

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
Fruit and Vegetable Programs
14th and Independence
Room 1406-South
Washington, DC 20250

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CERTIFICATE OF MAILING
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Docket No. AO-FV-09-0138; AMS-FV-09-0029;
FV09-970-1]
Leafy Green Vegetables Handled in the United
States; Hearing on Proposed Marketing Agreement
No. 970

I, Anne M. Dec, hereby certify that on the third day of September, 2009, by authority vested in me, and in accordance with the applicable rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders, as amended (7 CFR Part 900), I mailed a true copy of the notice of "Leafy Green Vegetables Handled in the United States; Hearing on Proposed Marketing Agreement No. 970" (74 FR 45565) to each of the persons known to be interested therein.

Dated: 9-10-09



Anne M. Dec
Assistant Branch Chief
Marketing Order Administration Branch
Fruit and Vegetable Programs

A public hearing will be held to give persons an opportunity to comment on a proposed national marketing agreement covering the handling of leafy green vegetables. A notice of these hearings was published in the Federal Register today, September 3, 2009. A copy of the notice is attached. This is a formal rulemaking proceeding.

Hearings will be held in seven locations between September 22 and October 22, 2009. Details are provided in the Notice of Hearing. USDA will produce an on-demand video recording of the September 22-24, 2009, hearing sessions, and will make it available for viewing by interested parties beginning September 23, 2009, at www.ams.usda.gov/moab. We will make the transcripts from all hearing sites available on the website, as well, soon after each hearing.

The proposal was submitted to USDA by a cross-section of producer and handler representatives from the fresh produce industry, collectively referred to as the "proponent group." As proposed, the agreement would authorize the development and implementation of production and handling regulations (metrics) designed to support the United States Food and Drug Administration's Good Agricultural Practices, Good Handling Practices and Good Manufacturing Practices in the fresh leafy green vegetable industry. As a voluntary program, only signatory handlers to the proposed agreement would be regulated.

Sincerely,

Anne M. Dec
Marketing Order Administration Branch
USDA AMS Fruit and Vegetable Programs

Proposed Rules

Federal Register

Vol. 74, No. 170

Thursday, September 3, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 970

[Docket No. AO-FV-09-0138; AMS-FV-09-0029; FV09-970-1]

Leafy Green Vegetables Handled in the United States; Hearing on Proposed Marketing Agreement No. 970

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; notice of public hearing.

SUMMARY: Notice is hereby given of a public hearing to consider a proposed marketing agreement under the Agricultural Marketing Agreement Act of 1937 to cover the handling of leafy green vegetables and products in the United States. The proposal was submitted by a cross-section of producer and handler representatives from the fresh produce industry, collectively referred to as the "proponent group." The proposed agreement would authorize the development and implementation of production and handling regulations (metrics). Such metrics would reflect Good Agricultural Practices, Good Handling Practices, and Good Manufacturing Practices. The proposal would be voluntary in that only handlers who sign the marketing agreement would be subject to the requirements of the marketing agreement. Signatory handlers could only handle leafy green vegetables or product from the production area or imported that meets the requirements of the program. The program would be financed by assessments on first handlers of leafy green vegetables for the fresh market and would be administered by a twenty-three member committee, the majority of whom would be growers and handlers nominated by the industry and appointed by the Department of Agriculture (USDA).

DATES: The hearing dates are:

1. September 22 through 24, 2009, Monterey, California.

2. September 30 through October 1, 2009, Jacksonville, Florida.
3. October 6, 2009, Columbus, Ohio.
4. October 8, 2009, Denver, Colorado.
5. October 14 and 15, 2009, Yuma, Arizona.
6. October 20, 2009, in Syracuse, New York.
7. October 22, 2009, in Charlotte, North Carolina.

All hearing sessions are scheduled to begin at 8:30 a.m. and will conclude at 5 p.m., or any other time as determined by the presiding administrative law judge.

ADDRESSES: The hearing locations are:

1. Hyatt Regency Monterey, 1 Old Golf Course Road, Monterey, California, (831) 372-1234.

USDA will produce an on-demand video recording of the September 22-24, 2009, hearing sessions. The on-demand-video recordings will be available for viewing by interested parties beginning September 23, 2009, at <http://www.ams.usda.gov/moab>.

