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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 925 and 944

[Doc. No. AMS-FV-08-0106; FV09-925-1 IFR]

Grapes Grown in a Designated Area of Southeastern California and Imported Table Grapes; Relaxation of Handling Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule relaxes the handling requirements prescribed under the California table grape marketing order (order) and the table grape import regulation. The order regulates the handling of table grapes grown in a designated area of southeastern California and is administered locally by the California Desert Grape Administrative Committee (committee). The import regulation is authorized under section 8e of the Agricultural Marketing Agreement Act of 1937 and regulates the importation of table grapes into the United States. This rule relaxes the one-quarter pound minimum bunch size requirement for the 2009 season for grapes packed in containers holding 2 pounds net weight or less. Under the relaxation, up to 20 percent of the weight of such containers may consist of single, unattached stems or clusters of at least five berries each. This action provides California desert grape handlers and importers the flexibility to respond to a marketing opportunity on a test basis for one season to meet consumer needs.

DATES: Effective March 20, 2009; comments received by May 18, 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, 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 document number and the date and page number of this issue of the **Federal Register** and will be 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: Jennifer Garcia, 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, or e-mail: Jennifer.Garcia@ams.usda.gov or Kurt.Kimmel@ams.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@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 925, as amended (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 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 which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This rule relaxes the minimum bunch size requirement for the 2009 season for grapes packed in containers holding 2 pounds net weight or less. Under the relaxation, up to 20 percent of the weight of such containers may consist of single clusters weighing less than one-quarter pound, but with at least five berries each. This action provides California desert grape handlers and importers the flexibility to respond to a marketing opportunity on a test basis for one season to meet consumer needs. The committee met on November 14, 2008, and unanimously recommended the change for California desert grapes. The change in the import regulation is required under section 8e of the Act.

Section 925.52(a)(1) of the order provides authority to regulate the

handling of any grade, size, quality, maturity, or pack of any and all varieties of grapes during the season. Section 925.53 provides authority for the committee to recommend to USDA changes to regulations issued pursuant to § 925.52. Section 925.55 specifies that when grapes are regulated pursuant to § 925.52, such grapes must be inspected by the Federal or Federal-State inspection service to ensure they meet applicable requirements.

Section 925.304(a) of the order's rules and regulations requires grapes to meet the minimum grade requirements of U.S. No. 1 Table, or U.S. No. 1 Institutional, or to meet all the requirements of U.S. No. 1 Institutional, except that a tolerance of 33 percent is provided for off-size bunches. The requirements for the U.S. No. 1 Table and U.S. No. 1 Institutional grades are set forth in the United States Standards for Grades of Table Grapes (European or Vinifera Type) (7 CFR 51.880 through 51.914) (Standards). The regulatory period runs from April 10 through July 10 each year.

Currently, U.S. No. 1 Table grade grapes must meet a minimum bunch size requirement of one-quarter pound. Recently, there has been interest in packing grapes in individual consumer packages known as clamshells. These containers, used most commonly to pack strawberries, are made of a clear, rigid plastic and typically hold a half pound or a pound of fruit. Some retailers prefer these containers because they are of the same net weight, and can be scanned at check-out. This is particularly convenient for retailers that do not have facilities for weighing produce, such as convenience stores and fast food outlets. Some consumers also prefer the convenience of prepackaged individual portions of fruit.

To meet changing market requirements, California grape handlers would like to be able to pack clamshells containing 2 pounds net weight or less. However, current bunch size requirements make it difficult. Grape bunches normally range in weight from one-quarter pound to 3 pounds. Portions of bunches, weighing less than one-quarter pound, would have to be used to fill the new packages to the weights desired by buyers.

Thus, the committee unanimously recommended relaxing the one-quarter pound minimum bunch size requirement for the 2009 season for U.S. No. 1 Table grade grapes packed in clamshells containing 2 pounds net weight or less. Under the relaxation, up to 20 percent of the weight of such containers may consist of single clusters

weighing less than one-quarter pound, but with at least five berries each. This change will provide handlers with the flexibility to respond to a marketing opportunity on a test basis for one season to meet consumer needs. Section 925.304(a) is modified accordingly.

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)(1) specifies the minimum bunch size requirement for U.S. No. 1 Table grade grapes as set forth in the Standards. The change to the order's minimum bunch size requirement for the 2009 season requires a corresponding change to the minimum bunch size requirement for imported table grapes. Similar to the domestic industry, this change will allow importers the flexibility to respond to a marketing opportunity on a test basis for one season to meet consumer needs. Section 944.503(a)(1) is revised accordingly.

