DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV04–916–1 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 container requirements for fresh shipments of these fruits, beginning with 2004 season shipments. This rule also continues in effect an on-going modification of the requirements for placement of Federal-State Inspection Service lot stamps for the 2004 season and beyond, continues in effect a minimum net weight for a style of containers, continues in effect the authorization to continue shipments of ''CA Utility'' quality nectarines and peaches, and continues in effect the revision of the tolerance for blossom-end growth cracks for Peento type peaches. The marketing orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative and Peach Commodity Committees (committees). This rule will enable handlers to continue shipping fresh nectarines and peaches meeting consumer needs in the interests of producers, handlers, and consumers of these fruits.

EFFECTIVE DATE: August 6, 2004.

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

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

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Under the orders, lot stamping, grade, size, maturity, container, container marking, and pack requirements are established for fresh shipments of California nectarines and peaches. Such requirements are in effect on a continuing basis. The Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC), which are responsible for local administration of the orders, met on November 12, 2003, and unanimously recommended that these handling requirements be revised for the 2004 season, which began about the second week of April. The changes: (1) Continue indefinitely the lot stamping requirements that have been in effect since the 2000 season; (2) authorize continued shipments of ''CA Utility'' quality fruit during the 2004 season; (3) revise tolerances for blossom-end growth cracks for Peento type peaches; (4) establish a minimum net weight for volume-filled, five down containers; (5) add an additional container to the list of standard containers and amend the dimensions of another container already regulated; and (6) revise varietal maturity, quality, and size requirements to reflect changes in growing and marketing practices. These changes continue in effect until modified, suspended, or terminated.

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 November 12, 2003. 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' November 12, 2003, meetings because the nectarine and peach trees were dormant. The committees subsequently made crop estimates at their meetings on April 28, 2004. The 2004 nectarine crop was estimated to be approximately 22,245,000 containers, and the 2004 peach crop was estimated to be approximately 22,601,000 containers. These crops are similar to the 2003 crops, which totaled 21,896,300 containers of nectarines and 22,306,300 containers of peaches.

Lot Stamping Requirements

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

containers that are loaded directly onto railway cars, exempted, or mailed directly to consumers in consumer packages.

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

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

Several new containers have been adopted for use by nectarine and peach handlers in recent years. These containers are returnable plastic containers (RPCs). Use of RPCs may represent substantial savings to retailers for storage and disposal, as well as for handlers who do not have to pay for traditional, single-use containers. Fruit is packed in the containers by the handler, delivered to the retailer, emptied, and returned to a central clearinghouse for cleaning and redistribution to the handler. However, because these containers are designed for reuse, RPCs do not support markings that are permanently affixed to the container. All markings must be printed on cards that slip into tabs on the front or sides of the containers. The cards are easily inserted and removed, and further contribute to the efficient reuse of RPCs.

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

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

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

In a meeting of the Tree Fruit Quality Subcommittee on October 23, 2003, the subcommittee recognized that as time has passed, the likelihood of getting a suitable adhesive for the cards or an area on the containers for container markings has decreased significantly. Therefore, the subcommittee determined that it was no longer appropriate to put this regulation into effect annually. When the time comes that an adhesive for the cards becomes available or another method for securing the lot stamp on each container is found, the subcommittee determined that they would make a recommendation to eliminate this requirement.

For those reasons, the subcommittee unanimously recommended to the committees that the requirement for lot stamp numbers on USDA-approved pallet tags, when used on RPCs, as well as on individual containers on a pallet, be required for the 2004 season and beyond. The committees then recommended unanimously that such requirement be implemented for the 2004 season and beyond, as well.

Thus, the amendments to §§ 916.115 and 917.150 continue in effect and require the lot stamp number to be printed on a USDA-approved pallet tag, when used on RPCs in addition to the requirement that the lot stamp number be applied to cards on all exposed or outside containers, and not less than 75 percent of the total containers on a pallet. This regulation will remain in effect until such time as it may be modified.

