

Dated: January 9, 2009.

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For Part 2, Subpart M:

Dated: January 12, 2009.

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For Part 2, Subpart N:

Dated: January 9, 2009.

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For Part 2, Subpart P:

Dated: January 13, 2009.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 925 and 944

[Doc. No. AMS-FV-06-0184; FV03-925-1 IFR]

#### Grapes Grown in a Designated Area of Southeastern California and Imported Table Grapes; Change in Regulatory Periods

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule revises the regulatory period when minimum grade, size, quality, and maturity requirements apply to southeastern California grapes under Marketing Order No. 925 (order), and to imported grapes under the table grape import regulation, from April 20 through August 15 of each year to April 10 through July 10 of each year. The order regulates the handling of grapes grown in a designated area of southeastern California and is administered locally by the California Desert Grape Administrative Committee (Committee). The change to the regulatory period beginning date is needed to ensure that imported table grapes marketed in competition with domestic grapes are subject to the grade, size, quality, and maturity requirements of the order. Section 8e of the Agricultural Marketing Agreement Act of 1937 (Act) provides authority for such change. The change to the regulatory period ending date is needed to realign the regulatory period with current shipping trends for grapes in the order's production area. This rule also clarifies the maturity (soluble solids)

requirements for southeastern California and imported Flame Seedless variety grapes.

**DATES:** *Effective Date:* January 24, 2009; comments received by March 23, 2009, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.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 in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Barry Broadbent, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, Oregon 97204; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: [Barry.Broadbent@usda.gov](mailto:Barry.Broadbent@usda.gov); or Kurt Kimmel, 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 E-mail: [Kurt.Kimmel@usda.gov](mailto:Kurt.Kimmel@usda.gov).

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 and Marketing Order No. 925 (7 CFR part 925), regulating the handling of grapes grown in a designated area of southeastern California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as

amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

This rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including table grapes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities. The table grape import regulation is specified in § 944.503 (7 CFR part 944.503).

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 action 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.

There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

#### Introduction

This rule revises the beginning and ending dates of the regulatory period when minimum grade, size, quality, and maturity requirements apply to southeastern California grapes under Marketing Order No. 925 (order), and to imported grapes under the table grape import regulation. The revised regulatory period also applies to pack and container requirements issued under the order. The previous regulatory period for both domestic and

imported grapes was April 20 through August 15 of each year. The Committee, which locally administers the order, unanimously recommended changing the date when the order's requirements expire to July 10 of each year, because few grapes are normally shipped after that date. Additionally, the Desert Grape Growers League of California (League) requested that USDA change the beginning date of the regulatory period for imported table grapes from April 20 to April 1. The League requested this change to ensure that grapes imported prior to the beginning of the regulatory period, but marketed during the regulatory period in competition with domestically produced grapes, meet the California grape order's grade, size, quality, and maturity requirements. After much consideration, USDA has determined that a beginning regulatory period date of April 10 will adequately address the League's concerns and is consistent with the provisions of the Act.

This rule also changes the ending date of the regulatory period for imported grapes to July 10, because few grapes are shipped after that date. The rule also clarifies the maturity (soluble solids) requirements for southeastern California and imported Flame Seedless variety grapes.

Section 925.52(a)(2) of the grape marketing order provides authority to limit the handling of any grade, size, quality, maturity, or pack of grapes differently for different varieties, or any combination of the foregoing during any period or periods. Section 925.55 provides for mandatory inspection for all grapes handled pursuant to § 925.52 of the order. Section 925.304 of the order's administrative rules and regulations prescribes the period during which grapes are handled pursuant to regulation.

Current requirements under the marketing order require grapes shipped during the regulatory period to be at least U.S. No. 1 Table, as set forth in the United States Standards for Grades of Table Grapes (European or Vinifera type) (7 CFR 51.880 through 51.914) (Standards), or meet the requirements of the U.S. No. 1 Institutional grade, except for the tolerance percentage for bunch size. The tolerance is 33 percent instead of 4 percent as is required to meet the U.S. No. 1 Institutional grade.

Grapes meeting the institutional quality requirements may be marked "DGAC No. 1 Institutional" but shall not be marked "Institutional Pack." Grapes of the Flame Seedless and Perlette varieties are required to meet the "other varieties" standard for berry size (ten-sixteenths of an inch).

In addition, fresh shipments of grapes from the marketing order area are required to meet the minimum maturity requirements for table grapes as specified in the California Code of Regulations (3 CCR 1436.12). Grapes of the Flame Seedless variety shall be considered mature if the juice meets or exceeds 16.5 percent soluble solids, or contains not less than 15 percent soluble solids and the soluble solids are equal to or in excess of 20 parts to every part acid contained in the juice in accordance with applicable sampling and testing procedures specified in the California Code of Regulations.

The foregoing requirements also apply to imported table grapes, under the authority of section 8e of the Act, during the regulatory period established in § 944.503(a)(3). Prior to this action, the regulatory period for imported grapes began April 20 and extended through August 15 of each year, the same as the period delineated in the marketing order for domestic grapes. This rule revises the regulatory period established in the import regulations for imported grapes to April 10 through July 10 of each year. Again, this period mirrors the period set by the marketing order for domestic regulation.

