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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. FV04-916/917-03 FR]

#### Nectarines and Peaches Grown in California; Revision of Reporting Requirements for Fresh Nectarines and Peaches

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

**ACTION:** Final rule.

**SUMMARY:** This rule revises the reporting requirements in the rules and regulations of the marketing orders (orders) for fresh nectarines and peaches grown in California. The orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative and Peach Commodity Committees (committees). Under the orders, authority is provided for the committees to require handlers to file reports on their shipments of fresh nectarines and peaches. This rule revises the current shipment report to require handlers to include new information on the growers whose fruit the handler handles annually. The new information enhances committee communications and facilitates the development of a simplified ballot for referenda.

**DATES:** Effective Date: This final rule becomes effective September 4, 2004.

**FOR FURTHER INFORMATION CONTACT:** Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901; Fax: (559) 487-5906; or George Kelhart, Technical Advisor, 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.

Small businesses may request information on compliance with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders 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) 205-8938; or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreements 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. The marketing agreements and 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 final 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.

This rule revises the orders' rules and regulations pertaining to reporting requirements by revising the current handler shipment report for fresh nectarines and peaches. Handlers will be required to report the names, addresses, telephone numbers, and any available facsimile numbers and e-mail addresses for the growers who produced the nectarines and/or peaches the handlers shipped during the season. Handlers will also be required to report the nectarine and/or peach volumes of each of their growers annually. This change was unanimously recommended by the committees at their meetings on February 25, 2004.

In §§ 916.60 and 917.50 of the orders, authority is provided for the committees to require handlers to file reports with the committees. The information authorized includes, but is not limited to: (1) The name of the shipper and the shipping point; (2) the car or truck license number (or name of the trucker), and identification of the carrier; (3) the date and time of departure; (4) the number and type of containers in the shipment; (5) the quantities shipped, showing separately the variety, grade, and size of the fruit; (6) the destination; and (7) the identification of the inspection certificate or waiver pursuant to which the fruit was handled.

The nectarine order also requires that handlers supply the committee with other information, pursuant to paragraph (b) of §§ 916.60, which states, in part: "Upon request of the committee, made with the approval of the Secretary, each handler shall furnish to the committee, in such manner and at such times as it may prescribe, such other information as may be necessary to enable the committee to perform its duties under this part."

The requirement under the peach order is similar in paragraph (b) of § 917.50, which states, in part, "Upon request of any committee, made with the approval of the Secretary, each handler shall furnish to the Manager of the Control Committee, in such manner and at such times as it may prescribe, such other information as may be necessary to enable the committee to perform its duties under this part."

Under paragraph (b) of §§ 916.160 and 917.178 of the orders' rules and regulations, the requirement for a

shipment report is specified, and information required on the report and a due date for submission of the report are established, as well. With this final rule, paragraph (b) in §§ 916.160 and 917.178 is amended to add the requirement that handlers begin reporting each of their grower's annual nectarine and/or peach volumes by including the grower's name, address, telephone number, facsimile number (if applicable), e-mail address (if applicable), and total volumes in 25-pound containers or container equivalent units.

At their February 25, 2004, meetings, the Nectarine Administrative Committee and the Peach Commodity Committee discussed the merits of revising the current shipment reports. The committees considered including information about varieties and styles of pack for each handler's growers. After some discussion about the proposed new information, it was determined that varietal and pack style information was unnecessary as long as each grower's total volume was required. The committees, then, unanimously recommended amending the existing shipment reports to include the name, address, telephone number, facsimile number (if applicable), e-mail address (if applicable), and volume of nectarines and/or peaches each handler handled annually on behalf of each of their growers.

The committees believe that having such information allows them to communicate more effectively and efficiently with growers. Material distributed by the committees includes information such as: Production and post-harvest research; proposed and existing regulatory requirements under the marketing orders, and requirements of local, county, State, or other Federal agencies; surveys about research needs; crop estimates; seasonal packout information; annual reports; meeting notices; and meeting minutes, etc.

The grower information provides the committees with more complete information on the growers that constitute their respective industries. More importantly, the committees will have information on each grower's volume of fruit, which will help the committees make more accurate crop estimates and compute seasonal packout totals.

According to the committees, such information also permits USDA to simplify continuance referendum ballots that are used to determine whether growers support the continuation of the marketing orders. These referenda are required under the orders every four years. USDA considers

termination of the marketing orders if less than two-thirds of those voting and less than two-thirds of the volume represented in the referendum favor continuance.

Currently, the ballot requires growers to list the total volume of nectarines and/or peaches that he or she produced during a representative period (usually the crop year preceding the referendum) by container type. This information is necessary to ensure that each grower's vote is properly weighted by the volume of fruit he or she produced. However, growers have complained that the ballot is confusing and difficult to complete partly because of the requirement for each grower to provide volume information. The committees believe that elimination of this requirement from the ballot will not only simplify the ballot, but also encourage more growers to vote.

