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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 905

[Doc. No. AO-85-A10; AMS-FV-07-0132; FV08-905-1]

#### Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Order Amending Marketing Order No. 905

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing order for oranges, grapefruit, tangerines, and tangelos grown in Florida. The amendments were proposed by the Citrus Administrative Committee (committee), which is responsible for local administration of the order. The amendments will modify committee representation by cooperative entities; allow substitute alternates to temporarily represent absent members at committee meetings; authorize the committee to conduct meetings by telephone or other means of communication; and authorize the committee to conduct research and promotion programs, including paid advertising, for fresh Florida citrus. The amendments are intended to improve the operation and administration of the order and provide the industry with additional tools for the marketing of fresh citrus.

**DATES:** This rule is effective October 9, 2009.

**FOR FURTHER INFORMATION CONTACT:** Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Room 385, Portland, OR 97204; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: [Melissa.Schmaedick@ams.usda.gov](mailto:Melissa.Schmaedick@ams.usda.gov); or Laurel May, 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: [Laurel.May@ams.usda.gov](mailto:Laurel.May@ams.usda.gov).

Small businesses may request information on this proceeding 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](mailto:Jay.Guerber@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on January 24, 2008, and published in the January 29, 2008, issue of the *Federal Register* (73 FR 5130); a Recommended Decision issued on December 19, 2008, and published in the December 24, 2008, issue of the *Federal Register* (73 FR 79028); and a Secretary's Decision and Referendum Order issued on April 6, 2009, and published in the April 13, 2009, issue of the *Federal Register* (74 FR 16798).

This action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

#### Preliminary Statement

This final rule was formulated on the record of a public hearing held on February 12, 2008, in Winter Haven, Florida. Notice of this hearing was issued on January 24, 2008, and published in the January 29, 2008, issue of the *Federal Register* (73 FR 5130). The hearing was held to consider the proposed amendment of Marketing Order No. 905, hereinafter referred to as the "order".

The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The Notice of Hearing contained four amendment proposals submitted by committee. Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on December 19, 2008, filed with the Hearing Clerk, U.S. Department of

Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by January 23, 2009. No exceptions were filed.

A Secretary's Decision and Referendum Order was issued on April 6, 2009, directing that a referendum be conducted during the period May 4 through May 18, 2009, among growers of fresh oranges, grapefruit, tangerines, and tangelos to determine whether they favored the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of those producers voting or by voters representing at least two-thirds of the volume of citrus represented by voters in the referendum. Three of the proposed amendments were favored by 95 percent of the voters, representing 99 percent of the volume. One amendment was favored by 88 percent of voters, who represented 49 percent of the volume.

The amendments approved by voters and included in this order will:

1. Modify committee representation by cooperative committees;
2. Allow substitute alternates to temporarily represent absent members at committee meetings;
3. Authorize the committee to conduct meetings by telephone or other means of communication; and
4. Add authority for research and promotion programs, including paid advertising, for fresh Florida citrus.

The Agricultural Marketing Service (AMS) also proposed to make such changes to the order as might be necessary to ensure that all of the order's provisions conform to the effectuated amendments. AMS proposed replacing the word "he" in the second sentence of § 905.22(a)(2) with the words "he or she" to conform to other proposed changes to § 905.22.

An amended marketing agreement was subsequently provided to all fresh orange, grapefruit, tangerine, and tangelo handlers in the production area for their approval. The marketing agreement was not approved by handlers representing at least 50 percent of the volume of fresh oranges, grapefruit, tangerines, and tangelos handled by all handlers during the representative period of August 1, 2007 through July 31, 2008.

#### Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA)

(5 U.S.C. 601–612), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000. Small agricultural producers have been defined as those with annual receipts of less than \$750,000.

There are approximately 48 handlers of fresh citrus subject to regulation under the order and approximately 7,700 producers of fresh citrus in the regulated area. Information provided at the hearing indicates that over 90 percent of the handlers would be considered small agricultural service firms. Hearing testimony also suggests that the majority of producers would also be considered small entities according to the SBA's definition.

The order regulates the handling of fresh citrus grown in the state of Florida. Total bearing citrus acreage has declined from a peak of approximately 800,000 acres in 1996–97 to about 550,000 acres in 2006–07, largely due to hurricane damage and the removal of diseased citrus trees. Approximately 7.236 million tons of citrus were produced in Florida during the 2006–07 season—a decline of approximately 6 million tons compared to the 1996–97 season. According to evidence provided at the hearing, approximately 10 percent of Florida citrus is used in the fresh market, while the remainder is used in the production of processed juice products. Generally, 40 percent of Florida's fresh citrus is shipped to export markets, including the Pacific Rim countries, Europe, and Canada.

Under the order, outgoing quality regulations are established for fresh citrus shipments, and statistical information is collected. Program activities administered by the committee are designed to support large and small citrus producers and handlers. The 18-member committee is comprised of both producer and handler representatives from the production area, as well as a public member. Committee meetings where regulatory

recommendations and other decisions are made are open to the public. All members are able to participate in committee deliberations, and each committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

After discussions within the citrus industry, the committee considered developing its own research and marketing promotion programs focusing on fresh Florida citrus. An amendment study subcommittee was formed to explore this idea and other possible order revisions. The subcommittee developed a list of proposed amendments to the order, which was then presented to the committee and shared with other industry organizations. The proposed amendments were also posted on the committee's Web site for review by the Florida citrus industry at large.