Container and Pack Requirements

Sections 916.52 and 917.41 of the orders authorize establishment of container, container marking, and pack requirements for shipments of nectarines and peaches, respectively. Under §§ 916.350 and 917.442 of the orders' rules and regulations, the specifications of container markings, net weights, well-filled requirements, weight-count standards for various sizes of nectarines and peaches, and lists of standard containers are provided.

The committees unanimously recommended that a uniform net weight be established for all ''five down'' boxes (commonly referred to as ''Euro'' boxes) that are volume-filled. Currently, the net weight requirement for volume-filled, ''five down'' boxes is 29 and 31 pounds.

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

During the 2003 season, the industry used both the 29-pound and 31-pound net weights in Euro containers, and committee staff tracked the total packages of nectarines and peaches of each weight. The purpose of the tracking was to see if one net weight was predominant.

At a meeting of the Tree Fruit Quality Subcommittee meeting on October 23, 2003, the results of the study were released. During the 2003 season, 94,300 twenty-nine-pound boxes of nectarines were packed compared to 8,520 thirty-one-pound boxes of nectarines. There were also 69,115 twenty-nine-pound boxes of peaches packed as compared to 17,103 thirty-one-pound boxes. Based upon the statistics, the subcommittee voted unanimously to recommend to the committees that the minimum net weight for all volume-filled, five down Euro containers should be established at 29 pounds.

At the November 12, 2003, meeting, the NAC and PCC also unanimously recommended that all volume-filled, five down Euro boxes have an established net weight of 29 pounds, which is to be printed on the end of the container.

Nectarines: For the reasons stated above, the revision of paragraphs (a)(1) and (a)(8) of § 916.350 continues in effect to refer to all volume-filled, five down Euro containers. Such changes will ensure that all volume-filled, five down Euro containers of nectarines are a net weight of 29 pounds. The container markings shall be placed on

one outside end of the container in plain sight and in plain letters.

Peaches: For the reasons stated above, the revision of paragraphs (a)(1) and (a)(9) of § 917.442 continues in effect to refer to all volume-filled, five down Euro containers. Such changes will ensure that all volume-filled, five down Euro containers of peaches are a net weight of 29 pounds. The markings shall be placed on one outside end of the container in plain sight and in plain letters.

Standard Container Listings

This rule also makes changes to the pack and container marking requirements to establish one new standard container being used by the industry and to modify the dimensions of another already regulated. In the rules and regulations for nectarines at § 916.350, current paragraphs (a)(5) and (a)(6), and for peaches at § 917.442, current paragraphs (a)(6) and (a)(7), standard containers, such as the Nos. 22D, 22E, 22G, and 32, are required to be marked with the net weight. Under paragraph (b) in §§ 916.350 and 917.442, such standard containers are defined. Once the use of a container becomes common in the industry, such containers are determined to be standard containers. Standard containers represent container types that are recognized by the industry and adopted by the retail trade. As such, it is a practice of the committees to recommend that such containers be added to the list of standard containers together with container marking requirements.

At the November 29, 2001, meeting, the NAC and PCC, acting upon a recommendation from the Returnable Plastic Container Task Force, unanimously recommended that the Euro five down RPC be added to the list of standard containers. The container was, then, added to the list of standard containers, as approved by USDA.

During the 2003 season, the California Department of Food and Agriculture (CDFA) modified the dimensions of the Euro five down container and assigned it No. 35. CDFA also assigned numbers to one new container, the No. 36. These two new numbers were then added to the California Agricultural Code. By standardizing containers, the State permits handlers to use a new container for more than ten percent of their annual shipments. Otherwise, the container would be considered an experimental container for which handlers would have to file an application and limit shipments in such containers to a maximum of ten percent of their total seasonal shipments. Once containers are standardized within the California Agricultural Code, they are historically added to the orders so that regulated handlers may use them for packaging nectarines and peaches.

Thus, the revision of paragraph (b) of §§ 916.350 and 917.442 continues in effect adding the new No. 36, and the revised and renamed No. 35 to the list of standard containers.

