

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Parts 916 and 917**

[Docket No. FV06-916/917-2 FR]

**Nectarines and Peaches Grown in California; Increased Assessment Rates****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

**SUMMARY:** This rule increases the assessment rates established for the Nectarine Administrative Committee and the Peach Commodity Committee (committees) for the 2006-07 and subsequent fiscal periods from \$0.20 to \$0.21 per 25-pound container or container equivalent of nectarines and peaches handled. The committees locally administer the marketing orders that regulate the handling of nectarines and peaches grown in California. Assessments upon nectarine and peach handlers are used by the committees to fund reasonable and necessary expenses of the programs. The fiscal period runs from March 1 through the last day of February. The assessment rates will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** September 5, 2006.**FOR FURTHER INFORMATION CONTACT:**

Laurel May, Marketing Specialist, or Kurt Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: [Laurel.May@usda.gov](mailto:Laurel.May@usda.gov) or [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 Order Nos. 916 and 917, both as amended (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the "orders." The marketing 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. Under the marketing orders now in effect, California nectarine and peach handlers are subject to assessments. Funds to administer the orders are derived from such assessments. It is intended that the assessment rates as issued herein will be applicable to all assessable nectarines and peaches beginning on March 1, 2006, and continue until amended, suspended, or terminated. 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. Such 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.

This rule increases the assessment rate established for the Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC) for the 2006-07 and subsequent fiscal periods from \$0.20 to \$0.21 per 25-pound container or container equivalent of nectarines and peaches handled.

The California nectarine and peach marketing orders provide authority for the committees, with the approval of USDA, to formulate annual budgets of expenses and collect assessments from handlers to administer the programs. The members of the NAC and PCC are producers of California nectarines and peaches, respectively. They are familiar with the committees' needs, and with the costs for goods and services in their local area and are, therefore, in a position to formulate appropriate budgets and assessment rates. The assessment rates are formulated and discussed in public meetings. Thus, all directly affected persons have an

opportunity to participate and provide input.

**NAC Assessment and Expenses**

For the 2005-06 fiscal period, the NAC recommended, and USDA approved, an assessment rate of \$0.20 per 25-pound container or container equivalent of nectarines that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other information available to USDA.

The NAC met on April 27, 2006, and unanimously recommended 2006-07 expenditures of \$4,473,764 and an assessment rate of \$0.21 per 25-pound container or container equivalent of nectarines. In comparison, the budgeted expenditures for 2005-06 were \$4,919,048. The assessment rate of \$0.21 is \$0.01 higher than the rate currently in effect.

The rate increase was recommended to ensure that, despite lower than normal crop production estimates for the 2006 crop season, which began on March 1, 2006, the NAC could meet its 2006-07 anticipated expenses and carry over a financial reserve that would provide adequate funds for promotional and other activities at the beginning of the 2007 season before assessment collections begin. Increasing the assessment rate from \$0.20 to \$0.21 per 25-pound container or container equivalent is expected to provide about \$178,240 in additional assessment revenue, and should allow the NAC to start the 2007 season with adequate funds.

Expenditures recommended by the NAC for the 2006-07 fiscal period include \$567,856 for administration, \$1,070,832 for inspection, \$201,702 for research, and \$2,633,374 for domestic and international promotion. Budgeted expenses for these items in 2005-06 were \$899,288 for administration, \$1,167,381 for inspection, \$203,230 for research, and \$2,649,149 for domestic and international promotion.

The NAC 2006-07 fiscal period assessment rate was derived after considering anticipated fiscal period expenses; the estimated assessable nectarines of 17,824,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate financial reserve to carry the NAC into the 2007 season. Therefore, the NAC recommended an assessment rate of \$0.21 per 25-pound container or container equivalent. According to the committee, that assessment rate should result in an adequate financial reserve,

yet one well within the maximum of approximately one year's expenses permitted by the order (§ 916.42).

#### **PCC Assessment and Expenses**

For the 2005–06 fiscal period, the PCC recommended, and USDA approved, an assessment rate of \$0.20 per 25-pound container or container equivalent of peaches that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other information available to USDA.

The PCC met on April 27, 2006, and recommended 2006–07 expenditures of \$4,988,914 and an assessment rate of \$0.21 per 25-pound container or container equivalent of peaches. In comparison, last year's budgeted expenditures were \$5,095,709. The proposed assessment rate of \$0.21 is \$0.01 higher than the rate currently in effect.

The rate increase was recommended to ensure that the PCC could meet its 2006–07 anticipated expenses and carry over a financial reserve that would provide adequate funds for promotional and other activities at the beginning of the 2007 season before assessment collections begin. Increasing the assessment rate from \$0.20 to \$0.21 per 25-pound container or container equivalent is expected to provide about \$202,420 in additional assessment revenue, and should allow the PCC to start the 2007 season with adequate funds.

Expenditures recommended by the PCC for the 2006–07 fiscal period include \$629,024 for administration, \$1,299,211 for inspection, \$210,718 for research, and \$2,849,961 for domestic and international promotion. Budgeted expenses for these items in 2005–06 were \$918,736 for administration, \$1,260,160 for inspection, \$204,833 for research, and \$2,711,980 for domestic and international promotion.