USDA may now simplify the ballot by removing the requirement for grower volume information; the committee staff, based upon information from the revised shipment report, can now provide that information to USDA to facilitate vote tabulations in the next referendum. However, in the event that a handler fails to file a shipment report, his or her growers will be required to provide the volume of nectarines and/or peaches that were packed during the representative period, as part of the tabulation process.

Producer ballots on order amendments, as well, will be similarly changed by USDA to foster more producer participation.

#### **Final Regulatory Flexibility Analysis**

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

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. The Small Business Administration (13 CFR 121.201) defines small agricultural

service firms, which include handlers, as those whose annual receipts are less than \$5,000,000. Small agricultural producers are defined as those having annual receipts of less than \$750,000.

The committees' staff has estimated that there are less than 20 handlers in the industry who could be defined as other than small entities. In the 2003 season, 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 packers within the industry.

The committees' staff also has estimated that less than 20 percent of the producers in the industry could be defined as other than small entities. In the 2003 season, 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 estimated average revenue per producer of approximately \$98,228 from the sales of nectarines and peaches.

This final rule revises §§ 916.160 and 917.178 of the orders' administrative rules and regulations to require handlers to provide information annually about growers who grew the fruit they handled. The handlers will be required to list each grower's name, address, telephone number, facsimile number (if applicable), and e-mail address (if applicable). Additionally, the handlers will be required to list the volume of nectarines and/or peaches handled (in containers or container equivalents) for each of their growers.

Information obtained from such reports is expected to improve communications within the industry and facilitate the development of

simplified continuance referendum and amendatory ballots.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), AMS is seeking OMB approval of a new information collection. The new information collection would not become effective until OMB approves of the additional information collection. Upon OMB approval of the new information collection, the reports would be merged into 0581-0189.

An alternative to this action is to continue operations without requiring grower information. However, having such grower information enhances communication in the industry and may promote industry cohesion. Committee members agreed that the value of having grower information outweighed the burden on handlers of filing such reports by allowing the committees to more effectively target information and communications to growers. In addition, when e-mail addresses are provided, much of the information that the committees now mail to the industry could be sent electronically, thereby reducing committee administrative costs.

During the deliberations, some committee members indicated their concern that confidentiality of the required information would not be maintained. However, such information is available only to committee staff members, who are required by §§ 916.60(d) and 917.50(d) to maintain confidentiality of all reports and records submitted by handlers.

Further, a confidentiality statement will be provided on each form. Other concerns about confidentiality were addressed by not requiring handlers to report the volume handled by variety and style of pack. By limiting the quantity reported by the handler to the total volume handled for each of the handler's growers, members felt that confidentiality was better assured.

The committee meetings on February 25 were widely publicized throughout the tree fruit industry and all interested persons were invited to express their views and participate in committee deliberations. Like all committee meetings, the February 25, 2004, meetings were public meetings, and all entities, large and small, were able to express their views on this issue.

Meeting notices were provided to committee members and other interested persons both by mail and through the committee website. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information collection requirements and duplication by industry and public sector agencies.

A proposed rule concerning this action was published in the **Federal Register** on May 28, 2004 (69 FR 30597). Copies of the rule were provided to the industry through a link on the committees' website, as well as through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending on July 27, 2004 was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the rule as proposed.

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, including the information and recommendations 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.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already receiving nectarines and peaches from growers and will need to begin collecting complete grower information as soon as possible for submission to the committees by November 15. Further, handlers are aware of this rule, which was recommended at public meetings, and interested persons were provided 60 days in the proposed rule to submit comments.

#### 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. In § 916.160, paragraph (b) is revised to read as follows:

##### § 916.160 Reporting procedure.

\* \* \* \* \*

(b) *Recapitulation of shipments.* Each shipper of nectarines shall furnish to the manager of the Nectarine Administrative Committee not later than November 15 of each year a recapitulation of shipments of each variety shipped during the just-completed season. The recapitulation shall show: The name of the shipper, the shipping point, the district of origin, the variety, and the number of packages, by size, for each container type. Each shipper also shall furnish to the manager not later than November 15, a recapitulation of shipments by that shipper's growers showing: each grower's name, address, telephone number, facsimile number (if applicable), and e-mail address (if applicable), and the total number of packages shipped by container or container equivalents for each grower.