2. Wyndham Jacksonville Riverwalk, 1515 Prudential Drive, Jacksonville, Florida, (904) 396-5100.

3. Greater Columbus Convention Center, Room D130, 400 North High Street, Columbus, Ohio, (614) 827-2500.

4. Denver Airport Marriot at Gateway Park, 16455 East 40th Circle, Aurora, Colorado, (303) 371-4333.

5. Yuma Civic Center, Yuma Room, 1440 Desert Hills Drive, Yuma, Arizona, (928) 373-5040.

6. Renaissance Syracuse Hotel, 701 East Genesee Street, Syracuse, New York, (315) 479-7000.

7. Charlotte Marriott Executive Park, 5700 Westpark Drive, Charlotte, North Carolina, (704) 527-9650.

FOR FURTHER INFORMATION CONTACT:

Antoinette Carter, 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:

Antoinette.Carter@ams.usda.gov; or Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, Northwest Marketing Field Office, 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.

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.

SUPPLEMENTARY INFORMATION: This administrative action is instituted pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The proposed marketing agreement is authorized under section 8(b) of the Act. This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) seeks to ensure that within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. Interested persons are invited to present evidence at the hearing on the possible regulatory and informational impacts of the proposal on small businesses.

The marketing agreement proposed herein has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect.

The hearing is called pursuant to the provisions of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

Background

In mid-September 2006, the FDA issued the first public alerts of a multi-state *Escherichia coli* (*E. coli*) outbreak linked to fresh spinach grown in California's Salinas Valley. The resulting recall was the largest ever for leafy green products. Investigations by the FDA and the California Department of Health Services, in cooperation with the Centers for Disease Control and Prevention and USDA's Animal and Plant Health Inspection Service, concluded that the *E. coli* contamination might have been attributed to environmental factors in the production area.

In response to this outbreak, members of the California industry initiated the establishment of a State marketing agreement for handlers of leafy greens, which became effective February 10, 2007. Currently, signatory handlers under the California state program represent 99 percent of leafy green vegetable production volume in that state. In October 2007, a similar program was implemented in Arizona, which covers approximately 75 percent of leafy green vegetables produced in the state. While both the California and Arizona programs are voluntary, the requirements of these state agreements are mandatory for all signatories.

On October 4, 2007, USDA's Agricultural Marketing Service (AMS) published an Advance Notice of Proposed Rulemaking (ANPR) in the *Federal Register* (72 FR 56678) in response to industry interest in the establishment of a national marketing program to address the handling of fresh leafy green vegetables. Proposals and comments were sought from the public, particularly from growers, handlers, buyers, and sellers of leafy green commodities.

The ANPR resulted in the submission and consideration of 3,500 public comments on the need and level of support for a nationwide best practices program. These comments may be viewed at <http://www.regulations.gov/search/Regs/home.html#searchResults?Ne=11+8+8053+8098+8074+8066+8084+1&Ntt=AMS-FV-07-0090&Ntk=All&Ntx=mode+matchall&N=0>.

Proposed Marketing Agreement

On June 10, 2009, a petition for rulemaking requesting a public hearing on a proposed national marketing agreement for lettuce, spinach and other leafy greens was submitted to AMS. The proposal was submitted by a group of representatives (proponents) of a cross-section of producer and handler members of the fresh produce industry. The proponent group is comprised of: United Fresh Produce Association, Produce Marketing Association, Georgia Fresh Vegetable Association, Georgia Farm Bureau, Texas Fresh Vegetable Association, Arizona Farm Bureau, Leafy Greens Council, California Farm Bureau, California Leafy Greens Products Handler Marketing Agreement, Grower-Shipper Association of Central California, Western Growers, and the Imperial Valley Vegetable Growers Association. The proponents, whose membership includes both conventional and organic producers and handlers, claim to represent a majority of the volume of leafy green vegetables produced for the U.S. fresh market.

Proponents of the proposed program support the systematic application of good agricultural production, handling, and manufacturing under an auditable, science-based program. Proponents state that the proposed program is intended to minimize the potential for microbial contamination in production and handling systems, and would improve consumer confidence of fresh leafy green vegetables and their products in the marketplace.

Presently, there are no mandatory national food quality or safety requirements for the growing and handling of leafy green vegetables. Processing facilities, however, are subject to current good manufacturing practices as provided for in FDA Title 21, Part 110 of the Code of Federal Regulations.

