

***Statement
Of
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Agricultural Marketing Service
U.S. Department of Agriculture***

***Domestic Policy Subcommittee
Oversight and Government Reform Committee***

***Wednesday, July 29, 2009
2154 Rayburn HOB
2:00 p.m.***

***“Ready-to-Eat or Not: Examining the Impact of Leafy Green
Marketing Agreements”***

Mr. Chairman and Members of the Subcommittee, good afternoon and thank you for the invitation to appear before you today. I appreciate the opportunity to share with you a brief overview of the U.S. Department of Agriculture’s (USDA) Agricultural Marketing Service’s (AMS) activities with regard to marketing orders and agreements for the fruit and vegetable industries.

First of all, I would like to introduce myself to the Subcommittee. My name is Rayne Pegg and I am the new AMS Administrator. Before coming to USDA, I served as the Deputy Secretary of Legislation and Policy for the California Department of Food and Agriculture. In this role, I advised both the Secretary of the Department and the cabinet of the Governor of California on the Department's legislative and policy issues. I worked with growers and the public to find common ground and reach agreement on controversial issues such as invasive species, organic production, food safety, farmers

markets, government oversight, and trade barriers. Prior to my work for the State of California, I worked for California farmers and farmer cooperatives on various issues.

As you know, the Food and Drug Administration (FDA) is the Federal agency with primary responsibility for the food safety of fruits and vegetables. At the U.S. Department of Agriculture, the Food Safety and Inspection Service holds similar responsibility for meat, poultry, and egg products.

The mission of AMS is to facilitate the strategic marketing of agricultural products in the domestic and international marketplace. AMS is not a food safety agency. The agency, through programs such as marketing orders and agreements, assists handlers and producers in verifying various product quality control efforts.

Marketing Orders and Agreements

Authorized by the Agricultural Marketing Agreement Act of 1937 (the Act), marketing orders and agreements assist farmers and handlers by allowing them to collectively work to solve marketing problems. These programs are initiated by industries that choose to have Federal oversight, through AMS, of certain aspects of their operations. At the request of industry members, AMS reviews a proposal to establish a marketing order or agreement and solicits input, on numerous occasions, from all interested parties in order to reach a decision that addresses the marketing problems identified in the proposal.

Marketing orders and agreements may set minimum quality requirements, standardize packaging, regulate flow of product to market, and implement other regulations including consumer education, research and advertising. Marketing agreements only apply to handlers who voluntarily sign an agreement, while marketing orders set regulations on all handlers in a specified region once the program is approved in a grower referendum. Fees are collected from handlers to cover the local costs of administering these programs. AMS currently administers 32 fruit and vegetable marketing orders, covering 25 specialty crop commodities.

Establishing a Marketing Order or Agreement

After an industry identifies mutual marketing problems and determines that a marketing order or agreement could help the industry solve these problems, a proposal is prepared and submitted, along with a request for a hearing, to AMS. The proposal should indicate the degree of industry support, the problems the program would address, and suggest a possible hearing site and approximate date. A Notice of Public Hearing is then issued, and is published at least 15 days before the hearing. A USDA Administrative Law Judge presides at the public hearing and a verbatim record is compiled of the testimony of opponents, proponents and others, including USDA personnel. Because proponents bear the burden of proof, they must present evidence to support the need for the program, and every provision in the proposal.

Based on hearing evidence, a Recommended Decision is issued by USDA. Persons are

allowed to file exceptions to it for a set time period. For both marketing orders and agreements, the Recommended Decision is followed by a Secretary's Decision. The Secretary's Decision takes into account any comments submitted in response to the Recommended Decision, makes modifications if warranted, and then restates USDA's position on whether or not there is compelling evidence to proceed with implementation of a new program. Accompanying the Secretary's Decision is either a grower referendum order (in the case of marketing orders) or a handler sign-up period (in the case of marketing agreements). An order requires a 2/3 vote, by number or volume, of those voting in the referendum in order to pass and be implemented. The Act does not stipulate a handler sign-up threshold, but USDA has discretion to determine if handler sign-up participation is adequate to implement an agreement. Depending on the outcome of either the referendum or the handler sign-up, a Final Order is issued. The Final Order either implements the new program or terminates the proceeding if participation is not adequate.

Once a marketing order or agreement is established, committees and / or boards of farmers and handlers - appointed by the Secretary of Agriculture - administer the order or agreement. These committees and boards are responsible for the development of production and handling practices (best practices, or metrics) which are submitted to USDA. AMS then publishes the proposed metrics and solicits public comments.

Product Quality Issues under Federal Marketing Orders

Section 608c(6) of the Act provides authority to regulate the quality of various commodities through Federal marketing orders and agreements. AMS considers the absence of harmful pathogens or toxins to be a characteristic of higher quality products. In response to producer requests for support of their product quality control efforts, AMS has incorporated product quality verification requirements into marketing order regulations for a number of years. AMS recognizes the importance of coordinating with FDA as closely as possible because, as stated earlier, FDA is the Federal Government's lead agency with respect to food safety issues. It is also important to reiterate that although certain requirements related to food safety have been incorporated into various marketing agreements and orders, these requirements have been incorporated solely to improve product marketability.

