



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Parts 925 and 944**

**[Doc. No. AMS-SC-16-0009, SC16-925-2 PR]**

**Grapes Grown in a Designated Area of Southeastern California and Imported Table Grapes; Removing Varietal Exemptions**

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement a recommendation from the California Desert Grape Administrative Committee (Committee) to remove varietal exemptions from the regulations established under the California table grape marketing order (order) and the table grape import regulation (import regulation). The order regulates the handling of table grapes grown in a designated area of southeastern California and is administered locally by the Committee. The import regulation is authorized under section 8e of the Agricultural Marketing Agreement Act of 1937, as amended, and regulates the importation of table grapes into the United States. In conjunction with this proposed rule, administrative exemptions that were previously granted for

other varieties of imported grapes, including those that are genetically related to the four varieties exempted under the order's regulations and import regulation, would be removed.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, 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 proposal 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:** Kathie Notoro, Marketing Specialist, or Jeffrey Smutny, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901; Fax: (559) 487-5906, or E-mail: Kathie.Notoro@ams.usda.gov or Jeffrey.Smutny@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This proposed 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 proposed 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 those commodities into the United States are prohibited unless they meet the same or comparable quality, grade, size, and maturity requirements as those in effect for the domestically produced commodities.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 13175. Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See the Office of Management and Budget's (OMB) Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is 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 a petition with USDA 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.

Under the terms of the order, fresh market shipments of *Vitis vinifera* table grape varieties, including hybrids, from the production area are required to be inspected and are subject to grade, size, quality, maturity, pack, and

container requirements during the period April 10 through July 10 (regulatory period) each year. Such shipments must be certified as meeting the order's requirements. Pursuant to section 8e of the Act, table grapes imported into the United States during the regulatory period must also be inspected and certified as meeting the grade, size, quality, and maturity standards contained in the import regulation.

Historically, four varieties of grapes have been exempted from requirements established under the order and the import regulation because these varieties were not grown within the regulated production area. The Emperor, Calmeria, Almeria, and Ribier varieties were first exempted from regulation under the order for the 1983 marketing period (48 FR 16025; April 4, 1983). The import regulation provides that imported grapes must meet the same or comparable grade, size, quality, and maturity requirements as domestic grapes regulated under the order.

The varietal exemptions were made effective in both the order's regulations and the import regulation on a continuing basis in 1985 (50 FR 18849; May 3, 1985). Subsequently, sixteen other grape varieties genetically

related to one or more of the four exempted varieties were subject to administrative exemptions from regulation under the import regulation because they were not grown in the production area.

The order regulates all vinifera species of table grapes, including the exempted varieties. Accordingly, the proposed rule would update the order's regulations to remove all varietal exemptions including the original varietal exemptions and subsequent administrative exemptions. Pursuant to section 8(e), corresponding updates would also be made to the import regulations.

The Committee believes it is important that table grapes marketed in the U.S. during the regulatory period are of a consistently high quality, grade, size, and maturity. Updating the regulations to remove outdated varietal exemptions will improve the marketing of table grapes; better meet the needs of consumers; increase returns to growers, handlers, and importers; and foster repeat purchases by consumers.

Section 925.6 of the order defines varieties to mean and to include all classifications or subdivisions of Vitis vinifera table grapes.

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 grape varieties during any period. Section 925.53 provides authority for the Committee to recommend to USDA changes to regulations issued pursuant to § 925.52.

Section 925.55 of the order specifies that when grapes are regulated pursuant to § 925.52, such grapes must be inspected by the Federal or Federal-State Inspection Service and certified to ensure they meet applicable requirements.

Section 925.304 of the order's administrative rules and regulations specifies the grade, size, quality, maturity, pack, and container requirements for shipments of all varieties of Vitis vinifera table grapes from the production area from April 10 through July 10 each year. Section 925.304 also contains the regulatory exemption for the Emperor, Calmeria, Almeria, and Ribier varieties.

The corresponding grade, size, quality, and maturity requirements for imported table grapes are contained in 7 CFR 944.503, which also specifies the regulatory exemption for the Emperor, Calmeria, Almeria, and Ribier varieties.

In the early 1980s, when the order and import regulation were established, there were fewer grape varieties grown in the production area. The distinct characteristics of individual table grape varieties were recognized by consumers, and grapes were marketed accordingly. Regulatory exemptions were provided for the handling of certain varieties that were not grown in the production area but imported into the United States to satisfy market demand. Progeny and genetically-related hybrids of those exempted varieties were also exempted administratively because they were not being grown in the production area.