The ending date of the regulatory period is being changed from August 15 to July 10 to more accurately reflect the production season of grapes produced within the marketing order production area. Recent production history shows the majority of the grapes produced in the production area are shipped prior to July 10. Regulating after that date is unjustified, both economically and logistically, for the small quantity of grapes that are produced.

Additionally, the beginning date of the regulatory period is being changed from April 20 to April 10 of each year to respond to the marketing and technology changes that have occurred within the imported grape industry. Improvements in cold storage technology have enabled large quantities of imported grapes to be imported prior to the beginning of the marketing order regulatory period, when the order requirements come into effect, and subsequently be held in cold storage for long periods of time. This can potentially allow the stored product to be marketed after the start of the regulatory period in competition with regulated, domestically produced grapes. Establishing an earlier beginning regulatory period date for the marketing order will ensure that imported table grapes marketed in competition with domestically produced table grapes meet the minimum marketing order quality standards.

Marketing order regulation is intended to protect the interests of both the producers and consumers of agricultural commodities covered under the Act. A USDA/ERS report discussed the purposes and benefits of quality and condition standards (USDA, Economic Research Service, Agricultural Economic Report Number 707, "Federal Marketing Orders and Federal Research and Promotion Programs, Background for 1995 Farm Legislation", by Steven A. Neff and Gerald E. Plato, May 1995). The basic rationale for such standards is that only satisfied customers are repeat customers. Thus, quality standards help ensure that consumers are presented a product that is of a consistent quality, helps create buyer confidence, and contributes to stable market conditions. When consumers purchase satisfactory quality grapes, they are likely to purchase grapes again, and inspection helps ensure a quality product. It is anticipated that this action will improve the orderly marketing of grapes and benefit producers and consumers of grapes.

#### **Changing the Date When Domestic and Imported Table Grape Regulations Expire**

Prior to this action, § 925.304 of the order specified a regulatory period of April 20 through August 15 when minimum grade, size, quality, and maturity requirements apply to grapes grown in southeastern California. A final rule published on March 20, 1987, (52 FR 8865) established the regulatory period to promote the orderly marketing of grapes.

The Committee met on November 14, 2002, and unanimously recommended modifying § 925.304 of the order to change the date when minimum grade, size, quality, and maturity requirements expire to July 10, rather than August 15. The Committee met again on December 12, 2002, and clarified that the proposed regulatory period should also apply to pack and container requirements under the order.

Since 1987, the amount of grapes handled in the production area after July 10 has generally decreased as older vineyards, which typically produce late season varieties, have been removed. For the years 2000–2008, almost 99 percent of the approximately 7.3 million 18-pound lugs of grapes grown annually in the production area were handled during the period April 20 to July 10. On average, just over one percent of these grapes were harvested and marketed during the period July 11 to August 15. The Committee believes that ending regulatory requirements on July 10 will benefit handlers and producers

by reducing the costs associated with mandatory inspection.

Under section 8e of the Act, minimum grade, size, quality, and maturity requirements for table grapes imported into the United States are established under Table Grape Import Regulation 4 (7 CFR 944.503) (import regulation). Section 944.503(a)(3) of the import regulation specifies the regulatory period when imported grapes are subject to minimum requirements. The change to the order's regulatory period expiration date requires a corresponding change to expiration date of the regulatory period for imported table grapes.

It is expected that the earlier end to the regulatory period for domestic and imported grapes will benefit handlers, producers, and importers, because the regulatory burden on these entities will be reduced.

#### **Changing the Beginning of the Regulatory Period for Domestic and Imported Table Grapes**

In January 2003, the League requested that USDA change the beginning date of the regulatory period for imported table grapes from April 20 to April 1, and provided information in support of that request. The League contended that, in prior years, grapes not subject to marketing order requirements were imported prior to the start of the regulatory period and were subsequently marketed during the regulatory period in competition with domestically produced grapes subject to the California grape order's grade, size, maturity, and quality requirements. The League further contended that there would be no adverse effect on the availability and prices of grapes if the beginning of the regulatory period for imports were changed to April 1.

After much consideration, including the League's proposal and comments received by USDA concerning the proposed change, USDA is establishing with this rule an April 10 beginning date of the regulatory period for imported grapes.

USDA is authorized by Section 608e(b)(1) of the Act to extend marketing order requirements for a period, not to exceed 35 days, during which the order requirements would be effective for an imported commodity during any year, if USDA determines that the additional period of time is necessary to effectuate the purposes of the Act and to ensure that imports marketed during the regulatory period meet the grade, size, quality, or maturity requirements of the marketing order applicable to domestic production. Further, section 608e(b)(2) of the Act

provides that in making such a determination, USDA shall consider, through notice and comment procedures:

(A) To what extent, during the previous year, imports of a commodity that did not meet the requirements of a marketing order applicable to such commodity were marketed in the United States during the period that such marketing order requirements were in effect for available domestic commodities (or would have been marketed during such time if not for any additional period established by the Secretary);

(B) If the importation into the United States of such commodity did, or was likely to, avoid the grade, size, quality, or maturity standards of a seasonal marketing order applicable to such commodity produced in the United States; and

(C) The availability and price of commodities of the variety covered by the marketing order during any additional period the marketing order requirements are to be in effect.

