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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 900

[Docket No. AMS-FV-08-0061; FV08-900-1 FR]

#### Amendment of General Regulations for Fruit, Vegetable and Nut Marketing Agreements and Marketing Orders; Addition of Supplemental Rules of Practice for Amendatory Formal Rulemaking Proceedings

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

**ACTION:** Final rule.

**SUMMARY:** This rule amends the general regulations for federal fruit, vegetable and nut marketing agreements and marketing orders by establishing supplemental rules of practice for amendatory formal rulemaking proceedings in accordance with section 1504 of the Food, Conservation and Energy Act of 2008 (2008 Farm Bill). The supplemental rules of practice add procedures to the rulemaking process relating to amendments to fruit, vegetable and nut marketing agreements and marketing orders; authorize the Department of Agriculture (USDA) to impose assessments on affected industries to supplement funds necessary to improve or expedite an amendatory hearing process; and authorize the use of informal rulemaking (5 U.S.C. 553) to amend such agreements and orders. Section 1504 of the 2008 Farm Bill also applies to amendments of federal milk marketing agreements and orders. The supplemental rules of practice for federal milk marketing agreements and orders are addressed in a separate rulemaking document.

**DATES:** *Effective Date:* August 21, 2008.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Finn, Marketing Order

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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 final rule is issued under the general regulations for federal marketing agreements and orders (7 CFR part 900), effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Act provides authority for federal marketing agreement and order programs for various fruits, vegetables and nuts. Marketing agreements and orders can contain provisions that: Maintain the high quality of produce that is on the market; standardize packages and containers; regulate the flow of product to market; establish reserve pools for storable commodities; and authorize production research, marketing research and development, and advertising.

#### Background

Currently, the provisions of 556 and 557 of Title 5 of the United States Code (formal rulemaking; 5 U.S.C. 556-557) are followed for initiating, as well as amending federal marketing agreements and orders. Section 557 requires that the rulemaking proceeding, including agency decisions, be conducted on the record.

Following the provisions of 5 U.S.C. 556-557 and part 900 of the general regulations, which includes the rules of practice for formal rulemaking, a request for a hearing on the proposal to initiate or amend an agreement or order is sent to the Administrator of the Agricultural Marketing Service (AMS). When an amendment is requested, a request typically comes from a marketing agreement or order committee or board and includes a statement regarding the degree of industry support for the

proposal and the conditions the program or amendment to the program are intended to address. AMS reviews the request and supporting documents, as well as any alternative proposals from interested parties and, if appropriate, a notice of public hearing is issued and published in the **Federal Register**.

A USDA Administrative Law Judge presides at a public hearing and a record is compiled of the testimony of proponents, opponents, and other interested persons. Proposed findings and conclusions, and written arguments or briefs may be filed with USDA after the hearing.

A recommended decision is issued by AMS based on hearing evidence. Persons are allowed to file exceptions to the recommended decision for a set period of time.

After consideration of all exceptions to the recommended decision, USDA prepares a Secretary's (final) decision. If the decision is made to issue or amend a marketing order, a grower referendum to implement a marketing order is held on the proposal. While producers are voting, copies of a companion marketing agreement are sent to handlers for their signature, when such an agreement exists. Through their signatures on the agreement, handlers indicate their intention to abide by the terms of the program. For a stand-alone marketing agreement, a handler sign-up would be conducted in lieu of a producer referendum for promulgation or amendment of a marketing agreement.

Under a proposed marketing order or an amendment to the order, if at least two-thirds of the growers voting by number or by volume approve the proposal, a marketing order or amendment is issued, which is binding on handlers in the designated production area. For marketing agreements, only the signatory handlers are bound by the terms of the agreement.

This process typically takes 18 to 24 months to complete, depending on the complexity of the proposal and the size of the industry, and is applicable to both proposed programs and amendments to programs.