For example, a large majority of the currently active Federal marketing order programs include minimum grade requirements and most U.S. grade standards have criteria that relate to food safety (e.g., lack of mold, insects, foreign material, etc.). The marketing order for California prunes has had inspection and fumigation requirements relative to live insect infestations since 1961. Since 1965, testing for *Aflatoxin* has been required for U.S. grown peanuts originally under a Federal marketing agreement and subsequently through separate legislation administered by AMS. Requirements have been in place since 1977 for California raisins specifying the absence of dirt, insects and mold. Also, beginning in 2005, pistachio handlers were required to test all nuts destined for human consumption for *Aflatoxin*, which, if present, would lower the quality and market value of pistachios. Starting with the 2007-08 almond crop, handlers were required to treat almonds prior to

shipment to reduce the chance of *Salmonella* contamination, which could also lower the quality and value of almonds shipped to market.

In both February 2008 and 2009, the USDA-chartered Fruit and Vegetable Industry Advisory Committee, a group of 25 members of the U.S. produce industry, expressed strong support for making Federal marketing agreements and orders available to industries to facilitate national adoption and compliance with food safety standards, such as Good Agricultural Practices (GAPs), Good Handling Practices (GHPs), and Good Manufacturing Practices (GMPs).

California Leafy Green Marketing Agreement

Following the September 2006 *E. coli* outbreak linked to fresh spinach grown in the Salinas Valley, which lead to a number of deaths and illnesses, the spinach and related leafy green industries collectively worked with the California Department of Food and Agriculture (CDFA) to begin designing a state marketing agreement that would require adherence to GAPs for most signatory companies involved in shipping leafy greens in the state. The California Leafy Green Marketing Agreement (Agreement) became effective in February 2007. Arizona implemented a similar program in October 2007.

The CDFA Agreement is a voluntary program. This program licenses signatory handlers to use a mark to certify the member's use of GAPs on all California grown and handled product. The use of the certification mark would be denied to those firms found in

violation. The Agreement also mandates that handler's source their leafy greens produced in California from growers who comply with a specified set of GAPs. According to CDFA, to date, handlers representing more than 99 percent of the leafy greens produced in California have signed the Agreement. AMS has cooperated with CDFA in the verification aspects of the Agreement, including the design and delivery of training for the California State auditors who monitor compliance.

AMS has also worked with the California and Arizona leafy greens industries, the California tomato industry, and the American mushroom industry to develop a framework for providing audit services. Each industry developed a "best practices" document and requested AMS to develop an audit protocol to monitor compliance with these practices. As a result, AMS is providing auditing services which recognize an operator's adherence to industry-defined best practices and FDA guidance. FDA specialists have interacted with industry as "subject matter experts" in the development of the best practices documents and AMS maintains an active working relationship with these same specialists.

Proposed National Marketing Agreement for Leafy Greens

In response to interests expressed by segments of the leafy green vegetable industries, AMS published in October 2007 an Advanced Notice of Proposed Rulemaking (ANPR) that resulted in the submission and consideration of 3,500 public comments on the need and level of support for a nationwide good agricultural and handling practices program. In short, AMS' analysis indicated public backing for such a measure could be favorable if

certain issues, such as the cost and impact on small entities, the possible impacts on the environment and wildlife habitat, the need for science-based guidelines, and other factors, were addressed in the development and implementation of any Federal regulation.

Subsequent to the analysis of the ANPR, a coalition of U.S. produce industry members began drafting a national marketing agreement proposal that would help minimize the risks of food-borne contamination in leafy green vegetables. On June 8, 2009, AMS received a proposal for a national marketing agreement for lettuce, spinach and other leafy greens. The purpose of the proposed marketing agreement would be to enhance the quality and increase the marketability of fresh leafy green vegetable products through the application of good agricultural and handling practices. Requirements implemented under the program would be science-based, conform to the FDA's guidance to minimize food safety risks, and be subject to USDA inspection audit verification and oversight. As a marketing agreement, the proposed program would only be binding on handlers who voluntarily sign the agreement. The program would require signatories to verify that any product handled comes from producers or other handlers using verified good agricultural and handling practices. The program would authorize unannounced audits and apply to imports, creating the need to audit growing facilities outside of the United States.

The program would license signatory handlers to use a mark to certify the member's compliance with the program. As a result of agreement violation, a signatory would be subject to losing the privilege of the official certification mark, and may be subject to misbranding or trademark violations, thereby possibly losing the ability to sell the

product to a buyer. Any product deemed an immediate food safety concern by USDA inspection would be reported to FDA.

Any requirements under a Federal marketing agreement for leafy greens would reinforce those industries' abilities to meet FDA requirements. AMS could not support any proposed marketing agreement program unless the authorities and regulations under such a program were consistent with FDA guidance and regulations.

The industry proposal initiates a process that involves AMS conducting hearings around the country later this year. The hearings, as well as documents and notices to be published in the Federal Register, will provide ample opportunity for groups and individuals to convey their evidence and views for the record before any such marketing agreement takes effect. If the evidence merits such a program, an extensive outreach effort to make businesses, especially small entities, aware of the marketing agreement and audit requirements would be undertaken.

We are aware that there are concerns from various groups on this proposed marketing agreement and a process is in place to hear all points of view. We want a robust comment period to allow us to make the best possible decision. I would like to again stress that this proposal to establish a marketing agreement is not a USDA proposal, but rather one offered by industry as provided for in the Act.

Conclusion

To conclude, Mr. Chairman, I would like to reiterate that Federal food safety policies for fruits and vegetables fall under the jurisdiction of the FDA. AMS has significant experience in the design and delivery of marketing programs, including marketing orders and agreements. The process for potentially establishing a marketing order or agreement is an open and transparent process in which AMS carefully considers all viewpoints.

I would be pleased to respond to questions.