In its request, the League presented arguments and data that support the claim that unregulated imported grapes have been and likely will continue to be in the market in competition with grapes subject to regulation, that the presence of such grapes may result in an avoidance of the marketing order requirements, and that expanding the marketing order regulatory period to ensure that imported and domestic grapes marketed during the regulatory period meet minimum marketing order quality standards will have minimal impact on the price and availability of grapes.

Current market mechanisms for imported grapes dictate that product is either immediately shipped directly to retail markets or diverted for holding in cold storage facilities. Improved cold storage technology allows importers to divert imported grapes from normal marketing channels for up to 60 days after their arrival at a U.S. port. The practice of importing grapes into the U.S. prior to the start date of the regulatory period, holding them in cold storage, and subsequently releasing them into the market after the regulatory period has begun may result in the avoidance of the marketing order regulation. Revising the start of the regulatory period to April 10 will reduce the likelihood that uninspected grapes that are imported prior to the start of regulation are marketed during the regulatory period.

Exporting countries export many high quality grapes to the U.S. prior to April 20. Those same countries have the

capability of exporting grapes which will consistently meet the minimum requirements of the import regulation. There is no expectation that an earlier beginning date for regulation will cause a shortage of grapes in the market. An earlier beginning date will help to ensure that grapes being imported and marketed during the regulatory period meet minimum requirements prior to being allowed to be marketed in the U.S.

It is expected that uniform high quality product consistently in the market will encourage repeat purchases of imported and domestic grapes, which should benefit producers, handlers, importers, and consumers of grapes.

The U.S. Census Bureau indicates that on average for the years 2000–2008, 68 million 18-pound lugs of grapes were imported into the United States. The two main countries exporting to the United States were Chile, with average exports of 51 million 18-pound lugs (76 percent of the total), and Mexico, with 14 million 18-pound lugs (21 percent of the total). The remaining three percent came from various other countries.

Total grape imports for the February through April period in the years 2000–2008 averaged 44 million 18-pound lugs. Of this amount, 97 percent came from Chile and the remaining percentage came from various other countries.

Information from USDA's Market News Service (Market News) for 2000–2008 shows that the Port of Philadelphia (where historically the greatest percentage of Chilean table grapes enter the United States) received an average of 20 million 18-pound lugs of imported Chilean grapes during the February 1 to April 19 period, with approximately 30 percent (6 million) of these 20 million 18-pound lugs arriving between April 1 and April 19. Market News import statistics for the 2008 shipping season show that 18.82 million lugs of grapes were imported from Chile into Philadelphia from February 1 to April 19, with 28 percent (5.26 million) arriving between April 1 and April 19. After the April 20 start of the regulatory period, shipments dropped off dramatically and ended completely by June 4.

Fresh grapes imported prior to the beginning of the regulatory period are not subject to mandatory inspection but may be inspected on a voluntary basis. USDA's Fresh Products Branch, Fruit and Vegetable Programs (Fresh Products), is responsible for the performance of those voluntary inspections and compiles the inspection results data. Approximately 10 percent of the table grapes imported in during

the period April 1–19, 2008 were voluntarily inspected.

The grapes that are voluntarily inspected and fail to meet the Standards are not prohibited from entering into the channels of commerce in the U.S. By contrast, imported grapes that fail import quality requirements during the regulatory period must be reworked to meet the minimum requirements before being marketed in the U.S. Otherwise, failing product must be exported, destroyed, or utilized in processed products.

Under normal marketing conditions, imported grapes move directly through distribution channels into retail markets. However, when the supply of imported product exceeds demand, the imported grapes can be put into cold storage until the market is ready to absorb them. The length of time the grapes remain in storage likely has a negative effect the quality of the grapes.

Studies of table grape importer storage behavior performed by SURRES, a division of the Applied Technology Corporation, and the College of Business and Management, University of Maryland, indicate that importers use their storage capability extensively during the March-April time frames and that storage periods in the 30 to 60 day range are not uncommon at this time of year. Thus, the utilization of cold storage facilities in this manner creates a mechanism whereby grapes imported prior to the April 20 start of the regulatory period (product which is not subject to the marketing order requirements) may be held over in cold storage and subsequently enter the market after April 20, in competition with grapes that have passed inspection and met or exceeded the marketing order and import requirements.

Market News reports of commodity movement for the years 2000–2008 show that grape imports decrease dramatically soon after the start of the regulatory period. The amount of grapes imported during the regulatory period cannot account for the substantial quantity of imported grapes consistently present in the market in May and, sometimes, into June. Since few grapes are imported early in the regulatory period, many of the imported grapes available during the regulatory period have entered the country prior to the beginning of the regulatory period and have been held in cold storage and marketed during the regulatory period.

The Market News terminal market reports generally indicate that marginal quality and condition grapes command dramatically reduced prices in the market. In addition, those same reports

indicate that grapes of better quality and condition tend to receive higher prices.

The April 10 regulatory period beginning date is being implemented to ensure that imported and domestic grapes marketed during the regulatory period meet the minimum marketing order quality standards. This action is expected to reduce the quantity of unregulated imported grapes marketed during the regulatory period and to provide consumers with higher quality grapes on a more consistent basis. Experience has shown that an improvement in product quality results in increased acceptance in the marketplace and translates into more frequent purchases. USDA expects domestic producers and handlers of southeastern California grapes, and exporters and importers of foreign-produced grapes to benefit from this action through stabilized marketing conditions and prices. The regulatory period change is anticipated to benefit the producers and marketers of both domestic and imported grapes, as well as grape consumers.

