

64133-4676, at least 120 days prior to the first sales closing date applicable to the policy.

(b) FCIC will review the NRS policy to determine that it does not materially increase or shift risk to the underlying policy or plan of insurance reinsured by FCIC, reduce or limit the rights of the insured with respect to the underlying policy or plan of insurance, or cause disruption in the marketplace for products reinsured by FCIC.

(1) An NRS policy will be considered to disrupt the marketplace if it adversely affects the sales or administration of reinsured policies, undermines producers' confidence in the Federal crop insurance program, decreases the producer's willingness or ability to use Federally reinsured risk management products, or harms public perception of the Federal crop insurance program.

(2) The applicant, at a minimum, must provide worksheets and examples that establish liability and determine indemnities that demonstrate the performance of the NRS policy under differing scenarios. When the review is complete, FCIC will forward their findings to the applicant.

(c) If the approved insurance provider sells an NRS policy that RMA determines materially increases or shifts risk to the underlying FCIC reinsured policy, reduces or limits the rights of the insured with respect to the underlying policy, or causes disruption in the marketplace for products reinsured by FCIC, reinsurance, A&O subsidy and risk subsidy will be denied on the underlying FCIC reinsured policy for which such NRS policy was sold.

(d) FCIC will respond to the submitter not less than 60 days before the first sales closing date or provide notice why FCIC is unable to respond within the time frame allotted.

Signed in Washington, DC on July 26, 2005.

**Ross J. Davidson, Jr.,**

*Manager, Federal Crop Insurance Corporation.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. FV05-916-1 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 (USDA) is adopting, as a final rule, with changes, an interim final rule revising the handling requirements for California nectarines and peaches by modifying the grade, size, maturity, and pack requirements for fresh shipments of these fruits, beginning with 2005 season shipments. This rule also authorizes continued shipments of "CA Utility" quality nectarines and peaches, and revises weight-count standards for fruit in volume-filled containers. 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 to ship fresh nectarines and peaches in a manner that meets consumer needs, increases returns to producers and handlers, and reflects current industry practices.

**EFFECTIVE DATE:** September 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 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, grade, size, maturity, pack and container 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 December 7, 2004, and unanimously recommended that these handling requirements be revised for the 2005 season, which began about the first week of April. The changes will: (1) revise varietal maturity, quality, and size requirements to better reflect current industry practices; (2) authorize continued shipments of "CA Utility" quality fruit during the 2005 season; and (3) adjust weight-count standards for fruit packed in volume-filled containers.

The committees meet prior to and during each season to review the rules and regulations effective on a continuing basis for California nectarines and peaches under the orders. Committee meetings are open to

the public and interested persons are encouraged to express their views at these meetings. The committees held such meetings on December 7, 2004. USDA reviews committee recommendations and information, as well as information from other sources, and determines whether modification, suspension, or termination of the rules and regulations would tend to effectuate the declared policy of the Act.

No official crop estimate was available at the time of the committees' December 7, 2004, meetings because the nectarine and peach trees were dormant. The committees subsequently made crop estimates at their meetings on April 24, 2005. The 2005 nectarine crop was estimated to be approximately 20,682,000 containers, and the 2005 peach crop was estimated to be approximately 21,180,000 containers. These crop estimates are slightly larger than the 2004 crops, which totaled 19,860,000 containers of nectarines and 20,585,000 containers of peaches.

#### 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 of §§ 916.350, 916.356, 917.442, and 917.459 to permit shipments of nectarines and peaches meeting "CA Utility" quality requirements during the 2005 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 6 percent

(1,408,362 containers) during the 2003 season.

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 5.6 percent of all peach shipments (1,231,000 containers) during the 2002 season.

Handlers have commented that the availability of the "CA Utility" quality option 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 Tree Fruit Quality Subcommittee met on November 30, 2004, and recommended unanimously to the NAC and PCC to continue shipments of "CA Utility" quality nectarines and peaches. Subsequently, the NAC and PCC voted unanimously at their December 7, 2004, meetings to authorize continued shipments of "CA Utility" quality fruit during the 2005 season.

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 2005 season, on the same basis as shipments since the 2000 season.