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 2004 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 also 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 October 23, 2003, 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 November 12, 2003, meetings to authorize continued shipments of ''CA Utility'' quality fruit during the 2004 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 2004 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). 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 2004 handling regulations are the same as those that appeared in the 2003 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 seven varieties of nectarines. Specifically, SPI recommended adding maturity guides for the Honey Dew variety to be regulated at the B maturity guide, for the Emelia and Grand Sweet

varieties at the J maturity guide, for the June Candy and Regal Red at the K maturity guide, and the Gee Sweet and Honey Fire varieties to be regulated at the L maturity guide.

In addition, eight nectarine varieties are no longer being shipped and their removal from the listing of maturity guide assignments in Table 1 of paragraph (a)(1)(iv) of § 916.356 continues in effect. The varieties removed include: Autumn Grand, Early May, Early May Grand, Independence, May Jim, May Lion, Red Grand, and Royal Delight nectarine varieties.

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

Peaches: Requirements for ''well-matured'' peaches are specified in § 917.459 of the order's rules and regulations. This rule continues in effect the revision of Table 1 of paragraph (a)(1)(iv) of § 917.459 to add maturity guides for twelve peach varieties. Specifically, SPI recommended adding maturity guides for the May Sweet and Sweet September varieties to be regulated at the I maturity guide; the Burpeachone (Spring Flame™ 21), Burpeachtwo (Henry II™), Candy Red, Country Sweet, Pretty Lady, Prima Peach 23, Shelly, Sierra Gem, and Summer Kist varieties to be regulated at the J maturity guide; and the Kaweah peach variety to be regulated at the L maturity guide.

Thus, the revision of Table 1 in paragraph (a)(1)(iv) of § 917.459 continues in effect to reflect these recommendations.

In addition, three peach varieties are no longer being shipped and their removal from the listing of maturity guide assignments in Table 1 of paragraph (a)(1)(iv) of § 917.459 continues in effect for the Sierra Crest peach variety. The PCC also recommended that the Johnny's White and Snow Ball peach varieties be removed. However, these two varieties were previously removed from Table 1.

SPI has also recommended changes to the ''California Well-Matured'' or ''CA WELL MAT'' maturity requirements for varieties of nectarines and peaches with insufficient ''ground color'' (ground color is the skin color beneath the characteristic red or pink exhibited on the fruit). Under the changes, the stem cavity will be utilized to make a determination regarding ''California Well-Matured'' or ''CA WELL MAT'' for varieties that have insufficient ground color. These varieties are usually highly colored red varieties on which the stem cavity is the only location where the ground color can be seen. SPI further recommends that the color in the stem cavity for most varieties should be at least at the H maturity guide and that confirmation of the maturity may further be established by using other ''California Well-Matured'' characteristics.

Further, SPI has recommended that two nectarine varieties be notated with an asterisk for additional inspection information. According to SPI, inspectors have determined that the Honey Dew and Mango varieties are appropriately ''California Well-Matured'' or ''CA WELL MAT'' when the ground color is ''breaking yellowish-green.'' In other words, the ground color of the fruit is a green color showing signs of changing to a yellow or orange color for yellow-fleshed varieties, and a green color showing signs of changing to a cream color for white-fleshed varieties.

The amendment to the note at the end of Table 1 of paragraph (a)(1)(iv) of § 916.356 continues in effect to reflect these recommendations regarding nectarines, and the amendment to the note at the end of Table 1 of paragraph (a)(1)(iv) of § 917.459 continues in effect to include the recommendation that the stem cavity will be used to determine the appropriate ground color for certain peach 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 (in §§ 916.52 and 917.41) authority to establish size requirements. Size regulations encourage producers to leave fruit on the tree longer, which improves both size and maturity of the fruit. Acceptable fruit size provides greater consumer satisfaction and promotes repeat purchases, and, therefore, increases returns to producers and handlers. In addition, increased fruit size results in increased numbers of packed containers of nectarines and peaches per acre, also a benefit to producers and handlers.