#### **Clarification of Maturity Requirements**

This action also revises § 944.503(a)(1)(ii) to clarify that imported Flame Seedless variety grapes shall be considered mature if the juice meets or exceeds 16.5 percent soluble solids, or contains not less than 15 percent soluble solids and the soluble solids are equal to or in excess of 20 parts to every part acid contained in the juice in accordance with applicable sampling and testing procedures specified in the California Code of Regulations (3 CCR 1436.3, 1436.5, 1463.6, 1436.7, 1436.12, and 1436.17). Previously, this subparagraph did not include the 16.5 percent option for meeting maturity requirements. In addition, obsolete language specifically regarding requirements in effect only in 1998 is removed from paragraph (a)(1). These same requirements are already in effect for grapes shipped from southeastern California under Marketing Order No. 925.

#### **Initial Regulatory Flexibility Impact Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule 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 the 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. Import regulations issued under the Act are comparable to those established under Federal marketing orders.

There are approximately 14 handlers of southeastern California grapes who are subject to regulation under the order and about 50 grape producers in the production area. In addition, there are approximately 123 importers of grapes. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000. Nine of the 14 handlers subject to regulation have annual grape sales of less than \$7 million. Based on data from the National Agricultural Statistics Service (NASS) and the Committee, the average crop value for 2008 is about \$53,040,000. Dividing this figure by the number of producers (50) yields an average annual producer revenue estimate of about \$1,060,800, which is above the SBA threshold of \$750,000. Based on the foregoing, it may be concluded that a majority of grape handlers and none of the producers may be classified as small entities. The average importer receives \$2.8 million in revenue from the sale of grapes. Therefore, we believe that the majority of these importers may also be classified as small entities.

#### **Summary of Changes**

This rule revises the regulatory periods when minimum grade, size, quality, and maturity requirements apply to grapes grown in southeastern California under the order, and to imported grapes under the table grape import regulation. The revised regulatory period also applies to pack and container requirements issued under the order. Prior to this action, the regulatory period for both domestic and imported grapes was April 20 through August 15 of each year.

The California Desert Grape Administrative Committee, which locally administers the order for grapes grown in a designated area of southeastern California, unanimously recommended changing the date when these requirements expire for grapes grown in California to July 10. Moving the ending date of the regulatory period forward is in the interest of table grape

handlers and producers. The Desert Grape Growers League of California requested that the beginning date of the regulatory period for imported grapes be changed from April 20 to April 1 and provided information to support its request. The League proposed this regulatory period change to reduce the quantity of unregulated imported grapes that are marketed during the regulatory period in competition with regulated grapes. The League believes that regulating product quality to meet minimum standards will result in increased acceptance of grapes in the marketplace, and is expected to translate into more frequent purchases on the part of the consumer.

After publishing a proposed rule and receiving comments, USDA has subsequently determined that changing the beginning date of the regulatory period to April 10, as opposed to the April 1 date requested by the League, adequately addresses the League's concerns and is consistent with the provisions of the Act.

In addition, this action revises regulatory language in the grape import regulations to clarify maturity requirements on imported Flame Seedless variety grapes. Prior to this rule, the regulation did not include the 16.5 percent option for meeting maturity requirements that is already in effect for grapes shipped from southeastern California under Marketing Order No. 925.

#### **Changing the Ending of the Regulatory Period for Domestic and Imported Grapes**

Section 925.52(a)(2) of the grape order provides authority to limit the handling of any grade, size, quality, maturity or pack of grapes differently for different varieties, or any combination of the foregoing during any period or periods.

Section 925.304 of the order's administrative rules and regulations stipulates the regulatory period, most recently April 20 through August 15, when minimum grade, size, quality, and maturity requirements apply to grapes grown in southeastern California under the order. A final rule published on March 20, 1987, (52 FR 8865) established that regulatory period to promote the orderly marketing of grapes.

Grape handlers in the production area shipped and marketed an average of 7.3 million 18-pound lugs of grapes annually from 2000–2008.

Approximately 99 percent of those grapes were shipped and marketed during the period April 20 to July 10. At least 14 varieties are grown in the production area regulated under the

order and marketed in major U.S. market areas. The four major varieties are Flame Seedless, Perlette, Thompson Seedless, and Sugraone.

Since 1987, the amount of grapes handled after July 10 has decreased, and, in the period 2000–2008, the amount of grapes handled after July 10 constituted just slightly more than 1 percent of the grapes produced in the production area. The Committee met on November 14, 2002, and unanimously recommended modifying § 925.304 of the order's administrative rules and regulations to advance the date when minimum grade, size, quality, and maturity requirements expire to July 10, rather than August 15. The Committee met again on December 12, 2002, and clarified that the proposed regulatory period should also apply to pack and container requirements under the order.

The amount of grapes handled in the production area after July 10 of each year has generally decreased as older vineyards, which typically produce late season varieties, have been removed. During the past 3 years, approximately 99 percent of the grapes grown in the production area were handled during the period April 20 through July 10.

Grapes handled after July 10 tend to bring much lower prices than early season grapes. For example, in the 2003 season that followed the Committee recommendation, early season Flame Seedless grapes had an average FOB price of \$13.85 to \$23.85 while end-of-season Flame Seedless grapes brought an average FOB price of \$11.85 to \$12.85 per 18-pound lug. In 2008, early season Flame Seedless prices averaged \$22.95 to \$28.95 while the late season prices averaged \$11.95 per 18-pound lug.

