

**TITLE 3. FOOD AND AGRICULTURE  
DIVISION 3. ECONOMICS  
CHAPTER 1. FRUIT AND VEGETABLE STANDARDIZATION  
SUBCHAPTER 4. FRESH FRUITS, NUTS AND VEGETABLES  
Article. 6.5. Direct Marketing**

December 6, 2019

**NOTICE OF PROPOSED RULEMAKING**

NOTICE IS HEREBY GIVEN that the California Department of Food and Agriculture (Department) proposes to amend the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed actions.

**PUBLIC HEARING**

The Department has not scheduled a public hearing on this proposed action. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

**WRITTEN COMMENT PERIOD**

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department. Comments may also be submitted via facsimile (FAX) at (916) 900-5345 or by e-mail to [maria.tenorio@cdfa.ca.gov](mailto:maria.tenorio@cdfa.ca.gov). The written comment period closes at **5:00 p.m. on January 21, 2020**. The Department will consider only comments received at the Department by that time. Submit comments to:

Maria Tenorio, Agriculture Program Supervisor II  
Inspection and Compliance Branch  
California Department of Food and Agriculture  
1220 N Street, Sacramento, CA 95814  
Telephone: (916) 900-5030; Fax: (916) 900-5345

**AUTHORITY AND REFERENCE**

Food and Agricultural Code (FAC) section 14 authorizes the Department to adopt rules and regulations in accordance with the Administrative Procedure Act. Additional authority vested in the FAC grants the Department Secretary the authority to amend or repeal rules and regulations.

FAC section 407 authorizes the Secretary of the Department to adopt such regulations as are reasonably necessary to carry out the provisions of the FAC which the Secretary is directed or authorized to administer or enforce.

FAC section 47000 establishes the Legislature's findings and declarations with regard to direct marketing. This section specifies, in part, that a regulatory scheme should be developed that provides flexibility to make direct marketing a viable marketing system.

FAC section 47000.5 establishes definitions for "agricultural product," "practice of the agricultural arts," and "Producer" under the Direct Marketing Chapter.

FAC section 47001 specifies, in part, that the Secretary of the Department may adopt regulations to encourage the direct sale by farmers to the public of all types of California agricultural products. These regulations may include provisions to ensure and maintain quality and wholesomeness of the products, and to ensure that the selling activities are conducted without fraud, deception, or misrepresentation.

FAC section 47002 provides, in part, opportunities for California farmers to market their agricultural products directly to the public with exemptions for minimum size, labeling, standard pack, and container requirements. These exemptions allow farmers to sell their product directly to the public without the added expense of commercial preparation.

FAC section 47003 provides, in part, that the Secretary may establish qualifications for persons selling products directly to the public whenever the sales involve the use of any exemption granted under the chapter pertaining to Direct Marketing. In addition, this section provides that certified farmers' markets (CFMs) and other direct marketing outlets and distributors may likewise be subject to qualifications.

FAC section 47004 establishes, in part, that CFMs are California agricultural product point of sale locations that are registered under the provisions of FAC section 47020 and operated in accordance with the chapter governing direct marketing and regulations adopted pursuant to the Direct Marketing Chapter.

FAC section 47005 grants an enforcing officer the authority to enter and inspect any place or conveyance where products are produced, stored, packed, delivered for shipment, loaded, shipped, transported, or sold pertaining to a certified producer's certificate over which they have jurisdiction.

FAC sections 47005.1 through 47005.3 provide, in part, that an enforcing officer may inspect, seize, and hold all products, containers, and equipment found in any place or conveyance to determine compliance with the Direct Marketing Chapter or regulations adopted thereunder.

FAC section 47020 establishes that the Department is responsible for administering and regulating CFMs and county agricultural commissioners are responsible at the local level for issuing producer and operator certificates and conducting onsite inspections to verify that all agricultural products sold at the CFM are grown by the producer. In addition, this section authorizes the Secretary of the Department to promulgate regulations specifying the information a certified producer is required to submit to the Department.

FAC section 47021 provides, in part, that CFM operator fees shall be used, including, among other things, for investigation and enforcement expenses, including expenses incurred by county agricultural commissioners for actions conducted pursuant to the provisions related to direct marketing.

FAC section 47022 provides, in part, that it is unlawful for any person when operating under the provisions of the Direct Marketing Program or the regulations adopted thereunder to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported, or sell any products in bulk, or in any container or subcontainer, unless such products conform to the provisions of this chapter or the regulations adopted thereunder.

FAC sections 47022.1 through 47022.7, establish, in part, that it is unlawful to engage in various activities related to agricultural commodities that fall under the provisions of the Direct Marketing Chapter or the regulations adopted thereunder.

FAC section 47025 provides that in lieu of prosecution, but not precluding suspension or revocation of certified producer's certificates or CFM certificates, the Secretary of the Department or a county agricultural commissioner may levy a civil penalty against a person who violates these provisions or any regulation implemented pursuant to these provisions, as specified.

### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

This rulemaking action proposes to amend the California Code of Regulations (3 CCR), Title 3, Division 3, sections 1392, 1392.1, 1392.2, 1392.4, 1392.5, 1392.6, 1392.8, 1392.8.1, 1392.9, 1392.9.1, and 1392.9.2; adopt sections 1392.10, 1392.10.1, and 1392.10.2; and repeal sections 1392.4.1, 1392.7, 1392.10, and 1392.11. Specifically, this rulemaking action clarifies and makes specific the conditions of direct marketing at CFMs.