The PCC 2006–07 fiscal period assessment rate was derived after considering anticipated PCC expenses; the estimated assessable peaches of 20,242,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate reserve to carry the PCC into the 2006 season. Therefore, the PCC recommended an assessment rate of \$0.21 per 25-pound container or container equivalent. According to the committee, that assessment rate should result in an adequate financial reserve, yet one well within the maximum of approximately one year's expenses permitted by the order (§ 917.38).

#### **Continuance of Assessment Rates**

The assessment rates established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committees or other available information.

Although these assessment rates will be in effect for an indefinite period, the committees will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rates. The dates and times of committee meetings are available from the committees' Website at <http://www.eatcaliforniafruit.com> or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate the committees' recommendations and other available information to determine whether modification of the assessment rate for each committee is needed. Further rulemaking will be undertaken as necessary. The committees' 2006–07 fiscal period budgets and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

#### **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 rule 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 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.

There are approximately 150 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 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 \$6,500,000. Small agricultural producers are defined by the Small Business Administration as those having annual receipts of less than

\$750,000. A majority of these handlers and producers may be classified as small entities.

The committees' staff has estimated that there are fewer than 25 handlers in the industry who could be defined as other than small entities. For the 2005 season, the committees' staff estimated that the average handler price received was \$10.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 650,000 containers to have annual receipts of \$6,500,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2005 season, the committees' staff estimates that small handlers represent approximately 83 percent of all the handlers within the industry.

The committees' staff has also estimated that fewer than 10 percent of the producers in the industry could be defined as other than small entities. For the 2005 season, the committees' staff estimated the average producer price received was \$5.25 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 142,858 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 2005 season, the committees' staff estimates that small producers represent more than 90 percent of the producers within the industry.

With an average producer price of \$5.25 per container or container equivalent, and a combined packout of nectarines and peaches of 38,691,622 containers, the value of the 2005 packout is estimated to be \$203,131,016. Dividing this total estimated grower revenue figure by the estimated number of producers (800) yields an estimate of average revenue per producer of about \$253,914 from the sales of peaches and nectarines.

This rule increases the assessment rates established for the NAC and PCC for the 2006–07 and subsequent fiscal periods from \$0.20 to \$0.21 per 25-pound container or container equivalent of nectarines and peaches.

The NAC recommended 2006–07 fiscal period expenditures of \$4,473,764 for nectarines and an assessment rate of \$0.21 per 25-pound container or container equivalent of nectarines. The assessment rate of \$0.21 is \$0.01 higher than the 2005–06 rate. The PCC recommended 2006–07 fiscal period expenditures of \$4,988,914 for peaches and an assessment rate of \$0.21 per 25-pound container or container equivalent

of peaches. The assessment rate of \$0.21 is \$0.01 higher than the 2005–06 rate.

#### Analysis of NAC Budget

The quantity of assessable nectarines for the 2006–07 fiscal period is estimated at 17,824,000 25-pound containers or container equivalents. Thus, the \$0.21 rate should provide \$3,743,040 in assessment income. Income derived from handler assessments, along with interest income and research grants, should be adequate to cover budgeted expenses and maintain the desired reserve.

The major expenditures recommended by the NAC for the 2006–07 fiscal period include \$567,856 for administration, \$1,070,832 for inspection, \$201,702 for research, and \$2,633,374 for domestic and international promotion. Budgeted expenses for these items in 2005–06 were \$899,288, \$1,167,381, \$203,230, and \$2,649,149, respectively.

The NAC recommended an increase in the assessment rate to meet anticipated 2006–07 expenses and maintain an acceptable financial reserve, which is needed to fund expenses for the following year until assessments for that year are received. The NAC reviewed and recommended 2006–07 expenditures of \$4,473,764 and the increased assessment rate.

#### Analysis of PCC Budget

The quantity of assessable peaches for the 2006–07 fiscal year is estimated at 20,242,000 25-pound containers or container equivalents. Thus, the \$0.21 rate should provide \$4,250,820 in assessment income. Income derived from handler assessments, along with interest income and research grants, should be adequate to cover budgeted expenses and maintain the desired reserve.

The major expenditures recommended by the PCC for the 2006–07 fiscal period include \$629,024 for administration, \$1,299,211 for inspection, \$210,718 for research, and \$2,849,961 for domestic and international promotion. Budgeted expenses for these items in 2005–06 were \$918,736, \$1,260,160, \$204,833, and \$2,711,980, respectively.

The PCC recommended an increase in the assessment rate to meet anticipated 2006–07 expenses and maintain an acceptable financial reserve, which is needed to fund expenses for the following year until assessments for that year are received. The PCC reviewed and recommended 2006–07 expenditures of \$4,988,914 and the increased assessment rate.