\* \* \* \* \*

#### PART 917—PEACHES GROWN IN CALIFORNIA

■ 3. In § 917.178, paragraph (b) is revised to read as follows:

##### § 917.178 Peaches.

\* \* \* \* \*

(b) *Recapitulation of shipments.* Each shipper of peaches shall furnish to the manager of the Control Committee not later than November 15 of each year a recapitulation of shipments of each variety shipped during the just-completed season. The recapitulation shall show: The name of the shipper, the shipping point, the district of origin, the variety, and the number of packages, by size, for each container type. Each shipper also shall furnish to the manager not later than November 15, a recapitulation of shipments by that shipper's growers showing: each grower's name, address, telephone number, facsimile number (if applicable), and e-mail address (if applicable), and the total number of

packages shipped by container or container equivalents for each grower.

\* \* \* \* \*

Dated: August 30, 2004.

**Kenneth C. Clayton,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 04-20107 Filed 9-2-04; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2004-19017; Directorate Identifier 2004-NM-144-AD; Amendment 39-13782; AD 2004-18-04]

RIN 2120-AA64

#### **Airworthiness Directives; McDonnell Douglas Model MD-10-10F, MD-10-30F, MD-11, MD-11F, and 717-200 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all McDonnell Douglas MD-10-10F, MD-10-30F, MD-11, MD-11F, and 717-200 airplanes. This AD requires a revision to the Limitations section of the Airplane Flight Manual (AFM) to prohibit use of the flight management system (FMS) profile (PROF) mode for descent and/or approach operations unless certain conditions are met. This AD is promoted by a report of two violations of the selected flight control panel (FCP) altitude during FMS PROF descents. We are issuing this AD to prevent, under certain conditions during the FMS PROF descent, the uncommanded descent of an airplane below the selected level-off altitude, which could result in an unacceptable reduction in the separation between the airplane and nearby air traffic or terrain.

**DATES:** Effective September 20, 2004.

We must receive comments on this AD by November 2, 2004.

**ADDRESSES:** Use one of the following addresses to submit comments on this AD.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590.

- Fax: (202) 493-2251.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You can examine this information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

- You can examine the contents of this AD docket on the Internet at <http://dms.dot.gov>, or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Room PL-401, on the plaza level of the Nassif Building, Washington, DC.

#### **Docket Management Systems (DMS)**

The FAA has implemented new procedures for maintaining AD dockets electronically. As of May 17, 2004, new AD actions are posted on DMS and assigned a docket number. We track each action and assign a corresponding directorate identifier. The DMS AD docket number is in the form "Docket No. FAA-2004-99999." The Transport Airplane Directorate identifier is in the form "Directorate Identifier 2004-NM-999-AD." Each DMS AD docket also lists the directorate identifier ("Old Docket Number") as a cross-reference for searching purposes.

#### **Examining the Dockets**

You can examine the AD docket on the Internet at <http://www.dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

#### **FOR FURTHER INFORMATION CONTACT:**

*Technical information:* Jim Webre, Flight Test Pilot, Flight Test Branch, ANM-160L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5364; fax (562) 627-5210.

*Plain language information:* Marcia Walters, [marcia.walters@faa.gov](mailto:marcia.walters@faa.gov).

**SUPPLEMENTARY INFORMATION:** We have received a report of two violations of the selected flight control panel (FCP) altitude during flight management system (FMS) profile (PROF) descents on McDonnell Douglas Model MD-11 airplanes. Investigation by the airplane and avionics manufacturers revealed that under certain conditions during an FMS PROF descent, the FMS will allow an airplane to descend below the selected FCP altitude or FMS-constrained altitude or both. In addition, the FMS will not command the autopilot or flight director to level off at the next altitude constraint, if a specific series of events occur and the airspeed of the airplane is within the overspeed detection window during an FMS descent. Under certain conditions during the FMS PROF descent, the uncommanded descent of the airplane below the selected level-off altitude, if not corrected, could result in an unacceptable reduction in the separation between the airplane and nearby air traffic or terrain.

The FMS software on Model MD-10-10F, MD-10-30F, MD-11F, and 717-200 airplanes is identical to that on the affected Model MD-11 airplanes. Therefore, all of these models may be subject to the same unsafe condition.

#### **FAA's Determination and Requirements of This AD**

The unsafe condition described previously is likely to exist or develop on other airplanes of the same type design, which use the same FMS software. Therefore, we are issuing this AD to prevent, under certain conditions during the FMS PROF descent, the uncommanded descent of an airplane below the selected level-off altitude, which could result in reducing the separation between the airplane and nearby air traffic or terrain. This AD requires a revision to the Limitations section of the Airplane Flight Manual (AFM) to prohibit use of the FMS PROF mode for descent and/or approach operations unless certain conditions are met.

#### **Interim Action**

This is considered to be interim action. The manufacturer has advised that it currently is developing a software modification that will address the unsafe condition addressed by this AD. Once this modification is developed, approved, and available, the FAA may consider additional rulemaking.

#### **FAA's Determination of the Effective Date**

An unsafe condition exists that requires the immediate adoption of this