Additionally, inspection costs for grapes handled after July 10 are higher, as inspection fees are proportionate to the volume of grapes inspected. Thus, this shortened regulatory period is expected to benefit handlers and producers.

The Committee considered other regulatory period alternatives that would more adequately reflect the end of the harvest for the domestic production area but still ensure shipments of higher quality grapes. For example, one suggestion was to change the ending date of the regulatory period for grapes grown in the designated area of southeastern California to July 1 or July 5. This suggestion was not adopted because the Committee believes that July 10 is more reflective of the end of the season. Approximately one percent of grapes are shipped from the production area after July 10, but the industry felt that commercial quantities

of grapes may still be shipped before that date and was not supportive of an earlier ending date.

Section 8e of the Act specifies that whenever certain specified commodities, including table grapes, are regulated under a Federal marketing order, imports of that commodity into the United States are prohibited unless they meet the same or comparable grade, size, quality, and maturity requirements as those in effect for the domestically produced commodity. Minimum grade, size, quality, and maturity requirements for table grapes imported into the United States are established under Table Grape Import Regulation 4 (7 CFR 944.503) (import regulation).

Section 944.503(a)(3) of the import regulation specifies the regulatory period during which imported grapes are subject to regulation. Prior to this rule, the regulatory period was April 20 to August 15 of each year. Since this action will change the expiration date of the regulatory period for the California production area to July 10, a corresponding change to the regulatory period for imported table grapes is required under section 8e of the Act.

#### **Changing the Beginning of the Regulatory Period for Imported Grapes**

The U.S. Census Bureau indicates that on average, for the years 2000–2008, 68 million 18-pound lugs of grapes were imported into the United States. The majority of these grapes are imported prior to April 20. Only grapes imported during the regulatory period are required to be inspected and to comply with the same minimum grade, size, quality, and maturity requirements as the domestic marketing order.

The League requested that the beginning date of the regulatory period for imported grapes be advanced from April 20 to April 1, and submitted information to support its request to USDA for review and evaluation. After much consideration, USDA determined that changing the beginning date of the regulatory period to April 10 adequately addresses the League's concerns and is consistent with the provisions of the Act. The beginning date of the marketing order regulatory period is also being changed to keep the import and domestic regulatory period dates the same.

The authority for changing the beginning date of the regulatory period for imports is specified in § 608e(b) of the Act. These provisions allow the Secretary to extend import requirements for a period, not to exceed 35 days, during which the import requirements would be effective for the imported

commodity. To change the beginning date, USDA must consider the following: (1) For the prior year, whether imports of grapes that did not meet import requirements were marketed in the United States during the period that such import requirements were in effect; (2) whether imported grapes did or were likely to avoid such import requirements; and (3) whether there would be any adverse effect on the availability and prices of grapes if the regulatory period for imports was changed.

The League contends that such an action is needed to ensure that grapes imported into the United States prior to the beginning of the regulatory period, but marketed when the regulation is in effect, meet marketing order grade, size, quality, and maturity requirements.

Grape importers use cold storage extensively during the months of March and April. Storage periods in the 30–60 day range are not uncommon at this time of year. Much of the imported product available in the market during the regulatory period is believed to have been shipped prior to the beginning of the regulatory period and held in such facilities before shipping to terminal markets.

On average, 68.0 million 18-pound lugs of grapes were imported into the United States at all ports during each of the years 2000 to 2008. During each of those years, there was a significant decrease in imports after the April 20 beginning of the regulatory period. Approximately 3 million 18-pound lugs of imported grapes arrive each week of the shipping season prior to the April 20 beginning date of regulation. After April 20, shipments drop dramatically and usually cease altogether by May 31.

Market News reports show that shipments of imported Chilean grapes in 2008 mirror the pattern of previous years. An average of 3.25 million 18-pound lugs of grapes were imported each week of the season leading up to the April 20 start of regulation. For the week following the April 20 start date, shipments dropped to approximately 750,000 lugs per week. In the weeks that followed, shipments were 430,000 lugs, 372,000 lugs, and 78,000 lugs. Shipments continued to decrease to statistically insignificant quantities, ceasing completely after June 4, 2008.

Fresh Products data indicates that from 2004–2007, less than one percent of imported Chilean grapes were subject to inspection during the regulatory period, confirming that only limited quantities of Chilean grapes are imported after the import regulation takes effect. The majority of imports from Mexico are imported during the

May–July period of each year subject to the import regulation requirements.

Market News terminal market reports for grapes for the years 2000–2008 indicate that imported table grapes are in the domestic market during May and June and that they compete with regulated grapes that are required to be inspected and certified as meeting minimum quality requirements. Given the small quantity of grapes imported during the early part of the regulatory period, it is presumed that the imported grapes available in the market during that time were imported prior to the start of the regulatory period and held over in cold storage.

USDA's Economic Research Service (ERS) studies indicate that low quality commodities can adversely affect the market for shippers of acceptable quality products. Quality requirements are typically used to cultivate a positive image of a consistent and reliable supplier of high-quality product. This results in consumer goodwill that strengthens demand and boosts producer prices. (USDA, Economic Research Service, Agricultural Economic Report Number 629, "Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops" by Nicholas J. Powers, March 1990; USDA, Economic Research Service, "Criteria for Evaluating Federal Marketing Orders: Fruits, Vegetables, Nuts, and Specialty Commodities" by Leo C. Polopolus, Hoy F. Carman, Edward V. Jesse, and James D. Shaffer, December 1986).