Varieties recommended for specific size regulations have been reviewed and such recommendations are based on the specific characteristics of each variety. The NAC and PCC conduct studies each season on the range of sizes attained by the regulated varieties and those varieties with the potential to become regulated, and determine whether revisions 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 2003 season. This rule also continues in effect the removal of the variety-specific minimum size requirements for five varieties of nectarines whose shipments fell below 5,000 containers during the 2003 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the White September variety of nectarines, recommended for regulation at a minimum size 80. Studies of the size ranges attained by the White September variety revealed that 100 percent of the containers met the minimum size of 80 during the 2000, 2001, and 2002 seasons. Sizes ranged from size 40 to size 80, with 24.7 percent of the fruit in the 40 sizes, 33.1 percent of the packages in the 50 sizes, 38.9 percent in the 60 sizes, 3.3 percent in the 70 sizes, and 0 percent in the size 80, for the 2002 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 White September 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 White September 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 of the introductory text of paragraph (a)(4) of § 916.356 continues in effect to include the Spring Ray variety; the revision of the introductory text of paragraph (a)(5) of § 916.356 continues in effect to include the Mango variety; and the revision of the introductory text of paragraph (a)(6) of § 916.356 continues in effect to include the Arctic Gold, August Fire, Emelia, Honey Fire, Red Pearl, Ruby Bright, and White September nectarine varieties.

This rule also continues in effect the revision of the introductory text of paragraphs (a)(3), (a)(4), and (a)(6) of § 916.356 to remove five 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 2003 season. Specifically, the revision of the introductory text of paragraph (a)(3) of § 916.356 continues in effect to remove the Grand Sun nectarine variety; the revision of the introductory text of paragraph (a)(4) of § 916.356 continues in effect to remove the May Grand and Red Glo nectarine varieties; and the revision of the introductory text of paragraph (a)(6) of § 916.356 continues in effect to remove the Firebrite and Sun Diamond 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). The revision of § 917.459 to establish variety-specific minimum size requirements for 17 peach varieties that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2003 season continues in effect. This rule also continues in effect the removal of the variety-specific minimum size requirements for 14 varieties of peaches whose shipments fell below 5,000 containers during the 2003 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Jupiter variety of peaches, which was recommended for regulation at a minimum size 72. Studies of the size ranges attained by the Jupiter variety revealed that 100 percent of the containers met the minimum size of 72 during the 2000, 2001, and 2002 seasons. The sizes ranged from size 30 to size 70, with 39.1 percent of the containers meeting the size 30, 31.1 percent meeting the size 40, 29.3 percent meeting the size 60, and .05 percent meeting the size 70.

A review of other varieties with the same harvesting period indicated that the Jupiter 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 Jupiter variety in the variety-specific minimum size regulation at a minimum size 72 is appropriate. This recommendation, as with all other size recommendations for peaches, results from size studies conducted over a three-year period.

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)(5) of § 917.459 continues in effect to include the Burpeachfourteen (Spring Flame™ 20), Scarlet Queen, Sugar Time (214LC68), and the Supecheight peach varieties; and the revision of the introductory text of paragraph (a)(6) of § 917.459 continues in effect to include the Autumn Fire, Autumn Ruby, Burpeachseven (Summer Flame™ 29), Gypsy Red, Ice Princess, Jupiter, Late September Snow, Magenta Gold, Pink Moon, Ruby Gold, Sugar Crisp, Sugar Red, and Sweet Blaze peach varieties.

This rule also continues in effect the revision of the introductory text of paragraph (a)(4) of § 917.459 to remove the Snow Dance peach variety; continues in effect the revision of the introductory text of paragraph (a)(5) of § 917.459 to remove the Happy Dream, Kern Sun, Kingscrest, Pink Rose, Ray Crest, and Rich Mike peach varieties; and continues in effect the revision of the introductory paragraph (a)(6) of § 917.459 to remove the Cassie, Flamecrest, Kings Lady, Prima Peach XXV, Red Dancer, Sierra Lady, and Sweet Gem 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 2003 season.