As a result of extensive breeding programs, the number of different grape varieties cultivated in the production area has expanded. Now, varieties administratively exempted from the import regulation, such as the Red Globe variety, are being grown in the production area.

In addition, as a result of the extensive breeding programs introducing new hybrids, the distinguishing characteristics of each variety have become less pronounced. Table grapes are now typically marketed by

color and presence or absence of seeds, rather than by specific variety, such as "red seedless" instead of "Emperor", "green seeded" instead of "Calmeria" or "Almeria", or "black seeded" grapes instead of "Ribier".

According to a March 2011 consumer research study sponsored by the Desert Grape Growers League of California entitled, "Consumer Awareness of Grape Varieties Online Study," the presence or absence of seeds, overall appearance, and price are the dominant factors in grape purchases by retail customers. Most customers surveyed could not name a single grape variety without prompting. A copy of this study can be obtained by contacting the Committee or the USDA contact persons listed in the "**FOR FURTHER INFORMATION CONTACT**" section of this proposed rule.

To update the regulations to reflect changes in production in the production area, as well as changes in consumer understanding about table grapes and consumer considerations when purchasing them, the Committee recommended at its meeting on November 12, 2015, that the order's administrative rules and regulations be updated to remove exemptions provided for the Emperor, Calmeria, Almeria, and Ribier varieties. Under the proposed rule,

all table grapes handled in the production area during the regulatory period would be subject to the grade, size, quality, maturity, pack, and container requirements specified in the order and would be subject to inspection and certification requirements, regardless of variety. The Committee believes that ensuring consistently high quality grade, size, and maturity, as verified through inspection and certification, would encourage repeat purchases by consumers, thereby increasing returns to producers and handlers.

As required under section 8e of the Act, varietal exemptions would likewise no longer apply to imported grapes. Accordingly, all table grapes offered for importation into the United States during the regulatory period would be subject to the grade, size, quality, and maturity regulations specified in the import regulation and would be subject to inspection and certification requirements.

The proposed rule would modify the introductory paragraph of § 925.304 - California Desert Grape Regulation 6 - of the order's regulations by removing the four historically exempt varieties: Emperor, Calmeria, Almeria,

and Ribier. Additionally, § 944.503(a)(1) of the import regulation would be modified by removing the exemptions for Emperor, Calmeria, Almeria, and Ribier varieties from the import regulation. In conjunction with these actions, administrative exemptions for imported varieties, including Italia Pirovano (Blanca Italia), Christmas Rose, Muscatel, Barlinka, Dauphine, Kyoho, Waltham Cross, Alphonse Lavallee, Bien Donne, Bonnoir (Bonheur), La Rochelle, Queen, Rouge, Sonita, Tokay and Red Globe, would be removed.

#### **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 proposed 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 businesses 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. Import regulations issued under the Act are based on those established under Federal marketing orders.

Currently, there are approximately 12 handlers of southeastern California grapes who are subject to regulation under the order and about 38 table grape producers in the production area. Additionally, there are approximately 135 importers of grapes. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000. According to the Committee's inspection reports, seven of the 12 handlers subject to regulation have annual grape sales of less than \$7.5 million. In addition, the Committee estimates that at least nine of the 38 producers have annual receipts of less than \$750,000 and would be considered small businesses under the Small Business Administration threshold of \$750,000. Based on the foregoing, it may be concluded that slightly more than half of the grape handlers and a

minority of the grape producers could be classified as small entities.

Chile, Mexico, and Peru are the major countries that export table grapes to the United States. According to the 2015 data from the U.S. Department of Agriculture, Foreign Agricultural Service, shipments of table grapes imported into the United States from Chile were valued at \$805,226,000; from Mexico were valued at \$329,494,000; and those from Peru were valued at \$204,349,000. The total value of table grapes imported into the United States in 2015 was \$1,344,077,000. When this value is divided by the total number of importers (135), it is estimated that the average grape importer received over \$9.9 million in revenue from the sale of grapes. Therefore, it may be concluded that the average table grape importer is not classified as a small entity.

This rule would remove the varietal exemptions from the introductory paragraph of § 925.304 of the regulations of the California desert grape marketing order and from § 944.503(a)(1) of the table grape import regulation. 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.