Marketing orders are locally administered by committees or boards made up of growers and/or handlers, and often a member of the public. Marketing agreements are locally

administered by a committee or board made up of signatories to the marketing agreement. Committees and boards have regularly scheduled meetings to discuss industry conditions that the agreement or order can address, as well as to conduct administrative matters, such as committee or board nominations, and development of budgets and necessary assessments to administer the programs. Also, it is during such regularly scheduled meetings that amendments to a marketing agreement or order are considered. As discussed subsequently, it is at this time a pre-hearing information session typically would be conducted.

Section 608c(17) of the Act provides that the provisions for promulgating a marketing agreement or order are also applicable to amendments to agreements or orders. Industries regulated under marketing agreements and orders may find the need to amend the agreements or orders if changes in the market or marketing problems experienced in the industries warrant such revision. In other instances, amendments can also be made to clarify and update order provisions.

When needed, the committees and boards can recommend marketing agreement and order implementing regulations, such as seasonal regulations to establish grade and size requirements or the establishment of assessment rates. Regulations must be based on the authority in the agreement or order. These regulations are implemented through informal rulemaking procedures, as provided under § 553 of Title 5 of the United States Code (5 U.S.C. 553). This section of Title 5 provides for notice and comment rulemaking. It requires, in part, that notices of proposed rulemaking be published in the **Federal Register**, and that interested parties be provided an opportunity to comment on the proposal. After consideration of the relevant matter presented, a final rule is issued. Typically, informal rulemaking is accomplished within 90 days.

There are currently 32 active fruit, vegetable and nut marketing orders, many with companion marketing agreements. Presently, there are no stand-alone marketing agreement programs.

#### **The 2008 Farm Bill and Supplemental Rules of Practice To Amend Marketing Agreements and Orders**

Section 1504 of the 2008 Farm Bill (H.R. 6124, Pub. L. 110-246) made changes to section 18c(17) of the Act, which, in turn, requires the addition of supplemental rules of practice to 7 CFR part 900. For amendments to fruit,

vegetable and nut marketing agreements and orders, the supplemental rules of practice: add certain rulemaking procedures for amending marketing agreements and orders; authorize USDA to impose assessments on affected industries to supplement funds necessary to improve or expedite the amendatory hearing process; and authorize the use of informal rulemaking (5 U.S.C 553) to amend such agreements and orders, when determined appropriate.

Sections 900.1 through 900.18 of the general regulations of part 900 set forth the rules of practice and procedure governing proceedings to formulate marketing agreements and orders. As stated previously, the Act provides that provisions for initiating marketing agreements and orders are also applicable to amendments to agreements and orders. This final rule amends part 900 by adding supplemental rules of practice regarding amendments to fruit, vegetable and nut marketing agreements and orders to conform to the 2008 Farm Bill. This rule will add new sections 900.36 through 900.43.

A new § 900.36 is added to include standard language to a new subpart stating that words in the singular form will be deemed to import the plural, and vice versa, as the case may demand.

A new § 900.37 is added to set forth that the definitions in the Act and in § 900.2 of this part apply to these supplemental rules of practice.

#### **Pre-Hearing Information Session**

A new § 900.38 is added to provide that a pre-hearing information session may be held either before or after a submission to amend an agreement or order is submitted to USDA. The 2008 Farm Bill provides for the establishment of pre-hearing information session specifications. Pre-hearing information sessions may be conducted when an industry is considering amending a marketing agreement or order. Such sessions are intended to assist in the conduct of the overall amendatory formal rulemaking process. The sessions may be held by a marketing agreement or order committee or board. A pre-hearing information session may also be held by the Secretary. The sessions may be held either prior or subsequent to a submission of a proposal under § 900.3 of this part.