The removal of the Snow Dance peach variety from the introductory text of paragraph (a)(4) of § 917.459 results in no peach varieties regulated at a minimum size 84 and continues in effect. This paragraph is being reserved for future use. The committees may recommend new peach varieties for regulation at this size in the future.

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.

Peento Type Peach Tolerances

The Tree Fruit Quality Subcommittee met on July 25, 2003, to discuss a modified blossom-end growth crack tolerance for Peento type peaches for the 2004 and subsequent seasons. Peento type peaches, also known as donut peaches due to their characteristic flattened shape, have been produced for a decade. Because of their genetic characteristics, these flattened peaches are prone to blossom-end growth cracks. These cracks heal while on the tree and do not affect the edibility of the fruit. Since the 2000 season, this peach has been provided an additional tolerance of 10 percent for well-healed, non-serious blossom-end growth cracks. A grower who produces a large quantity of Peento type peaches advised the subcommittee that adverse weather in the spring of 2003 caused a larger than normal percentage of his fruit to fail inspection even with the additional tolerance for well-healed, non-serious blossom-end growth cracks.

The subcommittee deliberated whether to relax the tolerance for blossom-end growth cracks, carefully weighing the grower's desire to market as much of his crop as possible against the industry's desire of assuring that quality peaches end up in the market place. In the end, the subcommittee

decided that this was a minor defect that did not affect edibility, contribute to internal breakdown, or dramatically detract from fruit appearance, and recommended to the PCC that the tolerance be modified. The modification allows for an unlimited amount of blossom-end cracking as long as the cracks are well healed and do not exceed the aggregate area of a circle 3/8 of an inch in diameter and/or do not exceed a depth that exposes the peach pit.

The PCC adopted the subcommittee's recommendation on blossom-end growth cracks and recommended the relaxations to USDA. Continuation of the relaxed requirements are expected to allow more fruit to be marketed and to return more value to the producer.

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 also will help the California nectarine and peach industries provide fruit desired by consumers. This rule continues in effect the establishment and maintenance of orderly marketing conditions for these fruit 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 250 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 1,800 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration [13 CFR 121.201] as those whose annual receipts are less than $5,000,000. Small agricultural producers are defined by the Small Business Administration as those having annual receipts of less than $750,000. A majority of these handlers and producers may be classified as small entities.

The committees' staff has estimated that there are less than 20 handlers in the industry who could be defined as other than small entities. For the 2003 season, the committees' staff estimated that the average handler price received was $7.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 714,286 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 2003 season, the committees' staff estimates that small handlers represent approximately 94 percent of all the handlers within the industry.

The committees' staff has also estimated that less than 20 percent of the producers in the industry could be defined as other than small entities. For the 2003 season, the committees' estimated the average producer price received was $4.00 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 187,500 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the committees' staff and the average producer price received during the 2003 season, the committees' staff estimates that small producers represent more than 80 percent of the producers within the industry. With an average producer price of $4.00 per container or container equivalent, and a combined packout of nectarines and peaches of 44,202,600 containers, the value of the 2003 packout level is estimated to be $176,810,400. Dividing this total estimated grower revenue figure by the estimated number of producers (1,800) yields an estimate of average revenue per producer of about $98,228 from the sales of peaches and nectarines.

Regulatory Revisions

Under §§ 916.52 and 917.41 of the orders, grade, size, maturity, container, container marking, and pack requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect on a continuing basis. The NAC and PCC met on November 12, 2003, and unanimously recommended that these handling requirements be revised for the 2004 season. These recommendations had been presented to the committees by various subcommittees, each charged with review and discussion of the changes. The changes: (1) Continue the lot stamping requirements which have been in effect since the 2000 season; (2) authorize shipments of ''CA Utility'' quality fruit to continue during the 2004 season; (3) revise tolerances for blossom-end growth cracks for Peento type peaches; (4) establish a minimum net weight for volume-filled, five down containers; (5) add an additional container to the list of standard containers and amend the dimensions of another container already regulated; and (6) revise varietal maturity, quality, and size requirements to reflect changes in growing and marketing practices. These changes continue in effect until modified, suspended, or terminated.