Initial Regulatory Flexibility 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.

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 (SBA) (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 \$7,000,000. Based on data from the National Agricultural Statistics Service 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, it may be concluded that the majority of importers may be classified as small entities.

This rule revises § 925.304(a) of the rules and regulations of the California desert grape order and § 944.503(a)(1) of the table grape import regulation. This rule relaxes the one-quarter pound minimum bunch size requirement for the 2009 season for U.S. No. 1 Table grade grapes packed in small consumer packages containing 2 pounds net weight or less. Under the relaxation, up to 20 percent of the weight of each clamshell container may consist of single clusters weighing less than one-quarter pound, but with at least five berries each. Authority for the change to the California desert grape order is provided in §§ 925.52(a)(1) and 925.53. Authority for the change to the table grape import regulation is provided in section 8e of the Act.

Regarding the impact of this rule on affected entities, this rule provides both California desert grape handlers and importers the flexibility to respond to a marketing opportunity on a test basis for one season to meet consumer needs. Handlers and importers will be able to provide buyers in the retail sector more packaging choices. The relaxation may result in increased shipments of consumer-sized grape packs, which would have a positive impact on producers, handlers, and importers.

There is general agreement in the industry for the need to relax the minimum bunch size requirement for grapes packed in clamshells to allow for more packaging options. One suggestion was to relax the minimum bunch size requirement for U.S. No. 1 Table grade grapes packed in clamshells containing net weights of 2, 3, and 4 pounds. The committee discussed this alternative and decided that there is not a problem with clamshells containing net weights of 3 and 4 pounds meeting the minimum requirements at this time. Ultimately, the committee unanimously agreed that the relaxation for grapes packed in clamshells containing 2 pounds net weight or less was appropriate as a test for one season.

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.

This rule 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.

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

Further, the committee's meeting was widely publicized throughout the grape industry and all interested persons were invited to attend the meeting and participate in committee deliberations. Like all committee meetings, the November 14, 2008, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. Also, the World Trade Organization, the Chilean Technical Barriers to Trade 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 this action.

Finally, interested persons are invited to submit comments on this rule, including 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: <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 relaxing the handling requirements currently prescribed under the marketing order for grapes grown in southeastern California and for grapes imported into the United States. Any comments received will be considered prior to finalization of this rule.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this rule.

After consideration of all relevant material presented, including the committee's recommendation, and other information, it is 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 rule until 30 days after publication in the **Federal Register** because: (1) This action relaxes the handling requirements currently in effect for grapes grown in a designated area of southeastern California and for grapes imported into the United States for the 2009 season; (2) California desert grape handlers are aware of this action which was unanimously recommended by the committee at a public meeting; (3) the shipping season begins on April 10, 2009, and handlers and importers need sufficient time to prepare for the upcoming season; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects

7 CFR Part 925

Grapes, Marketing agreements and orders, 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:

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

Authority: 7 U.S.C. 601–674.

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

§ 925.304 [Amended]

■ 2. Section 925.304 is amended by revising paragraph (a) introductory text to read as follows:

§ 925.304 California Desert Grape Regulation 6.

* * * * *

(a) *Grade, size, and maturity.* Except as provided in paragraphs (a)(1) and (a)(2) of this section, such grapes shall meet the minimum grade and size requirements of 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 percentage 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 may be marked “DGAC No. 1 Institutional” but shall not be marked “Institutional Pack.” In addition, during the period April 10 through July 10, 2009, U.S. No. 1 Table grade grapes may be packed in individual consumer packages containing 2 pounds net weight or less: *Provided*, That not more than 20 percent of the weight of such containers may consist of single clusters weighing less than one-quarter pound, but with at least five berries each.

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PART 944—FRUITS; IMPORT REQUIREMENTS

■ 3. In § 944.503, paragraph (a)(1) introductory text is 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.” In addition, during the period April 10 through July 10, 2009, U.S. No. 1 Table grade grapes may be packed in individual consumer packages containing 2 pounds net weight or less: *Provided*, That not more than 20 percent of the weight of such containers may consist of single clusters weighing less than one-quarter pound, but with at least five berries each.

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Dated: March 12, 2009.

David R. Shipman,
Acting Administrator.

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