#### 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, along with other maturity tests as applied by the inspection service). 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 2005 handling regulations are the same as those that appeared in the 2004 handling regulations with a few exceptions. Those exceptions are explained in this rule and continue in effect.

*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 of Table 1 of paragraph (a)(1)(iv) of § 916.356 to add maturity guides for eleven varieties of nectarines. Specifically, SPI recommended adding maturity guides for the Crimson Baby variety to be regulated at the G maturity guide; for the Alta Red, Grand Candy, Kay Glo, Kay Sweet, Red Roy and Shay Sweet varieties at the J maturity guide; and for the August Fire, Candy Gold, Prince Jim I and Sugar Queen varieties 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 revisions to Table 1 of paragraph (a)(1)(iv) of § 917.459 to add maturity guides for six peach varieties. Specifically, SPI recommended adding maturity guides for the Island Princess variety to be regulated at the H maturity guide; the Bev's Red variety to be regulated at the I maturity guide; and the Prima Peach IV, Spring Gem, Sweet Amber, and Zee Diamond varieties to be regulated at the J maturity guide.

The PCC also recommended adding the Burpeachtwo (Henry II®) variety to the table for regulation at the J maturity guide, but that variety had already been added to the table for regulation at the J maturity guide in 2004 (7 July 2004, 69 FR 41120). Thus, the revision of Table 1 of paragraph (a)(1)(iv) of § 917.459 continues in effect to reflect the recommended addition of only six varieties.

The NAC and 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 nectarine and peach varieties in production.

### Size Requirements

Both orders provide authority (in §§ 916.52 and 917.41) 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 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 of § 916.356 to establish variety-specific minimum size requirements for nine varieties of nectarines that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2004 season. This rule also continues in effect the removal of the variety-specific minimum size requirements for fifteen varieties of nectarines whose shipments fell below 5,000 containers during the 2004 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the La Pinta variety of nectarines, recommended for regulation at a minimum size 80. Studies of the size ranges attained by the La Pinta variety revealed that 100 percent of the containers met the minimum size of 80 during the 2001, 2002, and 2003 seasons. Sizes ranged from size 30 to size 80, with 4.9 percent of the fruit in the 30 sizes, 34.3 percent of the packages in the 40 sizes, 41.1 percent in the 50 sizes, 19.5 percent in the 60 sizes, 0.2 percent in the 70 sizes and 0 percent in the size 80, for the 2003 season. However, the fruit sized down to the 80 sizes during the two previous seasons, and setting the minimum size at size 70 would not be appropriate at this time.

A review of other varieties with the same harvesting period indicated that

the La Pinta 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 La Pinta variety in the variety-specific minimum size regulation at a minimum size 80 is appropriate. This recommendation results from size studies conducted over a three-year period.

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 to the introductory text of paragraph(a)(3) of § 916.356 continues in effect to include the Red Jewel and Zee Fire varieties; the revision of the introductory text of paragraph (a)(4) of § 916.356 continues in effect to include the Diamond Pearl and Kay Fire varieties; and the revision to the introductory text of paragraph (a)(6) of § 916.356 continues in effect to include the Burnectfour (Summer Flare® 35), Burnectseven (Summer Flare® 28), Honey Dew, La Pinta and Mike's Red nectarine varieties.

This rule also continues in effect the revision of the introductory text of paragraphs (a)(3), (a)(4), (a)(5) and (a)(6) of § 916.356 to remove fifteen 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 2004 season. Specifically, the revision of the introductory text of paragraph (a)(3) of § 916.356 continues in effect to remove the May Kist nectarine variety; the revision of the introductory text of paragraph (a)(4) of § 916.356 continues in effect to remove the Sparkling May and White Sun nectarine varieties; the revision of the introductory text of paragraph (a)(5) continues in effect to remove the Red May nectarine variety; and the revision of the introductory text of paragraph (a)(6) of § 916.356 continues in effect to remove the Candy Sweet, Flame Glo, Grand Diamond, June Lion, King Jim, Ruby Bright, Scarlet Red, Summer Jewel, Sunny Red, Sweet

White and White September nectarine varieties.