Lot Stamping Requirements—Discussions and Alternatives

This rule continues in effect the authorization for continuation of the lot stamping requirements for returnable plastic containers under the marketing orders' rules and regulations that have been in effect for such containers since the 2000 season for nectarine and peach shipments. The modified requirements of §§ 916.115 and 917.150 mandated that the lot stamp numbers be printed on a USDA-approved pallet tag, in addition to the requirement that the lot stamp number be applied to cards on all exposed or outside containers, and not less than 75 percent of the total containers on a pallet. Continuation of such requirements for the 2004 and beyond would help the inspection service safeguard the identity of inspected and certified containers of nectarines and peaches, and would help the industry by keeping in place the information necessary to facilitate their ''trace-back'' program.

The Tree Fruit Quality Subcommittee met on October 23, 2003, and considered possible alternatives to this action. Other alternatives were rejected because the members of the subcommittee determined that given the different styles and configurations of

RPCs available, having a satisfactory adhesive for placement of the cards might not be realistic. Box manufacturers have been very slow to respond to the industry's requests. The subcommittee recognized that as time has passed, the likelihood of getting a suitable adhesive for the cards has decreased significantly. Therefore, the subcommittee determined that it was no longer appropriate to put this regulation into effect annually. When the time comes that an adhesive for the cards becomes available or another method for securing the lot stamp on each container is found, the subcommittee determined that they would make a recommendation to adjust this requirement.

For these reasons, the subcommittee and the committees unanimously recommended continuing the requirement for the lot stamp number to be printed on the cards on each container and for each pallet to be marked with a USDA-approved pallet tag, also containing the lot stamp number for the 2004 season and beyond. Such safeguards are intended to ensure that all the containers on each pallet have been inspected and certified in the event a card on an individual container or containers is removed, misplaced, or lost.

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 that 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 2004 season.

The Tree Fruit Quality Subcommittee met on October 23, 2003, 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 November 12, 2003, and have done so continuously since such shipments were first authorized in 1996.

Container and Container Marking Requirements—Discussions and Alternatives

Sections 916.350 and 917.442 establish container, pack, and marking requirements for shipments of nectarines and peaches, respectively. This rule continues in effect the changes to the pack and container marking requirements of the orders' rules and regulations to establish a minimum net weight of 29 pounds for all types of five down Euro boxes.

This rule also continues in effect the changes to the pack and container marking requirements to establish one new standard container and to modify the dimensions of a standard container currently being used by the industry.

During the 2003 season, the California Department of Food and Agriculture assigned numbers to one new container, the No. 36, modified the dimensions of the Euro five down container, and assigned that container the No. 35. The new container and the modified dimensions of the Euro five down container were then added to the California Agricultural Code.

By standardizing containers, the State permits handlers to use a new container for more than ten percent of their annual shipments. Otherwise, the container would be considered an experimental container for which handlers would have to file an application and limit shipments in such containers to a maximum of ten percent of their total seasonal shipments. Once containers are standardized within the California Agricultural Code, they are historically added to the orders so that regulated handlers may use them for packaging nectarines and peaches.

At the meeting of the Tree Fruit Quality Subcommittee on October 23, 2003, the addition of these standardized boxes was discussed. The members noted that these two boxes are used increasingly and may continue to be, potentially replacing the older, more conventional boxes. According to one member of the subcommittee, no handler really wants to add extra boxes to the growing inventory of box sizes and styles; but in practical terms, the retail customers prefer the newer boxes, so they must be added to the list of available and standard containers. The alternative of not adding the containers was unacceptable because handlers would not have them available when requested by their retail customers.