USDA has quality grade standards for select leafy green vegetables (lettuce, endive, dandelion and cabbage), and offers voluntary quality related programs for fresh fruits and vegetables (Qualified Through Verification, Partners in Quality, Identity Preservation, and Domestic Origin Verification programs), as well as Good Agricultural and Good Handling Practices Audit Verification Programs.

Two FDA documents provide guidelines for the fresh produce industry and leafy green supply chain: Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables, and Commodity Specific Food Safety Guidelines for Lettuce and Leafy Greens Supply Chain. Recently, a third FDA document was published as draft guidelines for leafy greens. All these documents may be viewed at <http://www.fda.gov>.

If the proposed national marketing agreement were implemented, the administrative committee, after consultation with the proposed Technical Review Board, would recommend audit metrics for USDA approval. These metrics would be science-based, scalable and regionally applicable in order to accommodate compliance of varying size and types of operations.

As a voluntary program, only signatory handlers to the proposed agreement would be regulated. Under the proposed agreement, signatory handlers could only handle leafy green vegetables from (1) producers within the production area who meet the requirements of the program, or (2) producers and handlers outside the production area who meet the requirements of the program. The production area is defined as the 50 states and the District of Columbia. Audits would be conducted by the

USDA Inspection Service, and would include both domestic and imported product handled by signatory handlers.

The proposed program would be financed by assessments collected from first handlers on the volume of leafy green vegetables handled for the fresh market. Such assessments would include costs of domestic audit verification for first handlers and their producers. First handlers would also be responsible for fees for audit verification services provided for their imported leafy green vegetables or products. Secondary signatory handlers would be responsible for fees for audit verification services for leafy green vegetables or products handled by such handler.

The proponent group states that the proposed agreement has been discussed with leafy green vegetable growers, handlers, including those importing leafy greens, trade associations, and other industry stakeholders for more than a year. The proposal discussed herein has not received approval by the Secretary of Agriculture.

Testimony is invited at the hearing on the proposed marketing agreement and all of its provisions, as well as any appropriate modifications or alternatives.

The public hearing is held for the purpose of:

- (a) Receiving evidence about the economic and marketing conditions that relate to the proposed agreement and to appropriate modifications thereof;
- (b) Determining whether the handling of leafy green products within the production area is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce and foreign commerce;
- (c) Determining whether there is a need for a marketing agreement for leafy green vegetables;
- (d) Determining the economic impact of the proposed agreement on the affected leafy green growers, handlers, other industry members and consumers; and,
- (e) Determining whether the proposed agreement or any appropriate modification thereof would effectuate the declared policy of the Act.

All persons wishing to submit written material as evidence at the hearing should be prepared to submit four copies of such material at the hearing and should have prepared testimony available for presentation at the hearing. Where possible, all submitted written material should also be accompanied by an electronic copy in digital format. To the extent possible, all exhibits, including copies of prepared testimony, accepted into evidence during the hearing process will be available for

viewing by interested parties at <http://www.ams.usda.gov/woab>.

From the time the notice of hearing is issued and until the issuance of a Secretary's decision in this proceeding, USDA employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an ex-parte basis with any person having an interest in the proceeding. The prohibition applies to employees in the following organizational units: Office of the Secretary of Agriculture; Office of the Administrator, AMS; Office of the General Counsel; and the Fruit and Vegetable Programs, AMS.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Provisions of the proposed marketing agreement follow.

List of Subjects in Proposed 7 CFR Part 970

Marketing agreements, Reporting and recordkeeping requirements, Vegetables.

The marketing agreement proposed by the proponent group would add a new part 970 to read as follows:

PART 970—NATIONAL MARKETING AGREEMENT REGULATING LEAFY GREEN VEGETABLES

Subpart—Agreement Regulating Signatory Handlers

Definitions

- Sec.
- 970.1 Act.
 - 970.2 Audit verification.
 - 970.3 Broker.
 - 970.4 Critical limit.
 - 970.5 Crop year.
 - 970.6 Foodservice distributor.
 - 970.7 Fresh-cut.
 - 970.8 Fresh-cut, packaged leafy green product.
 - 970.9 Good agricultural and handling practices.
 - 970.10 Good manufacturing practices.
 - 970.11 Handle.
 - 970.12 Handler.
 - 970.13 Importer.
 - 970.14 Inspection Service.
 - 970.15 Leafy green vegetables.
 - 970.16 Manufacture.
 - 970.17 Manufacturer.
 - 970.18 Packaged.
 - 970.19 Person.
 - 970.20 Producer.
 - 970.21 Process.
 - 970.22 Process control.
 - 970.23 Production area.
 - 970.24 Retailer.
 - 970.25 Secretary.
 - 970.26 Signatory.
 - 970.27 USDA.
 - 970.28 Zone.