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 to establish variety-specific minimum size requirements for thirteen peach varieties that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2004 season. This rule also continues in effect the removal of the variety-specific minimum size requirements for ten varieties of peaches whose shipments fell below 5,000 containers during the 2004 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Ivory Queen variety of peaches, which was recommended for regulation at a minimum size 80. Studies of the size ranges attained by the Ivory Queen variety revealed that 100 percent of the containers met the minimum size of 80 during the 2002 and 2003 seasons. The sizes ranged from size 30 to size 80, with 0.3 percent of the containers meeting the size 30, 36.1 percent meeting the size 40, 47.7 percent meeting the size 50, 13.1 percent meeting the size 60, 2.2 percent meeting the size 70 and 0.5 percent meeting the size 80 in the 2003 season.

A review of other varieties with the same harvesting period indicated that the Ivory Queen variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to pack the variety confirm this information regarding minimum size and the harvesting period, as well. Thus, the recommendation to place the Ivory Queen variety in the variety-specific minimum size regulation at a minimum size 80 is appropriate. Although most other size recommendations for peaches result from size studies conducted over a three-year period, data on the Ivory Queen variety for earlier years is not available because the plantings of this variety did not bear fruit before 2002. Unusually large plantings of the Ivory Queen variety led to the rapid production of over 10,000 containers in just two years, and indicated inclusion in the variety-specific minimum size requirements.

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 continues in effect to include the April Snow and Sugar Snow peach varieties; the revision of the introductory text of § (a)(5) of § 917.459 continues in effect to include the Ivory Queen peach variety; and the revision of the introductory text of paragraph (a)(6) of § 917.459 continues in effect to include the Autumn Rich, Cherry Red, Crimson Queen, Early O'Henry, Henry III, Henry IV, Last Tango, Ruby Queen, Sierra Rich and 244LE379 peach varieties.

This rule also continues in effect the revision of the introductory text of paragraph (a)(5) of § 917.459 to remove the Redtop, Sugar May and 172LE White Peach (Crimson Snow/Sunny Snow) peach varieties; and continues in effect the revision of the introductory paragraph (a)(6) of § 917.459 to remove the Autumn Fire, Fairtime, June Pride, Late September Snow, Queen Lady, Ruby Gold and Sugar Red peach varieties from the variety-specific minimum size requirements specified in the section because less than 5,000 containers of each of these varieties was produced during the 2004 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) 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 establishment of minimum size requirements for fresh nectarines and peaches consistent with expected crop and market conditions.

#### **Weight-Count Standards**

Under the provisions of §§ 916.52 and 917.41 of the orders, the NAC and PCC, respectively, are also authorized to establish weight-count standards for

packed containers of fruit. These standards define a maximum number of peaches in a 16-pound sample when such fruit, which may be packed in tray-packed containers, is converted to volume-filled containers. In §§ 916.350 and 917.442 of the orders' rules and regulations, weight-count standards are established for all varieties of nectarines and peaches (except the Peento type peaches), in Tables 1 and 2 of paragraph (a)(5)(iv).

Weight-count standards differ for fruit packed early in the season and that packed later. Earlier fruit tends to be less dense than later fruit. While the earlier fruit sizes are adequate to fill the tray cavities in tray-packed containers, more pieces of fruit are required to meet the 16-pound sample standard for volume-filled fruit. The NAC and PCC routinely conduct tests to determine the optimum weight-count standards for early, mid-season and late-season fruit. Occasionally, adjustments are made to the weight-count standards to ensure equivalence between the pack styles and permit handlers to more easily convert tray-packed fruit to volume-filled containers.

Weight-count standards have also differed between nectarine and peaches historically because of the difference in shape between the two commodities. However, continued breeding of the two fruits has resulted in more uniformity of shape and size between the two. In response to consumer needs, handlers have sought a more generic sizing system to apply to both nectarines and peaches.

Finally, the industry has recently adopted a new packing container with dimensions different from those previously used. Conforming changes to the trays used to pack the fruit into the new containers resulted in reductions in cavity sizes in some cases to accommodate the same fruit counts as in the old containers. This led to a wider discrepancy between the sizes of fruit packed in both pack styles throughout the season.