The Tree Fruit Quality Subcommittee also discussed the net weight requirement for all five down Euro containers at its meeting on October 23, 2003. At that time, the subcommittee discussed results from the 2003 season during which both a 29- and 31-pound container had been authorized. Experience of handlers during the season resulted in the subcommittee's recommendation that only the 29-pound container continue to be authorized. The subcommittee unanimously recommended the change to the committees. The alternative would have meant that RPC five down Euro containers would have been subject to both the 29- and 31-pound net weight. In consideration of uniformity for five down Euro containers, this alternative was rejected.

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 SPI. 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 2004 season. Minimum size regulations are put in place to encourage producers to leave fruit on the trees for a longer period of time. This increased growing time not only improves maturity, but also increases fruit size. Increased fruit size increases the number of packed containers per acre, and coupled with heightened maturity levels, also provides greater consumer satisfaction, fostering repeat purchases. Such improved consumer satisfaction and repeat purchases benefit both producers and handlers alike.

Annual adjustments to minimum sizes of nectarines and peaches, such as these, are recommended by the NAC and PCC based upon historical data, producer and handler information regarding sizes attained by different varieties, and trends in consumer purchases.

An alternative to such action would include not establishing minimum size regulations for these new varieties. Such an action, however, would be a significant departure from the committees' practices and represent a substantial change in the regulations as they currently exist; 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.

Peento Type Peach Tolerances—Discussions and Alternatives

The Tree Fruit Quality Subcommittee met on July 25, 2003, to discuss a modified growth-crack tolerance for Peento type peaches for the 2004 and later seasons with a concerned grower. The grower advised the subcommittee that weather problems created some anomalies for his 2003 crop of Peento type peaches. A larger-than-normal percentage of his fruit failed inspection during the 2003 season because of blossom-end growth cracks. This type of peach is prone to such cracks. However, the cracks do not affect the edibility of the fruit, contribute to internal breakdown, or detract from the appearance of the fruit unless the cracks are unusually large or deep.

The subcommittee deliberated whether to relax the tolerance for blossom end growth cracks for the 2004 season, carefully weighing the grower's need to have a crop to market and the need to maintain a quality product in the market place. In the end, the subcommittee determined that peaches of the Peento type should be permitted blossom-end cracking as long as the cracks are well healed, do not exceed the aggregate area of a circle ⅜ inch in diameter, and/or do not exceed a depth that exposes the pit. This relaxation is in lieu of the previous requirement that Peento type peaches should be permitted a 10 percent tolerance for well-healed, non-serious, blossom-end growth cracks.

The PCC agreed with the subcommittee and recommended that the current tolerance for blossom-end growth cracks on Peento type peaches be revised to meet the demands of the growers and buyers of these unique peaches.

An alternative to this action would have been to leave these requirements unchanged. However, this would have meant that the growers of these fruits would be restricted in marketing them, since these fruits exhibit an increased propensity for blossom-end growth cracks, which are only a cosmetic defect. The relaxation is expected to allow more of these peaches to be marketed and to improve producer returns.

The committees make recommendations regarding the revisions in handling and lot stamping 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 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 available on the committees' Web site, thereby increasing the availability of information within the industry.

An interim final rule concerning this action was published in the **Federal Register** on March 25, 2004. 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 for a 60-day comment period, which ended on May 24, 2004. Two comments were submitted on the rule.

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

The commenter also noted that the peach varieties referred to as 91002 and 012–094 in § 917.459 (a)(2) and (a)(5) should be changed to include their patented names Supechsix and Supecheight, respectively. The peach variety name, Supecheight, in paragraph (a)(5) of § 917.459, is changed by adding the patented name ''012–094'' in parentheses, Supecheight (012–094). The correction of paragraph (a)(2) of § 917.459 will be made to remove the name ''91002'' and add the name ''Supechsix (91002)''.