Purpose

- 970.35 Purpose

Leafy Green Vegetable Administrative Committee

- 970.40 Establishment and membership.
- 970.41 Eligibility.
- 970.42 Term of office.
- 970.43 Nominations.
- 970.44 Alternate members.
- 970.45 Technical Review Board.
- 970.46 Market Review Board.
- 970.47 Compensation and expenses.
- 970.48 Procedure.
- 970.49 Powers.
- 970.50 Duties.

Expenses and Assessments

- 970.55 Expenses.
- 970.56 Assessments.
- 970.57 Accounting.
- 970.58 Contributions.

Duties and Responsibilities of Signatories

- 970.65 Signatory parties.
- 970.66 Verification audits.
- 970.67 Audit metrics.
- 970.68 Traceability.
- 970.69 Official certification mark.
- 970.70 Administrative review.
- 970.71 Modification or suspension of regulations.
- 970.72 Exemptions.

Research and Promotion

- 970.75 Research and promotion.

Reports and Records

- 970.80 Reports and recordkeeping.
- 970.81 Confidential information.
- 970.82 Verification of reports.
- 970.83 Compliance.

Miscellaneous

- 970.85 Effective time.
- 970.86 Rights of the Secretary.
- 970.87 Personal liability.
- 970.88 Separability.
- 970.89 Derogation.
- 970.90 Duration of immunities.
- 970.91 Agents.
- 970.92 Suspension or termination.
- 970.93 Proceedings upon termination.
- 970.94 Effect of termination or amendment.
- 970.95 Amendments.
- 970.96 Counterparts.
- 970.97 Additional parties.
- 970.98 Withdrawal.

Authority: U.S.C. 601–674.

Definitions

§ 970.1 Act.

Act means Public Act No. 10, 73d Congress (May 12, 1933), as amended and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. 601 *et seq.*).

§ 970.2 Audit verification.

Audit verification means the physical visit to the farm and/or facility when it is in operation by an Inspection Service audit team to verify and document that good agricultural, handling, and manufacturing practices are adhered to throughout the growing, harvesting,

packing operation and transportation as defined in § 970.9, and § 970.10. This verification shall take the form of an official audit conducted by the Inspection Service, § 970.14. An audit verification is a snapshot in time based on documentation reviewed, persons interviewed and operations observed, and is intended to represent the past and ongoing activities of the auditee.

§ 970.3 Broker.

Broker means an individual or entity that coordinates the sale and transport of fresh leafy green vegetable retail or foodservice buyers without taking ownership of the product.

§ 970.4 Critical limit.

Critical limit means a maximum and/or minimum value established as part of a process control to which a biological, chemical, or a physical parameter must be controlled to prevent or minimize the occurrence of a food safety hazard to an acceptable level.

§ 970.5 Crop year.

Crop year is synonymous with *fiscal year* and means the 12-month period beginning with April 1 of any year and ending with March 31 of the following year.

§ 970.6 Foodservice distributor.

Foodservice distributor means an individual or entity that provides leafy green vegetables to restaurants, cafeterias, industrial caterers, hospitals and nursing homes.

§ 970.7 Fresh-cut.

Fresh-cut means fresh vegetables that have been altered from their natural form by cutting, dicing, peeling, slicing, chopping, shredding, coring, or trimming, with or without washing prior to being packaged for use by the consumer, foodservice industry, or a retail establishment. Fresh-cut products do not require additional preparation, processing, or cooking before human consumption.

§ 970.8 Fresh-cut, packaged leafy green product.

Fresh-cut, packaged leafy green product means any leafy green vegetable defined under § 970.15 that is fresh-cut and packaged for human consumption. This definition excludes from regulation all whole or cut non-leafy green vegetables or non-produce ingredients commingled with fresh-cut leafy green vegetables in packaged products (e.g. salad kits which may contain carrots, meat, cheese, and/or dressings).