The presence of lower quality product in the marketplace, from any source, weakens demand for all products of that type. Market research and experience shows that consumers often purchase other commodities in place of the commodity with which they have had a bad quality experience. Decreasing demand ultimately has a negative effect on grower, handler, exporter, and importer returns.

The ERS report also discusses the purposes of quality standards. The basic rationale for such standards is that only satisfied customers are repeat customers. When consumers have a good quality experience, they make repeat purchases. Thus, quality standards help ensure that consumers are presented product that is of a known level of quality. It is in the interest of the grape industry to maintain consumer confidence by consistently offering high-quality product.

According to the League, table grapes shipped from some countries exporting to the United States must meet minimum inspection requirements on a year-round basis when their product is

exported to both the European Union and Canada. Hence, a change in the effective date to April 10 should not dramatically adversely affect the availability of imported table grapes in the U.S. market, as the exporting countries have the ability to supply high quality table grapes. As an example, during the period April 1–19, 2004, FOB prices for imported grapes in U.S. markets ranged from \$8 to \$26 per package, depending on the date, condition, and size of the grapes. During the same period, Canadian FOB prices for imported grapes ranged from \$12.03 to \$33.98 and European Union prices ranged from \$8 to \$22 depending on the date, condition, and size of the grapes.

Better quality grapes tend to command higher prices. The increase in revenue could offset the added inspection costs of 3.8 cents per box for imported grapes checked at dockside. In 2000–2008, less than 1 percent of Chilean grapes required mandatory inspection. However, if inspection in these years had been mandatory as of April 10, about 7 percent would have been required to be inspected. It is anticipated that grape prices will be slightly higher as the quality level of grapes offered to consumers is increased.

Inspection fees will now be applicable to grapes imported during the April 10–19 period. These fees vary, depending on such factors as the location of the inspection, the size of the load to be inspected, and whether there are multiple commodities to be inspected. Current inspection fees for imported grapes are 3.8 cents per package when inspected at dockside. When the inspection is performed at a location other than dockside, the fees range from \$69 to \$151 per car lot (approximately 45,000 pounds), depending on the number of packages in the load. (See <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=FreshProductInspectionService&rightNav1=FreshProductInspectionService&topNav=&leftNav=&page=FreshFVGrading&resultType=&acct=freshgrdcert> for inspection fee information).

With prices for imported grapes ranging from \$6 to mostly \$44 per package, depending on the month, condition, and size of the grapes, inspection fees are anticipated to be less than 1 percent of the value of the grapes imported during this period of time.

The benefits and costs associated with changing the dates when grade, size, quality, and maturity requirements apply to grapes grown in a designated area of southeastern California and to

imported grapes under the grape import regulation is not expected to be disproportionately larger or smaller for small importers than for large importers, nor for small handlers or producers than for larger entities.

A number of alternatives to an April 10 regulatory period start date were considered prior to this action, including leaving the April 20 beginning date of the regulatory period unchanged, and setting an earlier beginning date (April 1 per the League's request).

There is clear evidence that the April 20 start date has allowed unregulated imported grapes to compete in the marketplace with regulated grapes, negatively impacting domestic producers and handlers. Maintaining the status quo in relation to the regulatory period start date was not deemed to be a viable option.

An April 1 regulatory period start date, as originally proposed by the League, would certainly have addressed the problem, but may have also created some unintended consequences. The imported grape industry felt that an April 1 start date would have created undue economic hardship for the industry and may have ultimately resulted in curtailed shipments.

The April 10 regulatory period start date addresses the concerns of the domestic grape industry, while not excessively burdening the imported grape industry. An April 10 beginning date is expected to improve the quality of imported and domestic grapes available to consumers, lessen the chances of unregulated imported grapes being in the market during the regulatory period in competition with regulated grapes, and, ultimately, be in the best interest of all grape handlers, producers, importers, and consumers.

This action will not impose any additional reporting or recordkeeping requirements on either small or large grape handlers or importers. 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.

AMS is committed to compliance 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.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

In addition, the Committee's meetings were widely publicized throughout the

grape industry and all interested persons were invited to attend the meetings and participate in Committee deliberations. Like all Committee meetings, the November 14, 2002, and the December 12, 2002, meetings were public meetings and all entities, both large and small, were able to express their views on changing the marketing order regulatory period. Also, the World Trade Organization, the Chilean Technical Barriers to Trade (TBT) inquiry point for notifications under the U.S.-Chile Free Trade Agreement, the embassies of Argentina, Brazil, Canada, Chile, Italy, Mexico, Peru, and South Africa, and known grape importers were notified of the proposed action. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

#### Previously Published Proposed Rule

A proposed rule concerning this action was published in the **Federal Register** on May 25, 2005 (70 FR 30001). The rule proposed changing the regulatory period for southeastern California grapes and imported grapes from April 20 through August 15 to April 1 through July 10 and clarifying the maturity requirements for southeastern California and imported Flame Seedless variety grapes.