In an effort to provide a more generic sizing of the two commodities, to smooth the transition from early-season to mid-season and late-season fruit sizes, and to standardize the conversion from tray-packing to volume-filling fruit, the committees' staff conducted weight-count surveys during the 2004 packing season. With the data collected, they were able to determine the most optimum weight-counts for containers of volume-filled nectarines and peaches of various fruit sizes throughout the season, given the new containers and trays. The committees' staff prepared new weight-count tables, which were

reviewed by the Size Nomenclature Review Group at their meetings on September 3 and September 21, 2004, and by the Tree Fruit Quality Subcommittee at their meetings on September 13, November 9, and November 30, 2004. At their meetings on December 7, 2004, both the NAC and PCC unanimously recommended revision of the weight-count standards tables in the orders' rules and regulations to reflect the staff's findings.

*Nectarines:* This rule continues in effect the revision of Tables 1 and 2 of paragraph (a)(5)(iv) of § 916.350. Such revisions require continuation of the conforming modifications to the text of § 916.356, paragraphs (a)(4)(ii), (a)(6)(ii), (a)(8)(ii), and (a)(9)(ii) that increase the maximum number of nectarines in a 16-pound sample for the sizes regulated in those paragraphs.

*Peaches:* Similarly, this rule continues in effect the revision of Tables 1 and 2 of paragraph (a)(5)(iv) of § 917.442 to reflect the staff's study findings. Additionally, two new weight-count standards for peaches continue to be added to the tables. These two new standards are for large sizes previously without weight-count assignments, and were determined from the data collected.

Such revisions require continuation of the conforming modifications to the text of § 917.459, paragraph (a)(5)(iii) that increase the maximum number of peaches in a 16-pound sample for the size regulated in that paragraph.

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 continuing this rule in effect 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 to 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.

#### *Industry Information*

There are approximately 207 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 1,500 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 fewer than 26 handlers in the industry who could be defined as other than small entities. For the 2004 season, the committees' staff estimated that the average handler price received was \$8.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 625,000 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 2004 season, the committees' staff estimates that small handlers represent approximately 87 percent of all the handlers within the industry.

The committees' staff has also estimated that fewer than 20 percent of the producers in the industry could be defined as other than small entities. For the 2004 season, the committees' staff estimated the average producer price received was \$5.00 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 150,000 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 2004 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 \$5.00 per container or container equivalent, and a combined packout of nectarines and peaches of approximately 40,422,900 containers, the value of the 2004 packout is estimated to be \$202,114,500. Dividing this total estimated grower revenue figure by the estimated number of producers (1,500) yields an estimate of average revenue per producer of about \$134,743 from the sales of peaches and nectarines.

#### *Regulatory Revisions*

Under §§ 916.52 and 917.41 of the orders, grade, size, maturity, container 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 December 7, 2004, and unanimously recommended that these handling requirements be revised for the 2005 season. These recommendations had been presented to the committees by various subcommittees, each charged with review and discussion of the changes. The changes: (1) authorize shipments of "CA Utility" quality fruit to continue during the 2005 season; (2) adjust weight-count standards for fruit in volume filled containers; and (3) revise varietal maturity, quality, and size requirements to reflect changes in production and marketing practices.

#### **Grade and Quality Requirements— Discussions and 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 to continue shipments of "CA Utility" quality nectarines and peaches during the 2005 season.

The Tree Fruit Quality Subcommittee met on November 30, 2004, and unanimously agreed that the "CA Utility" quality requirements that are currently in place should be continued. Also, not authorizing such shipments would be an abrupt departure from their current practices. The NAC and PCC also unanimously recommended such continuation at their meetings on December 7, 2004, and have done so continuously since such shipments were first authorized in 1996.

#### **Minimum Maturity and Size Levels— Discussions and Alternatives**

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

Currently, 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 2005 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 would ultimately increase the amount of less acceptable fruit being marketed to consumers, and would be contrary to the long-term interests of producers, handlers, and consumers. For these reasons, this alternative was not recommended.