The committee met to review and discuss the subcommittee's proposals at its meeting on May 29, 2007. At that time, the committee voted unanimously to support the four proposed amendments that were forwarded to AMS.

In addition, the hearing to receive evidence on the proposed changes was open to the public and all interested parties were invited and encouraged to participate and provide their views.

The amendments are intended to provide the committee and the industry with additional flexibility in administering the order and producing and marketing fresh Florida citrus. Record evidence indicates that the amendments are intended to benefit all producers and handlers under the order, regardless of size. All producer and handler witnesses supported the amendments at the hearing. Some witnesses commented on the implications of implementing specific marketing, research, and development programs. In that context, witnesses stated that they expected the benefits to producers and handlers to outweigh any potential costs.

The amendment reducing the required number of cooperative producer and cooperative handler seats on the committee from three each to two each will have no economic impact on producers or handlers of any size. The number of cooperative entities in the industry has diminished considerably since the order's promulgation. Reducing the number of cooperative seats on the committee at this time will reflect the current composition of the industry. The reduction will help ensure that the interests of all large and small producers and handlers, whether independent or members of

cooperatives, are represented appropriately during committee deliberations.

Allowing substitute alternates to represent absent members at committee meetings, will have no adverse economic impact on producers or handlers of any size. Members who are unable to attend committee meetings will be allowed to designate available alternates to represent them if their own alternates are also unavailable in order to achieve a quorum. If members are unable to designate substitute alternates, the committee can designate substitutes at the meeting, if necessary to secure a quorum. Substitute alternates will be required to represent the same group affiliation (producer or handler) as the absent members and alternates. The amendment will allow alternates not otherwise representing absent members to represent other members at committee meetings in order to secure a quorum. This will help ensure that quorum requirements are met and that committee business is addressed in a timely manner.

Adding authority to conduct committee meetings by telephone or other means of communication is expected to benefit producers and handlers of all sizes by improving committee efficiencies and encouraging greater participation in industry deliberations. It is not expected to result in any significant increased costs to producers or handlers. Using modern communication technology will allow the committee to respond more quickly to urgent industry needs and will provide greater access to meetings by members and other industry participants. Greater meeting flexibility will make it easier for the committee to hold additional meetings where there is a need for lengthier discussion and consensus building. These changes are consistent with current practices in other citrus industry settings.

Adding authority to establish research and promotion programs will enable the committee to address the specific needs of the Florida fresh citrus industry by recommending, conducting, and funding research projects and promotional programs, including paid advertising, that focus on the production, handling, and marketing of fresh citrus.

Hearing witnesses testified that the committee's assessment rate could increase to cover the costs of any newly authorized research and promotion projects, but that there may be an offset by decreases in payments by the industry to fund projects through other entities. Any increased assessment costs would be based on the volume of fresh

citrus shipped by each handler and would, therefore, be applied proportionately to all handlers.

The benefits expected to accrue to producers and handlers following implementation of this amendment should outweigh the costs. Witnesses advocated the establishment of production research programs that would assist with the development of new varieties and post-harvest handling methods to improve the marketability of fresh Florida citrus. Marketing programs specific to fresh citrus are expected to increase consumer demand and sales, which should in turn increase returns to producers and handlers. Improved production and marketing strategies developed under the authorized programs are expected to outweigh any additional costs to the Florida fresh citrus industry. In addition, any increased costs would be proportional to a handler's size and would not unduly or disproportionately impact small entities. Witness support for this amendment was unanimous at the hearing.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence is that implementation of the amendments will have little or no impact on producers and handlers.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are intended to improve the operation and administration of the order and to assist in the marketing of fresh Florida citrus.

#### **Paperwork Reduction Act**

Information collection requirements for Part 905 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581-0189—"Generic OMB Fruit Crops." No changes in these requirements are anticipated as a result of these amendments. Should any such changes become necessary, they will be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the Government Paperwork Elimination Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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.

#### **Civil Justice Reform**

The amendments to Marketing Order 905 as stated herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

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 no later than 20 days after the date of the entry of the ruling.

#### **Order Amending the Order Regulating the Handling of Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida**

##### *Findings and Determinations*

The findings and determinations set forth hereinafter are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the order; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

##### *(a) Findings and Determinations Upon the Basis of the Hearing Record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674) and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to Marketing Order No. 905 (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing order, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby further amended, regulates the handling of oranges, grapefruit, tangerines, and tangelos grown in the production area in the same manner as, and is applicable only to persons in the respective classes of commercial and industrial activity specified in the marketing order upon which hearings have been held;

(3) The marketing order, as amended, and as hereby further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing order, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of oranges, grapefruit, tangerines, and tangelos grown in the production area; and

(5) All handling of oranges, grapefruit, tangerines, and tangelos grown in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Determinations.* It is hereby determined that:

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping oranges, grapefruit, tangerines, and tangelos covered by the order as hereby amended) who, during the period August 1, 2007 through July 31, 2008, handled 50 percent or more of the volume of such oranges, grapefruit, tangerines, and tangelos covered by said order, as hereby amended, have not signed an amended marketing agreement; and,

(2) The issuance of this amendatory order, further amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of August 1, 2007 through July 31, 2008 (which has been deemed to be a representative period), have been engaged within the production area in the production of such oranges, grapefruit, tangerines, and tangelos; and

(3) In the absence of a signed marketing agreement, the issuance of this amendatory order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers of oranges, grapefruit, tangerines, and tangelos in the production area.

