shipping season ends at the end of October, and the peach season ends in late November.

After consideration of all relevant matters presented, the information and recommendations submitted by the committees, and other information, it is found that this amended interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined, upon good cause, that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior

to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) California nectarine and peach producers and handlers should be apprised of this rule as soon as possible, since shipments of these fruits have already begun; (2) the committees recommended these changes at public meetings and interested persons had opportunities to provide input at these meetings; (3) these changes are relaxations; and (4) the rule provides a 30-day comment period, and any written comments timely received will be considered prior to any finalization of this interim final rule.

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:

PART 916—NECTARINES 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.

■ 2. Section 916.350 is amended by:

- A. Revising paragraph (a)(2), and
- B. Revising paragraph (a)(8) to read as follows:

§916.350 California nectarine container and pack regulation.

(a) * * *

(2) Each package or container of nectarines shall bear, on one outside end in plain sight and in plain letters, the word “nectarines” and, except for consumer packages in master containers and consumer packages mailed directly to consumers, the name of the variety, if known, or, when the variety name is not known, the words “unknown variety.” A marketing name, trade mark, or brand name may be associated with the variety name, but cannot be substituted for the variety name.

* * * * *

(8) Each five down Euro container of loose-filled nectarines shall bear on one outside end in plain sight and in plain letters the words “31 pounds net weight,” except for the 2003 season only, such containers may instead be

marked with the words “29 pounds net weight.”

* * * * *

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

■ 3. Section 917.442 is amended by:

- A. Revising paragraph (a)(2); and
- B. Revising paragraph (a)(9) to read as follows:

§917.442 California peach container and pack regulation.

(a) * * *

(2) Each package or container of peaches shall bear, on one outside end in plain sight and in plain letters, the word “peaches” and, except for consumer packages in master containers and consumer packages mailed directly to consumers, the name of the variety, if known, or, when the variety is not known, the words “unknown variety.” A marketing name, trademark, or brand name may be associated with the variety name, but cannot be substituted for the variety name.

* * * * *

(9) Each five down Euro container of loose-filled peaches shall bear on one outside end in plain sight and in plain letters the words “31 pounds net weight,” except for the 2003 season only, such containers may instead be marked with the words “29 pounds net weight.”

* * * * *

■ 4. Section 917.459 is amended by:

- A. Revising paragraph (b)(3); and
- B. Revising paragraph (c)(3) to read as follows:

§917.459 California peach grade and size regulation.

* * * * *

(b) * * *

(3) Such peaches in any container when packed other than as specified in paragraphs (b)(1) and (b)(2) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 96 peaches, except for Peento type peaches.

* * * * *

(c) * * *

(3) Such peaches in any container when packed other than as specified in paragraphs (c)(1) and (c)(2) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 73 peaches, except for Peento type peaches.

* * * * *

Dated: August 8, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03-20688 Filed 8-8-03; 4:36 pm]

BILLING CODE 3410-02-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 19

[Docket No. 03-19]

RIN 1557-AC10

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Part 263

[Docket No. R-1139]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064-AC57

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 513

[No. 2003-33]

RIN 1550-AB53

Removal, Suspension, and Debarment of Accountants From Performing Audit Services

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC, and OTS (each an Agency, and collectively, the Agencies) are jointly publishing final rules pursuant to section 36 of the Federal Deposit Insurance Act (FDIA). Section 36, as implemented by 12 CFR part 363, requires that each insured depository institution with total assets of \$500 million or more obtain an audit of its financial statements and an attestation on management's assertions concerning internal controls over financial reporting by an independent public accountant (accountant). The insured depository institution must include the accountant's audit and attestation reports in its annual report.

Section 36 authorizes the Agencies to remove, suspend, or debar accountants from performing the audit services required by section 36 if there is good cause to do so. The final rules establish rules of practice and procedure to implement this authority and reflect the Agencies' increasing concern with the quality of audits and internal controls for financial reporting at insured depository institutions. Although there have been few bank and thrift failures in recent years, the circumstances of the failures that have occurred illustrate the importance of maintaining high quality in the audits of the financial position and attestations of management assessments of insured depository institutions. The final rules enhance the Agencies' ability to address misconduct by accountants who perform annual audit and attestation services.

EFFECTIVE DATE: October 1, 2003.

FOR FURTHER INFORMATION CONTACT:

OCC: Mitchell Plave, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; Richard Shack, Senior Accountant, Office of the Chief Accountant, (202) 874-4911; and Karen Besser, National Bank Examiner, Special Supervision/Fraud, (202) 874-4464.

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SUPPLEMENTARY INFORMATION:

I. Background

Section 36 of the FDIA (12 U.S.C. 1831m), as implemented by FDIC regulations, requires every large insured depository institution to submit an annual report containing its financial statements and certain management assessments to the FDIC, the appropriate Federal banking agency, and any appropriate state bank supervisor.¹

¹ 12 U.S.C. 1831m, 1831m(j)(2); see also 12 CFR part 363 (describing the requirements for

Section 36 of the FDIA also requires that an independent public accountant audit the insured depository institution's annual financial statements to determine whether those statements are presented fairly in accordance with generally accepted accounting principles (GAAP) and with the accounting objectives, standards, and requirements described in section 37 of the FDIA. Under section 37, the accounting principles applicable to financial statements required to be filed with the Agencies must be uniform and consistent with GAAP.² In addition, the accountant must attest to and report on management's assertions concerning internal controls over financial reporting.³ The institution's annual report also must contain the accountant's audit and attestation reports.⁴

Section 36 of the FDIA gives the Agencies the authority to remove, suspend, or bar an accountant from performing the audit services required under section 36 for good cause.⁵ This authority is in addition to the enforcement tools the Agencies have under section 8 of the FDIA, which enable the Agencies to remove or prohibit an institution-affiliated party (IAP), including an accountant, from further participation in the affairs of an insured depository institution for certain types of misconduct.⁶ Section 36 authority is also distinct from the Agencies' authority to remove, suspend, or debar from practice before an Agency parties, such as accountants, who represent others.⁷

Section 36 does not define good cause, but authorizes the Agencies to implement section 36 through the joint issuance of rules of practice.⁸ A removal, suspension, or debarment under section 36 would limit an accountant's or accounting firm's eligibility to provide audit services to

independent audits and reporting for all insured depository institutions). The statute gives the FDIC Board of Directors the discretion to establish the threshold asset size at which a section 36 annual report is required. That amount is currently set at \$500 million. See 12 CFR 363.1(a). While a section 36 audit is not required of financial institutions with less than \$500 million in total assets, the Agencies encourage every insured depository institution, regardless of its size or character, to have an annual audit of its financial statements performed by an independent public accountant. See 12 CFR 363 App. A (Introduction).

² 12 U.S.C. 1831m(d), 1831n.

³ *Id.* 1831m(c); see also 12 CFR part 363 (independent audit and reporting requirements).

⁴ 12 U.S.C. 1831m(a)(1) and (2).

⁵ *Id.* 1831m(g)(4)(A).

⁶ *Id.* 1813(u)(4), 1818(e)(1).

⁷ See 12 CFR part 19, subpart K; 12 CFR part 263, subpart F; and 12 CFR part 513.

⁸ 12 U.S.C. 1831m(g)(4)(B).