The Direct Marketing/CFM Program ensures that certified producers and market operators are complying with direct marketing statutes and regulations, which are in place to ensure an equitable marketplace for certified producers to conduct business. There are approximately 2,700 certified producers and 700 CFMs in California. In addition, these statutes and regulations are intended to promote consumer confidence in the direct marketing industry by ensuring that selling activities at CFMs are conducted without fraud, deception, or misrepresentation.

On January 1, 2015, Assembly Bill (AB) 1871 (Dickinson) (Chapter 579, Statutes of 2014) was enacted. This measure modified several sections of the FAC related to direct marketing/CFMs. Specifically, responsibilities and requirements for operators, producers, county agricultural commissioners, and the Department were expanded. These changes bring the need for regulatory action to align existing regulations with the newly enacted statutes. This action provides the following:

- Clarification and revision of the intent of the Direct Marketing Article in order to align with recent statutory changes.
- Changes to the authorization of direct marketing to align with new terminology

included within recently adopted statutes.

- Amendments to several definitions within the Direct Marketing Article to provide clarity to the definitions and reflect recent statutory changes.
- Revisions to the conditions of direct marketing to reflect changes in statute and to provide for effective administration and enforcement of direct marketing statutes and mandates.
- Amendments to administrative civil penalties and appeal procedures for direct marketing to align with recent statutory changes, and to promote uniform enforcement of direct marketing/CFM statutes and regulations throughout the state.
- Amendments to producer certification procedures to ensure certificates contain uniform information and to allow county agricultural commissioner's flexibility in the way certified producer certificates are validated.
- Amendments to CFM certification requirements to ensure certificates contain uniform information.

Benefits of the Proposed Action: This proposed regulatory action will assist in clarifying and making specific the responsibilities and requirements of CFM operators, producers, county agricultural commissioners, and the Department. This will ensure that county agricultural commissioners and the Department conduct enforcement and investigate claims of fraudulent activities at CFMs in a collaborative and seamless manner. The benefits of this proposed regulatory action include increased consumer confidence, the promotion of a fair and equitable marketplace for certified producers and market operators, and greater collaboration among state and county partners. This regulatory action is intended to protect and promote the direct marketing/CFM industry.

### **CONSISTENCY EVALUATION**

The Department has determined that this proposed regulatory action is not inconsistent with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that these are the only regulations that concern CFMs.

### **DISCLOSURES REGARDING THE PROPOSED ACTION**

The Department has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative private person or business: Cost impacts on a representative private person or business: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.” This is more consistent with the Administrative Procedure Act (APA) language of Gov. Code sec. 11346.5(a)(9).

### **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS**

The Department concludes that it is: (1) likely that the proposal will not create or eliminate jobs and not eliminate existing business; (2) likely that this proposal will not create new business or expand current business opportunities; (3) likely that this proposal will not eliminate jobs; (4) Also, enhanced enforcement activities will protect consumers and the industry, and assure that consumers are purchasing produce direct from the farm. Finally, this proposed rulemaking will have no impact on the general public and protection of public health and safety.

Significant effect on housing costs: None.

### **SMALL BUSINESS DETERMINATION**

The Department has initially determined that the proposed changes to the regulations would have no significant impact directly affecting small businesses. These regulations do not require any additional costs or outputs for small businesses. These regulations do not establish any new limitations on small businesses. All CFMs and vendors would be operating under the same regulatory structure with regards to the regulatory changes.

### **CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

### **CONTACT PERSONS**

Inquiries concerning the proposed administrative action may be directed to:

Maria Tenorio, Agriculture Program Supervisor II  
Inspection and Compliance Branch  
California Department of Food and Agriculture  
1220 N Street, Sacramento, CA 95814  
Telephone: (916) 900-5030; Fax: (916) 900-5345  
The backup contact person for these inquiries is:

Jennifer Leidolf, Agriculture Program Supervisor I  
Inspection and Compliance Branch  
California Department of Food and Agriculture  
1220 N Street, Sacramento, CA 95814  
Telephone: (916) 206-3225; Fax: (916) 900-5345

Please direct requests for copies of the proposed text of the regulations, the initial statement of reason, the modified text of the regulation, if any, or other information upon which the rulemaking is based to Maria Tenorio at the above address.

### **AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS**

The Department will have the rulemaking file available for inspection and copying throughout the rulemaking process at its office at: 2800 Gateway Oaks Drive, Suite 100, Sacramento, CA 95833. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, and the initial statement of reasons. Copies may be obtained by contacting Maria Tenorio at the address or phone number listed previously.

### **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

After considering all timely and relevant comments received, the Department may amend the proposed regulations substantially as described in this notice. If the Department makes modifications, which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Maria Tenorio at the address listed above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

### **AVAILABILITY OF FINAL STATEMENT OF REASONS**

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Maria Tenorio at the address listed previously.

### **AVAILABILITY OF DOCUMENTS ON THE INTERNET**

Copies of the Notice of Proposed Rulemaking, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through the Department's website at: <http://www.cdffa.ca.gov/is/Regulations.html>