### Weight-Count Standards—Discussions and Alternatives

Sections 916.350 and 917.442 also establish weight-count standards for fruit packed in volume-filled containers. These standards define a maximum number of peaches in a 16-pound sample when such fruit, which may be packed in tray-packed containers, is converted to volume-filled containers.

Industry-wide adoption of a new container led to the reconfiguration of the trays commonly used in packing tray-packed containers. Some of the tray cavity sizes were modified to conform to the dimensions of the new container. These modifications resulted in slightly smaller fruit being packed into some sizes, which led to an unacceptable discrepancy between the sizes of fruit packed in volume-filled containers and that in tray-packed containers.

Additionally, the difference in density between early-season and mid-season to late-season fruit causes an abrupt change in sizes during the seasonal transition. Handlers have reported that marketing through that period is difficult because of the discrepancy between sizes of earlier fruit and later fruit, and have sought a modified sizing method that would smooth that transition.

Finally, continuous breeding has led to an increasing similarity of fruit shapes between nectarines and peaches. The committees desire to develop a more uniform sizing system.

The Size Nomenclature Review Group met several times during 2003 and 2004 to discuss revision of the weight-count standards. Although the group considered the transition to a per pound sizing system similar to that used by the plum industry, they felt that the nectarine and peach industries would be better served by adjusting the weight-count standards already in place. The Size Nomenclature Review Group also believed that they could recommend modifications to the standards that would smooth the marketing transition between varieties packed in the early season and those packed in the mid-season to late-season.

The committee staff was directed to collect data during the 2004 season from which revision recommendations could be made. Extensive sampling of both nectarines and peaches of various sizes provided the information needed for the committee to make recommendations regarding revisions to the weight-count standards. The Tree Fruit Quality Subcommittee voted unanimously to recommend the adjustments to the NAC and PCC at their meeting on November 9, 2004. The NAC and PCC

unanimously recommended the changes to the regulations at their meeting on December 7, 2004.

The committees discussed various alternatives to this action, including leaving the weight-count standards unchanged or adopting a per-pound fruit sizing system similar to that used in the plum industry. However, the committees believe that failure to make changes would not take into account differences between the various pack styles. Also, the data collected did not support adoption of a per-pound fruit sizing system at this time. The committees believe that the recommended changes to the weight-count standards will provide for better uniformity of sizes between fruit packed in volume-filled containers and fruit packed in tray-packed containers, will smooth the transition from early-season to mid-season and late-season fruit for marketers, and will more closely align fruit sizes between nectarines and peaches.

The committees make recommendations regarding 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 Tree Fruit Quality Subcommittee, the Size Nomenclature Review Group, the Marketing Order Amendment Task Force, 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 Tree Fruit Quality Subcommittee, many growers and handlers who are affected by the issues discussed by the subcommittee attend and actively participate in the public deliberations, or call and/or write in their concerns and comments to the staff for presentation at the meetings. In addition, minutes of all subcommittee meetings are distributed to committee members and others who have requested them, and are also available on the committees' website, thereby increasing the availability of information within the industry.

An interim final rule concerning this action was published in the **Federal Register** on March 31, 2005. Copies of the rule were posted on the committees'

Web site and were also made available through the Internet by USDA and the Office of the Federal Register. That rule provided a 60-day comment period, which ended on May 31, 2005. One comment was submitted on the rule.

First, the commenter noted that the Spring Ray nectarine variety name should be changed to include the patented name, "Burnectone." This rule removes the name "Spring Ray" from Table 1 of paragraph (a)(1)(iv) in § 916.356 and from the introductory text of paragraph (a)(4) of § 916.356, and replaces it with "Burnectone (Spring Ray)."

The commenter also noted that the 012-094 peach variety name should be changed to include the patented name, "Supeacheight." This rule removes the name "012-094" in paragraph (a)(5) of § 917.459, and replaces it with "Supeacheight (012-094)."

Each of the recommended handling requirement changes for the 2005 season is expected to benefit 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. These meetings are held annually in the fall, winter and spring. Like all committee meetings, the December 7, 2004, meetings were public meetings, and all entities, large and small, were encouraged to express views on these issues. These regulations were also reviewed and thoroughly discussed at subcommittee meetings held on August

26, September 13, November 9 and November 30, 2004. Finally, interested persons were 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.