**Order Relative to Handling of Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida**

*It is therefore ordered,* That on and after the effective date hereof, all handling of oranges, grapefruit, tangerines, and tangelos grown in Florida shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed order further amending the order contained in the Secretary's Decision issued by the Administrator on April 6, 2009, and published in the **Federal Register** on April 13, 2009 (74 FR 16798), shall be and are the terms and provisions of this order amending the order and set forth in full herein.

**List of Subjects in 7 CFR Part 905**

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements, Tangelos, Tangerines.

■ For the reasons set forth in the preamble, Title 7, Chapter IX of the Code of Federal Regulations is amended by amending part 905 to read as follows:

**PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA**

■ 1. The authority citation for 7 CFR part 905 continues to read as follows:

*Authority:* 7 U.S.C. 601–674.

■ 2. Amend § 905.22 by revising paragraphs (a)(2) and (b)(2) to read as follows:

**§ 905.22 Nominations.**

(a) \* \* \*

(2) Each nominee shall be a producer in the district from which he or she is nominated. In voting for nominees, each producer shall be entitled to cast one vote for each nominee in each of the districts in which he or she is a producer. At least two of the nominees and their alternates so nominated shall be affiliated with a bona fide cooperative marketing organization.

(b) \* \* \*

(2) Nomination of at least two members and their alternates shall be made by bona fide cooperative marketing organizations which are handlers. Nominations for not more

than six members and their alternates shall be made by handlers who are not so affiliated. In voting for nominees, each handler or his or her authorized representative shall be entitled to cast one vote, which shall be weighted by the volume of fruit by such handler during the then current fiscal period.

■ 3. Revise § 905.23 to read as follows:

**§ 905.23 Selection.**

(a) From the nominations made pursuant to § 905.22(a) or from other qualified persons, the Secretary shall select one member and one alternate member to represent District 2 and two members and two alternate members each to represent Districts 1, 3, 4, and 5 or such other number of members and alternate members from each district as may be prescribed pursuant to § 905.14. At least two such members and their alternates shall be affiliated with bona fide cooperative marketing organizations.

(b) From the nominations made pursuant to § 905.22(b) or from other qualified persons, the Secretary shall select at least two members and their alternates to represent bona fide cooperative marketing organizations which are handlers, and the remaining members and their alternates to represent handlers who are not so affiliated.

■ 4. In § 905.29, redesignate paragraph (b) as paragraph (c), and add a new paragraph (b) to read as follows:

**§ 905.29 Inability of members to serve.**

\* \* \* \* \*

(b) If both a member and his or her respective alternate are unable to attend a committee meeting, such member may designate another alternate to act in his or her place in order to obtain a quorum: *Provided,* That such alternate member represents the same group affiliation as the absent member. If the member is unable to designate such an alternate, the committee members present may designate such alternate.

\* \* \* \* \*

■ 5. Revise paragraph (c) of § 905.34 to read as follows:

**§ 905.34 Procedure of committees.**

\* \* \* \* \*

(c) The committee may provide for meeting by telephone, telegraph, or other means of communication, and any vote cast at such a meeting shall be promptly confirmed in writing: *Provided,* That if any assembled meeting is held, all votes shall be cast in person.

\* \* \* \* \*

■ 6. Add a new § 905.54 to read as follows:

**§ 905.54 Marketing, research and development.**

The committee may, with the approval of the Secretary, establish, or provide for the establishment of, projects including production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. The expenses of such projects shall be paid by funds collected pursuant to § 905.41. Upon conclusion of each project, but at least annually, the committee shall summarize the program status and accomplishments to its members and the Secretary. A similar report to the committee shall be required of any contracting party on any project carried out under this section. Also, for each project, the contracting party shall be required to maintain records of money received and expenditures, and such shall be available to the committee and the Secretary.

Dated: September 2, 2009.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E9–21656 Filed 9–8–09; 8:45 am]

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 920**

[Doc. No. AMS–FV–08–0017; FV08–920–2 FR]

**Kiwifruit Grown in California; Change in Reporting Requirements**

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

**ACTION:** Final rule.

**SUMMARY:** This rule changes the reporting requirements currently prescribed under the marketing order that regulates the handling of kiwifruit grown in California. The order is administered locally by the Kiwifruit Administrative Committee (Committee). This rule requires handlers who ship 100,000 or more trays per season to file weekly shipment and price information with the Committee. Shipments of organic kiwifruit are exempt from this requirement. The Committee will use this information to prepare its marketing policy statements and annual reports and to provide timely information to the industry to assist them in making