In conjunction with this action, administrative regulatory exemptions previously granted for other imported *Vitis vinifera* table grapes, including any varieties that are genetically related to the four exempted varieties, such as Italia Pirovano (Blanca Italia), Christmas Rose, Muscatel, Barlinka, Dauphine, Kyoho, Waltham Cross, Alphonse Lavallee, Bien Donne, Bonnoir (Bonheur), La Rochelle, Queen, Rouge, Sonita, Tokay and Red Globe, would also be removed. Removing the exemptions is expected to ensure that all table grapes marketed during the regulatory period are of consistent high quality, grade, size, and maturity, which is expected to improve returns for domestic producers, handlers, and importers due to increased purchases by consumers.

The majority of grapes imported into the United States are from Chile. Recent data indicate total imports of grapes from Chile average approximately 352,102.2 metric tons annually. Of this amount, the quantity of exempt varieties of Chilean grapes imported during the regulatory period averages approximately 8,164.7 metric tons, which

represents less than four percent of the grapes imported from Chile. Of these exempt shipments, the majority (81 percent, based on a ten-year average) are of the Red Globe variety, which is now grown in the production area. All other exempt varieties are of the varietal types also grown in the production area.

As a result of the proposed changes, all table grapes grown in the production area or imported into the United States during the regulatory period would be subject to inspection and certification requirements, as established under the order. Fees for inspection and certification, which are performed by USDA's Federal or Federal-State Inspection Service, are typically 3.8 cents per package. This estimated increase in costs would represent only a small percentage of the value of the grapes. Grape prices can vary significantly, ranging from \$6 to \$44 per package. The inspection cost per package represents less than two-tenths of one percent of the midpoint of the range of prices per package (\$25).

In addition, some of the exempted varieties are currently being inspected on a voluntary basis to meet buyer requirements, but the quantity is unknown. For those

products, the proposed changes would result in no increased cost.

The benefits of removing the exemptions, as discussed below, are expected to outweigh any additional costs incurred by handlers and importers.

According to industry research, table grape consumers make purchases based upon the quality characteristics of the grapes. Consumers are more likely to make repeat purchases following satisfactory experiences with previous purchases. Rather than selecting grapes by variety, consumers purchase varietal types that will meet their needs, such as "red seedless" or "black seeded" grapes. Therefore, the Committee believes that it is important to ensure that all table grapes shipped or imported during the regulatory period are of consistent high quality, regardless of variety. It is expected that removing the regulatory exemptions will ensure that all table grapes marketed in the United States during the regulatory period will be of a consistent quality, better meeting the needs of consumers and fostering repeat purchases, thus increasing the demand for grapes and increasing returns to producers, handlers, and importers.

The Committee considered alternatives to this action, including maintaining the current varietal exemptions. However, the Committee anticipates that subjecting all grape varieties and variety types grown in the production area to the requirements under the order and the import regulation would best ensure that consumers receive quality grapes, which in turn would provide producers, handlers, and importers with higher returns.

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.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0189. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would 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 table grape industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the November 12, 2015, meeting was a public meeting. All entities, both large and small, were able to express their views on this issue. Interested persons are invited to submit comments on this proposed 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/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the

previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments received in a timely manner will be considered before a final determination is made on this matter.

#### **List of Subjects**

7 CFR Part 925

Grapes, Marketing agreements, 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 above, 7 CFR parts 925 and 944 are proposed to be amended as follows:

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

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

Authority: 7 U.S.C. 601-674.

2. In § 925.304, the introductory text is revised to read as follows:

§ 925.304 California Desert Grape Regulation 6.

During the period April 10 through July 10 each year, no person shall pack or repack any variety of grapes on any Saturday, Sunday, Memorial Day, or the observed Independence Day holiday, unless approved in accordance with paragraph (e) of this section, nor handle any variety of grapes unless such grapes meet the requirements specified in this section.

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PART 944 - FRUITS; IMPORT REGULATIONS

3. In § 944.503, revise the introductory text of paragraph (a)(1) to read as follows:

§ 944.503 Table Grape Import Regulation

(a)(1) Pursuant to section 8e of the Act and Part 944 - Fruits, Import Regulations, and except as provided in paragraphs (a)(1)(iii) and (iv) of this section, the importation into the United States of any variety of *Vinifera* species table grapes is prohibited unless such grapes meet the minimum grade and size requirements

established in paragraphs (a)(1)(i) or (ii) of this section.

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Dated: June 20, 2017

Erin Morris  
Associate Administrator  
Agricultural Marketing Service

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