After consideration of all relevant matters presented, the information and recommendations submitted by the committees, the comment received, and other information, it is found that finalizing the interim final rule, with changes, as published in the **Federal Register**, (70 FR 16383, March 31, 2005) 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 70 FR 16383 on March 31, 2005, is adopted as a final rule with the following changes:

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

**Authority:** 7 U.S.C. 601–674.

#### **PART 916—NECTARINES GROWN IN CALIFORNIA**

##### **§ 916.356 [Amended]**

■ 2. Section 916.356 is amended by:

■ A. Removing the words “Spring Ray” from column A and the entry “L” from column B and adding in alphabetical order the words “Burnectone (Spring Ray)” in column A and an entry “L” in column B of Table 1 in paragraph(a)(1)(iv);

■ B. Removing the words “Spring Ray” and adding the words “Burnectone (Spring Ray)” in alphabetical order in the introductory text of paragraph (a)(4).

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

##### **§ 917.459 [Amended]**

■ 3. Section 917.459 is amended by removing the word “012–094” and adding the words “Supeacheight (012–094)” in alphabetical order in the introductory text of paragraph (a)(5).

\* \* \* \* \*

Dated: July 27, 2005.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 05–15168 Filed 8–1–05; 8:45 am]

**BILLING COODE 3410–02–P**

#### **DEPARTMENT OF AGRICULTURE**

##### **Agricultural Marketing Service**

##### **7 CFR Part 923**

[Docket Nos. AO–F&V–923–3; FV03–923–01 FR]

#### **Sweet Cherries Grown in Designated Counties in Washington; Order Amending Marketing Order No. 923**

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

**ACTION:** Final rule.

**SUMMARY:** This rule amends the marketing order (order) for sweet cherries grown in Washington. Sweet cherry growers, voting in a mail referendum held March 1 through March 21, 2005, voted on four amendments proposed by the Washington Cherry Marketing Committee (Committee), which is responsible for local administration of the order, and two amendments proposed by the Agricultural Marketing Service of USDA. Of the six amendments proposed, three were favored, including: Adding authority for the Committee to accept voluntary contributions for research and promotion; establishing tenure limitations for Committee members; and requiring that continuance referenda be conducted every 6 years. The three amendments that failed include: adding authority for promotion, including paid advertising, and production research projects; adding authority for supplemental rates of assessment for individual varieties of cherries; and, adding a public member to the Committee. These amendments will not be implemented.

**EFFECTIVE DATE:** This rule is effective August 3, 2005.

**FOR FURTHER INFORMATION CONTACT:** Melissa Schmaedick, Marketing Order

Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, Post Office Box 1035, Moab, UT 84532, telephone: (435) 259–7988, fax: (435) 259–4945; or Robert J. Curry, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Northwest Marketing Field Office, 1220 SW., Third Avenue, Room 385, Portland, OR 97204; telephone (503) 326–2724 or Fax (503) 326–7440.

Small businesses may request information on this proceeding 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:** Prior documents in this proceeding include: Notice of Hearing issued on October 6, 2003, and published in the October 10, 2003, issue of the **Federal Register** (68 FR 58636); Recommended Decision issued on September 29, 2004 and published in the October 5, 2004 issue of the **Federal Register** (69 FR 59551); and a Secretary’s Decision and Referendum Order issued January 11, 2005 and published in the **Federal Register** on January 14, 2005 (70 FR 2573).

This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

#### **Preliminary Statement**

This final rule was formulated on the record of a public hearing held November 18, 2003, in Yakima, Washington. Notice of the public hearing was issued on October 6, 2003, and published in the October 10, 2003, issue of the **Federal Register** (68 FR 58636). The hearing was held to consider the proposed amendment of Marketing Agreement and Order No. 923, regulating the handling of sweet cherries grown in the State of Washington, hereinafter referred to as the “order”. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the “Act,” and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900). The Notice of Hearing contained six proposals: four proposals submitted by the Committee and two proposals by the