Currently, fruit, vegetable and nut marketing order committees and boards, with USDA representatives in attendance, conduct regularly scheduled meetings to discuss changes and challenges facing the industry and ways amendments to marketing orders can

address those issues. There are currently no stand-alone marketing agreement programs under section 608b of the Act. The meetings are also conducted to discuss administrative matters, such as annual budgets and necessary assessments. When a committee or board considers amendments to a marketing order, there is usually a subcommittee selected to consider the benefit of any amendments. The subcommittee meets in a public forum to formulate proposed amendments and presents such proposed amendments to the full committee or board. The full committee or board votes on whether to pursue amendment of the order, also in a forum open to the public.

Further, any proposals received by entities not directly associated with a committee or board may be referred by the Secretary to the applicable committee or board for their consideration.

#### **Proposal Submission Requirements**

A new § 900.39 is added to specify submission requirements for proposals to amend marketing agreements and orders. Currently, Fruit and Vegetable Programs, AMS requests that any proposal to initiate a new marketing agreement or order or to amend a marketing agreement or order include detailed explanations of: the purpose of the proposal; the problem the proposal is designed to address; the current requirements or industry practices relative to the proposal; the expected impacts on producers, handlers and consumers; how the proposal would tend to improve returns to producers; the expected effects on small businesses; whether the proposal would increase or decrease costs to producers, handlers, committees and/or USDA; how the proposal would be implemented; and how compliance would be effected with the proposal.

USDA has determined over time that a proposal that includes a discussion of the above topics assists in the implementation of a new marketing agreement or order and amendments to marketing agreements or orders. To effectuate a new marketing agreement or order or an amendment to an established agreement or order, USDA is required to make a ruling on certain findings, conclusions or exceptions relating to such proposals. The proposal submission requirement in the supplemental rules of practice will assist industries in preparation of their proposals for amendments to a current marketing agreement or order.

### Written Testimony and Data Request Requirements

A new § 900.40 is added to provide requirements for written testimony submitted as an exhibit at an amendatory fruit, vegetable or nut rulemaking hearing and requirements for USDA data requests to be used at such a hearing.

Currently, witnesses at hearings regarding proposed new or amended marketing agreements or orders are not required to supply written testimony prior to testifying. However, any documentation supplied during the hearing must be submitted in quadruplicate when prepared as an exhibit under current section 900.8(d)(4). Written testimony and exhibits received prior to, or at the time of, the testimony are useful for USDA participants whose role includes gathering sufficient information to make a determination as to the merits of a proposal.

However, it is not always practical to have written testimony. For example, a witness may want to testify on previous testimony by one or more witnesses. This provision should not impede witness testimony in this regard. In order to assist USDA participants, the new § 900.40 requires that testimony prepared as an exhibit and any other exhibits be made available to USDA on the day of appearance at the hearing, to the extent practicable.

The 2008 Farm Bill provides that the supplemental rules of practice establish requirements for requests for preparation of USDA data prior to a hearing. Currently, in most hearings, USDA assembles appropriate economic data and a USDA economist testifies to the sources and relevance of the data. Rarely, if ever, has data been requested of USDA from the industry prior to an amendatory hearing for fruit, vegetable and nut marketing agreements and orders. However, in the event such requests do occur, § 900.40 sets forth that any request for preparation of USDA data should be made at least 10 days before the beginning of the hearing. This period of time is reasonable considering the need to prepare such data.

### Electronic Document Submission

A new § 900.41 is added to allow for the submission of electronic documents in proceedings to amend marketing agreements and orders. The current rules of practice in part 900 require that four copies of all documents related to proposed new and amended marketing agreements and orders be filed with the hearing clerk. With new technologies

currently available, most documents in these proceedings are also filed electronically with AMS. The 2008 Farm Bill requires that electronic submission standards be established. Therefore, § 900.41 sets forth that when possible, all documents filed with the hearing clerk shall also be submitted electronically to the Fruit and Vegetable Programs, AMS and reference the docket number of the proceeding. The provision sets forth that instructions for electronic filing with AMS will be provided in each appropriate **Federal Register** publication regarding the proceeding. This will simplify electronic filing for all interested parties.

