

**DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS
Title 3. Food and Agriculture
Division 3. Economics
Chapter 1. Fruit and Vegetable Standardization
Subchapter 4. Fresh Fruits, Nuts and Vegetables
Article 11. Avocados
1408.22 Avocados, Fruit Dropped by Extreme Winds**

July 18, 2017

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 steve.patton@cdfa.ca.gov. The written comment period closes at **5:00 p.m. on September 11, 2017**. The Department will consider only comments received at the Department by that time. Submit comments to:

Steve Patton, Branch Chief
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

Sections 14, 407, 42681, 42682, 42683, and 42941 of the Food and Agricultural Code authorize the Department to adopt these proposed regulations. The proposed regulations implement, interpret, and make specific Sections 42681, 42682, and 42941

of the Food and Agricultural Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

This rulemaking action amends California Code of Regulations (CCR) Title 3, Division 3, Subchapter 4, Article 11, Section 1408.22

Section 14 of the Food and Agricultural Code authorizes the Department to adopt rules and regulations in accordance with the Administrative Procedure Act. Additional authority vested in this section grants the California Department of Food and Agriculture Secretary the authority to amend or repeal rules and regulations.

Section 407 of the Food and Agricultural Code authorizes the Secretary of the Department to adopt such regulations as are reasonably necessary to carry out the provisions of the Food and Agricultural Code which the Secretary is directed or authorized to administer or enforce.

Section 42681 of the Food and Agriculture Code authorizes that the director [Secretary] by regulation may prescribe methods of selecting samples of lots or containers of fruits, nuts, and vegetables on a basis of size or other specific classification, which are reasonably calculated to produce by such sampling fair representations of the entire lots or containers which are sampled, and make such other regulations as are reasonably necessary to secure uniformity in the enforcement of this division.

Section 42682 of the Food and Agricultural Code authorizes the director [Secretary] may upon petition of a person that the director [Secretary] finds has a substantial interest in the growing or handling of the particular fruit, nut, or vegetable involved, establish, modify, or rescind by the regulation which initially took effect January 1, 1971, standard container, lid, marking, sizing requirements for commodities, and packing arrangements for any fruits, nuts, or vegetables, for which specific quality standards have otherwise been provided by law or regulation.

Section 42683 of the Food and Agricultural Code authorizes that the director [Secretary], in promulgating regulations concerning standard containers, lids, marking, sizing, consumer packages or packing requirements for fruits, nuts, and vegetables, will consider such factors as the ease of handling, identification, federal laws, rules or regulations, containers, lids and packs in substantial use in the industry and the competitive position of the California fruit, nut, and vegetable industry.

Section 42941 of the Food and Agricultural Code mandates that it is unlawful for any person to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported, or sell any fruits, nuts, and vegetables in bulk, or in any container or subcontainer, unless such fruits, nuts, and vegetables, and their containers, conform to the provisions of this division or the regulations promulgated thereunder.

The Food Safety Modernization Act was signed into law by President Obama in 2011. Federal regulations related to on-farm food safety were promulgated in 2014. It is the Food and Drug Administration's (FDA) strategy of prevention rather than reaction to food safety events. The regulations cover such activities as water testing, personal worker hygiene, cleaning of equipment, biological soil amendments, and wildlife intrusion. These rules were adopted after a considerable public comment period in which all affected parties had the opportunity to provide input.

The California Code of Regulations Title 3, Division 3, Subchapter 4, Article 11, Section 1408.22 provides an allowance for avocados dropped to the ground as a result of extreme winds. This section gives the department discretion for the qualification of time period determining the "extreme winds" and factors to identify "windfall fruit". It further allows for maturity testing and upon passage of that test, release for marketing of such fruit.

The Federal Produce Safety Rule subpart K, Section 112.114 expressly prohibits distribution of produce that drops to the ground before harvest except for produce dropped intentionally as part of the normal harvest activity (e.g., some tree nuts). Due to the federal prohibition of this previously accepted practice, it is necessary to repeal the California regulation allowing windfall avocados to be sold. This will prevent California producers from potential violations as a result of conflicting laws.

Consumers will benefit because fruit will no longer be able to be sold after coming into contact with the ground thereby minimizing potential contamination.

CONSISTENCY EVALUATION

During the process of developing these regulations and amendments, the Department has conducted a search of any similar regulations on this topic and has concluded that these regulations are consistent and compatible with existing state regulations.

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: 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.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department concludes that it is (1) unlikely that the proposal will eliminate/create any jobs and/or eliminate existing business; (2) unlikely that this proposal may create new business or expand current business opportunities for producers and packers of avocados; (3) unlikely that this proposal may create new businesses for avocado handlers; lastly, the proposed rulemaking will create an indirect impact to the protection of public health and safety.

Benefits of the Proposed Action: The proposed regulation will benefit California Consumers because fruit will no longer be able to be sold after coming into contact with the ground, thereby minimizing potential contamination.

Significant effect on housing costs: None.

SMALL BUSINESS DETERMINATION

The Department has initially determined that the proposed changes to the regulations would result in no added costs to small businesses affected by these proposed changes. This proposed regulatory action will eliminate the Departments discretion for the qualification of time period determining the “extreme winds” and factors to identify “windfall fruit”. It further eliminates the allowance for maturity testing and upon passage of that test, release for marketing of such fruit.

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:

Steve Patton, Branch Chief
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:

Laurel Rudolph, AGPA
Inspection and Compliance Branch
California Department of Food and Agriculture
1220 N Street, Sacramento, CA 95814
Telephone: (916) 900-5233; Fax: (916) 900-5345

Please direct requests for copies of the proposed text of the regulations, the initial statement of reasons, the modified text of the regulation, if any, or other information upon which the rulemaking is based to Laurel Rudolph 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; the initial statement of reasons; and petitions received from industry. Copies may be obtained by contacting Laurel Rudolph at the address or phone number listed above.

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 Laurel Rudolph 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 Laurel Rudolph at the address listed above.

AVAILABILTY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, 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.cdfa.ca.gov/is/Regulations.html>