The proposed rule was subsequently reopened five times for further comments on July 25, 2005 (70 FR 42513), on September 27, 2005 (70 FR 56378), on July 11, 2006 (71 FR 39019), on October 25, 2007 (72 FR 60588), and on December 13, 2007 (72 FR 70811). Copies of the rule were mailed or sent via facsimile to all Committee members and grape handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register. A total of five 60-day comment periods and one 15-day comment period, the last of which ended December 28, 2007, were provided to allow interested persons to respond to the proposal.

In total, USDA received 161 comments in response to the proposed rule and subsequent reopenings. Comments were broken down as follows; 20 comments were in support of the proposal, 141 were in opposition, 112 of the comments originated from foreign sources, and 49 originated from domestic sources. Fifteen comments were in reference to procedural aspects of the rulemaking process and were not related directly to the merits of the proposal.

The comments were primarily directed towards the proposed change to the beginning date of the regulatory

period from April 20 to April 1, as published in the proposed rule. There were no comments in opposition to the proposed change to the ending date of the regulatory period or to the proposed change in the maturity requirements in the import regulation.

All comments, both in support of and in opposition to the proposed rule, were reviewed thoroughly and considered prior to the issuance of this action. Likewise, all comments received in response to this interim final rule will be considered prior to the issuance of a final rule.

#### Comments in Full Support

Twenty comments were submitted in full support of the proposal. The comments were submitted by domestic grape producers and handlers, associations related to the domestic grape industry, domestic agricultural service firms, and members of the U.S. Congress.

#### Comments in Opposition

Of the 141 comments in opposition to the proposal, 14 were concerned with procedural aspects of the rulemaking process, 106 were so similar in style and content as to be considered form letters, and the remaining 21 were unique submissions. The commenters represented foreign grape producers, foreign grape producer associations, and shippers, importers, exporters, and maritime affiliates that are directly involved in the importation of foreign produced grapes into the U.S.

The opposition comments that had material bearing on this rulemaking action were summarized into the following four categories: (1) The proposed change in the beginning effective date contravenes the mandates set forth in the Act; (2) the proposed rule fails to supply a reasoned analysis to rescind the 1987 finding that a change of the beginning effective date for Marketing Order 925 and Import Regulation 4 to a date before April 20 would constitute an unnecessary regulation of imports at a time when domestic shipments would appear to be remote; (3) the proposed beginning effective date of April 1 is contrary to the declared administrative policy of AMS/USDA; and (4) the proposed rule imposes marketing order standards on Chilean supplies when no domestic varieties are available, and therefore allegedly constitutes a non-tariff barrier contrary to the terms of WTO Agreements and the U.S.-Chile Free Trade Agreement and assesses inspection fees starting April 1 when no domestic supplies are being so charged,



and thereby allegedly violates Article III and Article VIII of GATT 1994.

The specific comments in opposition to the proposed rule maintained that the action violated the criteria set forth in the Act for such action and lacked the required statistical evidence from “the previous year.” The commenters also charged that deficient or irrelevant evidence in support of the action, rebutted allegations of poor quality of grape imports being imported immediately prior to the regulatory period, and asserted that grape imports would be curtailed in response to the action. Virtually all of the commenters in opposition stated that the imported grape industry would suffer negative economic impacts as a result of such action. In addition, opposition commenters asserted that the action violated previous rulemaking findings, that the action contravenes departmental policy determinations dating back to 1982, and that the action constituted a breach of various trade agreements entered into by the U.S. Government.

USDA is in disagreement with most of the opposition comments. However, USDA believes that an April 1 beginning date for the regulatory period would be too early and could potentially place an unjustifiable hardship on the imported grape industry. USDA believes that moving the beginning date of the regulatory period forward from April 20 to April 10 is necessary and justified.

USDA further believes that this rulemaking action fully adheres to the requirements of the Act to take such action. USDA has sought to collect, present, analyze, and consider evidence that is both current and relevant, as is required by the Act. The proposed rule, the reopening of the comment period to present updated statistical data, and this interim final rule present appropriate statistical justification for this action and are in compliance with the governing statutes. In addition, USDA rejects the opposition commenters’ contention that any statutory or procedural errors were committed during the course of this rulemaking process. USDA believes that all statutes, policies, and procedures of the federal government have been strictly adhered to.

Likewise, USDA believes that this action is not contrary to any previous actions, decisions, agreements, or treaties binding on the U.S. Government.

In deciding how to proceed on this matter, USDA took into consideration the information submitted prior to issue of the proposed rule, as well as the

comments received and determined that an April 10 regulatory period beginning date is more appropriate than the proposed April 1 date. Consequently, this interim final rule implements an April 10 regulatory period beginning date instead of the April 1 date contained in the proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop 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.

This rule invites comments on the revisions to the regulatory period when minimum grade, size, quality, and maturity requirements apply to southeastern California grapes under Marketing Order No. 925 (order), and to imported grapes under the table grape import regulation. Any comments received will be considered prior to finalization of this rule.

In accordance with section 8e of the Act, USTR has concurred with the issuance of this interim final rule.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this 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 action until 30 days after publication in the **Federal Register** because: (1) The 2008–2009 shipping season for imported grapes affected by this rule has already begun; (2) the immediate implementation of this rule is necessary for importers to make marketing decisions and to contract in advance for shipping; (3) handlers and importers are aware of this rule; (4) a proposed rule concerning the action taken in this rule was published in the **Federal Register** May 25, 2005 (70 FR 30001); and (5) this rule provides a 60-day comment period and all comments timely received will be considered prior to finalization of this rule.