### Industry Assessments

The 2008 Farm Bill provides for industry assessments. A new § 900.42 is added to allow USDA to assess handlers for costs associated with proceedings to amend fruit, vegetable and nut marketing agreements and orders, if it is determined necessary to improve or expedite the rulemaking proceeding. Currently, administrative costs associated with formal rulemaking are paid for by AMS. These costs include hiring a court reporter, a hearing examiner, legal counsel, and associated travel costs. Some of these costs could increase if it was determined necessary to improve or expedite the proceeding. For example, court reporting costs could increase in order to receive the transcripts at an earlier date than normal.

Section 900.42 states that if USDA determines it is necessary to improve or expedite an amendment proceeding, USDA may impose an assessment on a marketing agreement's or order's handlers affected by an amendment proceeding to supplement funds for costs associated with such, including, but not limited to, court reporters, hearing examiners, legal counsel, hearing venue and associated travel for USDA officials. The assessments would only be incurred by handlers regulated by the program being amended.

### Use of Informal Rulemaking

A new § 900.43 is added to allow the use of informal rulemaking procedures (5 U.S.C. 553) to amend fruit, vegetable and nut marketing agreements and orders and to set forth parameters that USDA will consider when determining whether this process is appropriate. Prior to the 2008 Farm Bill, the Act required that all proposals to initiate a new or amend a current marketing agreement or order were to be conducted through formal rulemaking under §§ 556 and 557 of title 5 of the

United States Code. However, the 2008 Farm Bill modified the authority as to how amendments to marketing agreements and orders can be conducted. It provides that authority under § 553 of the United States Code covering informal rulemaking procedures can be an option for amending a fruit, vegetable and nut agreement or order.

Currently, informal rulemaking procedures are used to establish implementing regulations authorized by marketing agreements and orders. The timeframe for completion of informal rulemaking actions is usually about 90 days, as opposed to formal rulemaking that, because of the procedural requirements including holding a public hearing and grower referenda, generally has a timeframe of 18 to 24 months.

In accordance with the 2008 Farm Bill, section 900.43 will allow the option of using informal rulemaking to amend fruit, vegetable and nut marketing agreements and orders. In considering whether informal rulemaking will be used to amend a fruit, vegetable or nut marketing agreement or order, USDA will consider: The nature and complexity of the proposal; the potential regulatory and economic impacts on affected entities; and any other relevant matters.

### Final Action

In accordance with the 2008 Farm Bill, this final rule establishes supplemental rules of practice regarding amendments to fruit, vegetable and nut marketing agreements and orders.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Further, a small business guide on complying with fruit, vegetable, and nut marketing agreements and orders may be viewed at: <http://www.ams.USDA.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Subtitle F of Title I of the 2008 Farm Bill provides that the promulgation of these regulations shall be made without regard to the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Statement of Policy of the Secretary of Agriculture, effective July 24, 1971 (36 FR 13804), and the notice and comment provisions

of section 553 of Title 5, United States Code.

This rule relates to internal agency management. Therefore, this rule is exempt from the provisions of Executive Orders 12866 and 12988, and for this same reason the notice of proposed rulemaking and opportunity for comment are also not required, as this rule may be effective less than 30 days after publication in the **Federal Register**. In addition, under 5 U.S.C. 804, this rule is not subject to congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121). Finally, this rule is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612) (RFA). Therefore, this rule is exempt from the requirements of the RFA.

It is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 900**

Administrative practice and procedures, Freedom of information, Fruit, vegetable, and nut marketing agreements and orders, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 900 is amended as follows:

**PART 900—GENERAL REGULATIONS**

■ Accordingly, in part 900, a new subpart is added to read as follows:

**Subpart—Supplemental Rules of Practice Governing Proceedings To Amend Fruit, Vegetable and Nut Marketing Agreements and Marketing Orders**

- Sec.
- 900.36 Words in the singular form.
- 900.37 Definitions.
- 900.38 Pre-hearing information sessions.
- 900.39 Proposal submission requirements.
- 900.40 Written testimony and USDA data request requirements.
- 900.41 Electronic document submission standards.
- 900.42 Industry assessments.
- 900.43 Use of informal rulemaking.