#### Considerations in Determining Expenses and Assessment Rates

Prior to arriving at these budgets, the committees considered information and recommendations from various sources, including, but not limited to: The Executive Committee, the Research Subcommittee, the International Programs Subcommittee, the Domestic Promotion Subcommittee, and the Nectarine and Peach Estimating Committees. Because 2006 crop estimates are lower than those for previous years, assessment revenues would decrease if the current rates were maintained through the 2006 season. The committees considered decreasing their promotional program expenditures in order to avoid raising the assessment rates. However, they believe that their current promotional programs are crucial to the success of the industry. Therefore, they recommended increasing the assessment rates in order to continue funding those activities at the current level. Both the NAC and PCC determined that an assessment rate of \$0.21 per 25-pound container or container equivalent would allow them to meet their 2006–07 fiscal period expenses and carry over necessary operating reserves to finance operations before 2007–08 assessments are collected. The committees then recommended these rates to USDA.

A review of historical and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for nectarines and peaches for the 2006–07 season could range between \$4.00 and \$6.00 per 25-pound container or container equivalent. Therefore, the estimated assessment revenue for the 2006–07 fiscal period as a percentage of total grower revenue could range between 3.5 and 5.25 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived from the operation of the marketing orders. In addition, the committees' meetings were widely publicized throughout the California nectarine and peach industries and all interested persons were invited to attend the meetings and participate in the committees' deliberations on all issues. Like all committee meetings, the April 27, 2006, meetings were public meetings and all entities of all sizes were able to express views on this issue.

This rule imposes no additional reporting or recordkeeping requirements

on either small or large California nectarine or peach 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.

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

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

A proposed rule concerning this action was published in the **Federal Register** on July 5, 2006 (71 FR 38115). Copies of the proposed rule were also mailed or sent via facsimile or E-mail to all nectarine and peach handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 10-day comment period ending July 17, 2006, was provided for interested persons to respond to the proposal. One comment supporting the proposal was received. The commenter cited reduced crop yields and the need to fund pre-harvest expenses next year as justification for the assessment rate increases.

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/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 material presented, including the information and recommendation submitted by the committees and other available information, it is hereby found that this 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 that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because (1) The 2006–07 fiscal period began on March 1, 2006, and the marketing orders require that the assessment rates for each fiscal period apply to all nectarines and peaches handled during such fiscal period; (2) the committees need to have sufficient funds to pay their expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was discussed and unanimously recommended by the committees at

public meetings and is similar to other assessment rate actions issued in past years. Also, a 10-day comment period was provided for in the proposed rule and the comment received has been considered in reaching a final decision on this matter.

#### List of Subjects

##### 7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

##### 7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR parts 916 and 917 are amended as follows:

■ 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

■ 2. Section 916.234 is revised to read as follows:

##### § 916.234 Assessment rate.

On and after March 1, 2006, an assessment rate of \$0.21 per 25-pound container or container equivalent of nectarines is established for California nectarines.

#### PART 917—PEACHES GROWN IN CALIFORNIA

■ 3. Section 917.258 is revised to read as follows:

##### § 917.258 Assessment rate.

On and after March 1, 2006, an assessment rate of \$0.21 per 25-pound container or container equivalent of peaches is established for California peaches.

Dated: August 28, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Docket No. FV06–983–2 FR]

#### Pistachios Grown in California; Modification of Small Handler Exemption

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

**ACTION:** Final rule.

**SUMMARY:** This rule modifies the current handling requirements prescribed under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered locally by the Administrative Committee for Pistachios (committee). The modification increases the exemption threshold for pistachio handlers who handle small amounts of pistachios, primarily for home or personal use. Currently, handlers of 1,000 pounds or less of hulled and dried pistachios (assessed weight) are exempt from most handling requirements. Under this modification, the exemption is extended to handlers of less than 5,000 pounds of assessed weight pistachios. This change is not expected to have a significant impact on the overall quality of California pistachios found in the marketplace.

**EFFECTIVE DATE:** This final rule becomes effective September 5, 2006.

#### FOR FURTHER INFORMATION CONTACT:

Terry Vawter, Senior Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; E-mail: [Terry.Vawter@usda.gov](mailto:Terry.Vawter@usda.gov) or [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 final rule is issued under Marketing Order No. 983 (7 CFR part 983), regulating the handling of pistachios grown in 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.”

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This final 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.

This final rule modifies the current handling requirements prescribed under the California pistachio order. This modification increases the exemption threshold for pistachio handlers who handle small amounts of pistachios from the current level of 1,000 pounds or less of assessed weight pistachios to less than 5,000 pounds of assessed weight pistachios. Under this change, pistachio handlers who handle less than 5,000 pounds of assessed weight pistachios are exempt from most handling requirements established under the order, including those relating to aflatoxin testing, minimum quality inspection, and payment of assessments.

Previous rules, one section of the order, and two sections of the rules and regulations refer to “dried pounds” or “dried weight” of pistachios. While these terms are not defined in the order, they are generally interchangeable with the defined term “assessed weight.” For the purposes of this final rule, the term “assessed weight” will be used.

Section 983.70 of the pistachio order currently exempts any handler who handles 1,000 pounds or less of assessed weight pistachios in any production year from the requirements of §§ 983.38 through 983.45 and § 983.53 of the order. A “production year” begins on