The interim final rule identified both the Mango and the Honey Dew nectarine varieties as requiring the stem cavity color to be ''breaking yellowish-green.'' The commenter noted that the NAC recommended only the Honey Dew nectarine variety for this designation and asked for a correction on the appropriate ''ground color'' requirement for the Mango variety nectarines. However, at the NAC meeting where this matter was discussed, the Federal or Federal-State Inspection Service, which includes SPI, recommended that this ground color requirement apply to both varieties of nectarines. As earlier mentioned, maturity requirements are based on maturity measurements generally using maturity guides (*e.g.*, color chips), as recommended by SPI. Such maturity guides are reviewed annually by SPI to determine the appropriate guide for each nectarine variety. These annual adjustments reflect refinements in measurements of the maturity characteristics of nectarines as experienced over previous seasons' inspections. For these reasons, the language in the interim final rule requiring both the Honey Dew and Mango nectarine varieties to exhibit ''breaking yellowish-green'' color in their stem cavities remains as published.

The commenter also asked for placement of an asterisk in the ''Note'' footnote at the end of Table 1 of paragraph (a)(1)(iv) in § 916.356 prior to the statement: ''Predominant ground color must be breaking yellowish green.'' Apparently, this asterisk was omitted in the publication of the interim final rule and has been added.

The commenter noted, too, that the term ''California Well-Matured'' was incorrectly referred to as ''California Well-Mature'' in the ''Note'' at the end of Table 1 of paragraph (a)(1)(iv) in § 916.356 and the ''Note'' at the end of Table 1 of paragraph (a)(1)(iv) of § 917.459. Those corrections have been made, as well.

In the second comment, the commenter noted his support for the lot stamping requirements, container and pack requirements, the authority to ship ''CA Utility'' quality fruit, and maturity requirements in the interim final rule.

Each of the recommended handling requirement changes for the 2004 season is expected to generate financial benefits for producers and handlers through

increased fruit sales, compared to the situation that would exist if the changes were not adopted. Both large and small entities are expected to benefit from the changes, and the costs of compliance are not expected to be substantially different between large and small entities.

This rule does not impose any additional reporting and recordkeeping requirements on either small or large handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule. However, as previously stated, nectarines and peaches under the orders have to meet certain requirements set forth in the standards issued under the Agricultural Marketing Act of 1946 (7 CFR 1621 *et seq.*). Standards issued under the Agricultural Marketing Act of 1946 are otherwise voluntary.

In addition, the committees' meetings are widely publicized throughout the nectarine and peach industry and all interested parties are encouraged to attend and participate in committee deliberations on all issues. These meetings are held annually in the fall and spring. Like all committee meetings, the November 12, 2003, 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 July 25, October 1, and October 23, 2003. 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, comments received, and other information, it is found that finalizing the interim final rule, with changes, as published in the **Federal Register**, (69 FR 15641, March 25, 2004) 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 69 FR 15641 on March 25, 2004, is adopted as a final rule with the following changes:

PART 916—NECTARINES GROWN IN CALIFORNIA

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

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

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.356 [Amended]

■ 2. Section 916.356 is amended by:

■ A. Removing the entry ''Spring Ray'' and adding in alphabetical order the entry ''Burnectone (Spring Ray)'' in Table 1, paragraph (a)(1)(iv);

■ B. Removing the words ''California Well-Mature'' in the ''Note'' following Table 1, paragraph (a)(1)(iv), and adding the words ''California Well-Matured'' in their place;

■ C. Adding an asterisk before the words ''Predominant ground color must be breaking yellowish green'' in the ''Note'' following Table 1, paragraph (a)(1)(iv); and

■ D. Removing the words ''Spring Ray'' and adding the words ''Burnectone (Spring Ray)'' in alphabetical order in paragraph (a)(4) introductory text.

* * * * *

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

§ 917.459 [Amended]

■ 4. Section 917.459 is amended by:

■ A. Removing the words ''California Well-Mature'' in the ''Note'' following Table 1, paragraph (a)(1)(iv), and adding the words ''California Well-Matured'' in their place;

■ B. Removing the number ''91002'' in paragraph (a)(2) and adding ''Supechsix (91002)'' in its place;

■ C. Removing the number ''012–094'' in paragraph (a)(5); and

■ D. Removing the word ''Supecheight'' and adding ''Supecheight (012–094)'' in its place in paragraph (a)(5).

Dated: June 30, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

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