**Authority:** 7 U.S.C. 608c(17) and 610.

**§ 900.36 Words in the singular form.**

Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

**§ 900.37 Definitions.**

As used in this subpart, the terms as defined in the Act and in § 900.2 of this part shall apply.

**§ 900.38 Pre-hearing information sessions.**

A pre-hearing information session concerning a proposal to amend a fruit, vegetable or nut marketing agreement or order may be held either prior or subsequent to submission of a proposal under § 900.3 of this part. Such sessions may be held by a marketing agreement or order committee or board or by the Secretary.

**§ 900.39 Proposal submission requirements.**

When a person other than the Secretary makes a proposal to amend a fruit, vegetable or nut marketing agreement or order under § 900.3 of this part, the proposal shall address the following, to the extent applicable:

- (a) The purpose of the proposal;
- (b) The problem the proposal is designed to address with explanation and quantification;
- (c) The current requirements or industry practices relative to the proposal;
- (d) The expected impact on the industry, including producers, handlers, and on consumers;
- (e) In the case of marketing orders, an explanation, including supporting information and data, of how the proposal would tend to improve returns to producers, and in the case of marketing agreements, how the proposal impacts the signatories to the agreement;
- (f) The expected effects on small businesses as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612);
- (g) A description and quantification of whether the proposal would increase or decrease costs to producers, handlers, or others in the marketing chain, and to consumers, marketing order committees and boards and/or the Secretary;
- (h) A description of how the proposal would be implemented; and
- (i) A description, including quantification, of how compliance with the proposal would be effected.

**§ 900.40 Written testimony and USDA data request requirements.**

In addition to the provisions of § 900.8(b)(4), witnesses at an amendatory fruit, vegetable or nut formal rulemaking hearing shall make, to the extent practicable, at least 8 copies of their testimony, if prepared as an exhibit, and any other exhibits available to USDA before testimony is given on the day of appearance at the hearing. Industry requests for preparation of USDA data for a rulemaking hearing should be made at least 10 days prior to the beginning of the hearing.

**§ 900.41 Electronic document submission standards.**

To the extent practicable, all documents filed with the hearing clerk in a proceeding to amend a fruit, vegetable or nut marketing agreement or order shall also be submitted electronically to the Agricultural Marketing Service, Fruit and Vegetable Programs, USDA. All documents should reference the docket number of the proceeding. Instructions for electronic filing shall be provided at the amendatory formal rulemaking hearing and in each **Federal Register** publication regarding the amendatory proceeding.

**§ 900.42 Industry assessments.**

If the Secretary determines it is necessary to improve or expedite an amendatory fruit, vegetable or nut formal rulemaking proceeding, costs associated with improving or expediting the proceeding may be charged to the committees or boards. Such costs shall be paid with assessments from the handlers regulated under the marketing order to be amended or on signatories to the marketing agreement subject to amendment. Such assessments may supplement funds for costs associated with, but not limited to, court reporters, hearing examiners, legal counsel, hearing venue and associated travel for USDA officials.

**§ 900.43 Use of informal rulemaking.**

(a) Notwithstanding the provisions of §§ 900.1 through 900.18, and 900.36 through 900.42 of this part, the Secretary may determine that informal rulemaking procedures under § 553 of Title 5, United States Code be used to amend fruit, vegetable or nut marketing agreements and marketing orders. In making this determination, consideration shall be given to:

- (1) The nature and complexity of the proposal;
- (2) The potential regulatory and economic impacts on affected entities; and
- (3) Any other relevant matters.

Dated: August 18, 2008.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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