## List of Subjects

### 7 CFR Part 925

Grapes, Marketing agreements, Reporting and recordkeeping requirements.

### 7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

■ For the reasons set forth in the preamble, 7 CFR parts 925 and 944 are amended as follows:

## PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

■ 1. The authority citation for 7 CFR parts 925 and 944 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. The introductory text to § 925.304 is revised to read as follows:

### § 925.304 California Desert Grape Regulation 6.

During the period April 10 through July 10 each year, no person shall pack or repack any variety of grapes except Emperor, Almeria, Calmeria, and Ribier varieties, on any Saturday, Sunday, Memorial Day, or the observed Independence Day holiday, unless approved in accordance with paragraph (e) of this section, nor handle any variety of grapes except Emperor, Calmeria, Almeria, and Ribier varieties, unless such grapes meet the requirements specified in this section.

\* \* \* \* \*

## PART 944—FRUITS; IMPORT REGULATIONS

■ 3. In § 944.503, paragraphs (a)(1) introductory text, (a)(1)(ii), and (a)(3) are revised to read as follows:

### § 944.503 Table Grape Import Regulation 4.

(a)(1) Pursuant to section 8e of the Act and Part 944—Fruits, Import Regulations, the importation into the United States of any variety of Vinifera species table grapes, except Emperor, Calmeria, Almeria, and Ribier varieties, is prohibited unless such grapes meet the minimum grade and size requirements specified in 7 CFR 51.884 for U.S. No. 1 table, as set forth in the United States Standards for Grades of Table Grapes (European or Vinifera Type, 7 CFR 51.880 through 51.914), or shall meet all the requirements of U.S. No. 1 Institutional with the exception of the tolerance for bunch size. Such tolerance shall be 33 percent instead of



4 percent as is required to meet U.S. No. 1 Institutional grade. Grapes meeting these quality requirements shall not be marked "Institutional Pack," but may be marked "DGAC No. 1 Institutional."

(i) \* \* \*

(ii) Grapes of the Flame Seedless variety shall meet the minimum berry size requirement of ten-sixteenths of an inch (1.5875 centimeters) and shall be considered mature if the juice meets or exceeds 16.5 percent soluble solids, or the juice contains not less than 15 percent soluble solids and the soluble solids are equal to or in excess of 20 parts to every part acid contained in the juice, in accordance with applicable sampling and testing procedures specified in sections 1436.3, 1436.5, 1436.6, 1436.7, 1436.12, and 1436.17 of Article 25 of Title 3: California Code of Regulations (CCR).

\* \* \* \* \*

(3) All regulated varieties of grapes offered for importation shall be subject to the grape import requirements contained in this section effective April 10 through July 10.

\* \* \* \* \*

Dated: January 14, 2009.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E9-1139 Filed 1-16-09; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9435]

RIN 1545-BH61

Guidance Regarding the Treatment of Stock of a Controlled Corporation Under Section 355(a)(3)(B); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final and temporary regulations (TD 9435) that were published in the Federal Register on Monday, December 15, 2008 (73 FR 75946) providing guidance regarding the distribution of stock of a controlled corporation acquired in a transaction described in section 355(a)(3)(B) of the Internal Revenue Code. This action is necessary in light of amendments to section 355(b). These temporary regulations will affect corporations and their shareholders. The text of these

temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the Federal Register.

DATES: Effective Date: This correction is effective January 21, 2009, and is applicable on December 15, 2008.

FOR FURTHER INFORMATION CONTACT: Russell P. Subin, (202) 622-7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations that are the subject of this document are under section 355 of the Internal Revenue Code.

Need for Correction

As published, final and temporary regulations (TD 9435) contains errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the entries to read as follows:

Authority: 26 U.S.C. 7805 \* \* \* Section 1.355-2T(g) and (i) are also issued under 26 U.S.C. 355(b)(3)(D). \* \* \*

Par. 2. Section 1.355-1 is amended by revising the last two sentences of paragraph (a) to read as follows:

§ 1.355-1 Distribution of stock and securities of a controlled corporation.

(a) \* \* \* This section and §§ 1.355-2 through 1.355-4, other than § 1.355-2(g) and (i) and § 1.355-2T, do not reflect the amendments to section 355 made by the Revenue Act of 1987, the Technical and Miscellaneous Revenue Act of 1988, and the Tax Technical Corrections Act of 2007. For the applicability date of §§ 1.355-2T(g), 1.355-5, 1.355-6, and 1.355-7, see §§ 1.355-2T(i), 1.355-5(e), 1.355-6(g), and 1.355-7(k), respectively.

Par. 3. Section 1.355-2T is amended by revising the last sentence of paragraph (i)(1) to read as follows:

§ 1.355-2T Limitations (temporary).

\* \* \* \* \*

(i) \* \* \*

(1) \* \* \* However, except as provided in paragraph (i)(2) of this section, paragraphs (g)(1) through (g)(5) of this section do not apply to any distribution occurring after December 15, 2008, that is pursuant to a transaction which is—

\* \* \* \* \*

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9435]

RIN 1545-BH61

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ACTION: Correction to final and temporary regulations.

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