

TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE
ARTICLE 6.5 DIRECT MARKETING
(Notice published July 30, 2010)

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the California Department of Food and Agriculture (Department) proposes to amend, Title 3, Article 6.5 of the California Code of Regulations (CCR) Sections 1392; 1392.1 (a), (d), (e), (f), (g) and (h); 1392.2 (a), (b), (e), (g), (h) (1), (2), (3), (j), and (s); 1392.4 (a), (b), and (d); 1392.6 (b), (f) and (g); 1392.8.1 (h); 1392.9 (a), (1), (2), (3), (4), (5), (6), and (7); 1392.9 (b), (1). The Department also proposes to add the following subsections: 1392.1 (h); 1392.2 (u), (v), (w), (x), (y), (z); 1392.4 (k), (l), and (m); 1392.4.1; and 1392.9(a)(7), (e); and 1392.11 (e).

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 comment relevant to the proposed regulatory action to the Department. The written comment period closes at 5:00 p.m. on September 13, 2010. The Department will consider only comments received at the Department offices by that time. Submit comments to:

Steve Patton, Compliance Chief
Inspection and Compliance Branch
California Department of Food and Agriculture
1220 N Street
Sacramento, CA 95814

AUTHORITY AND REFERENCE

Notice is hereby given that the California Department of Food and Agriculture, pursuant to the authority vested by Sections 14, 401, 407, 42681, 42682, 42684, 47000, 47001, 47002, 47003, 47004, 47004.1, 47005, 47011, 47020, 47021, 47022, 58101, 58101.5, 58103, and 58104 of the Food and Agricultural Code (FAC), and to implement, interpret, or make specific Sections 821, 861, 42651, 42681, 42941, 43003, 47000, 47001, 47002, 47003, 47004, 47004.1, 47005, 47011, 47021, 47022, 47025, 58101, 58101.5, 58102, 58103 and 58104 of the FAC, proposes to amend regulations in Title 3 of the California Code of Regulations (3 CCR).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Section 1392 expresses the intent of Article 6.5 Direct Marketing regulations. The specific purpose of amending Section 1392 is to further clarify the intent of the article.

Section 1392.1(a) defines what may be sold and to whom the producer may sell. Amending this section will expand to whom the producer may sell as recently updated in FAC Section 47002.

Section 1392.1(d) gives exemptions to a producer selling to specific entities. The specific purpose of amending this section is to allow those same exemptions to entities that will be re-selling or distributing fresh fruits, nuts and vegetables to an end user at specific locations. This also updates language recently changed in FAC Section 47002.

Section 1392.1(e) is a new sub-section that regulates producers selling to wholesalers.

Section 1392.1 (f) was previously sub-section (e).

Section 1392.1 (g) was previously sub-section (f). Amendments to this sub-section expand the locations to include a retail stand or farm stand where producers must comply with regulations pertaining to quality and maturity.

Section 1392.1 (h) was previously sub-section (g).

Section 1392.2 (a) further defines the term “Certified Farmers’ Market.” It states who may operate a farmers’ market. Amending this section adds the word “only” which clarifies that the options listed are not examples, but the specific entities that may operate the market. The definition to whom a producer may sell is also changed to include those that will sell or distribute to end users.

Section 1392.2 (b) defines and specifies conditions for valid Certified Farmers’ Market certificates. This definition includes to whom a producer may sell. This definition is expanded to include those that will sell or distribute to an end user. The amendment also makes clear that the operator is liable and responsible for the market operation and regulatory compliance as a condition of being issued a certificate.

Section 1392.2 (e) defines a certified producer and to whom they may sell. The amendment allows the producer to sell to those that will resell or distribute the products to end users as recently updated in FAC Section 47002.

Section 1392.2 (g) defines a consumer. The specific purpose of the amendment is to clarify the term.

Section 1392.2 (h) (1), (2), and (3) defines where a producer may sell their products and to whom they may sell. Amending this section will expand both where and to whom they may sell.

Section 1392.2 (j) defines the term “employee.” The amendment further clarifies that definition.

Section 1392.2 (s) defines a partnership and includes to whom that partnership may sell. This amendment changes the definition to include selling to those that will be reselling or distributing to end users.

Existing Section 1392.2 establishes definitions governing the construction of the language in this article. The specific purpose of adopting Section 1392.2 (u), (v), (w), (x) and (y) is to add definitions of processed agricultural products, and the preservatives, seasonings, flavorings, and food coloring allowed in those products. These definitions will make clarifications to enhance the uniformity of products sold at the markets.

Adopting Section 1392.2 (z) will give a definition to the term “at or near the point of production.” This term is used as a regulated location in several sections.

Section 1392.4 (a) establishes conditions of direct marketing. It details who may sell, where they may sell, and to whom they may sell. Amending this section expands where, and to whom producers may sell.

Section 1392.4 (b) declares additional state laws must be followed when products are sold at a certified farmers’ market or at or near the point of production. This amendment expands those locations to include retail stands and farm stands.

Existing Section 1392.4 (d) requires an embossed photocopy of the certified producers certificate to accompany the products during transportation and at the point of sale. The specific purpose of amending Section 1392.4 (d) is to add the word “valid” to the requirement that the embossed certificate be present during transportation and at point of sale. This will ensure expired certificates cannot be used to comply with this section.

The specific purpose of adopting Section 1392.4 (k) is to allow producers exemptions when selling their agricultural products to consumers or those that will be reselling or distributing to end users. It requires producers to issue a memorandum and outlines what that memorandum must contain.

The specific purpose of adopting Section 1392.4 (l) is to further clarify when the producer must issue a memorandum. Incorporates recent changes made to FAC Section 861.

The specific purpose of adopting Section 1392.4 (m) is to require the seller of processed products to document compliance with production requirements referenced in section 1392.2 (k) and to have that documentation available at the point of sale. It would restrict the quantities of the processed products to be less than the amount of fresh commodities listed on the certificate. It would require that the included ingredients not of their own production (other than sugar and water) must be the last ingredients listed on the label required by the Food and Drug Administration.

Adopting Section 1392.4.1 is to define the meaning of a “minor,” “moderate,” and “serious” violation; state the level of severity; specify the type of violation of associated sections of the FAC; and give a penalty range violation.

Section 1392.6 lists the certification requirements of a certified farmers' market. The specific purpose of amending Section 1392.6 (b) is to require that a map identifying the non-certified and/or non-agricultural product areas of the certified farmers' market be included in the operator application.

Section 1392.6 (f) contains a clause that market rules and regulations must be enforced in a fair and equitable manner. Amending this section clarifies that the rules shall contain this clause.

Amending Section 1392.6 (g) will stipulate that the market operator shall provide due process to market participants prior to the imposition of a fine, and further outlines the due process requirements. It also updates information on the Department of Food and Agriculture.

Section 1392.8.1 outlines what the certified farmers' markets are required to remit to the Department each quarter. The amendment to 1392.8.1(h) expands and clarifies this list.

Section 1392.9 lists the compliance requirements for the certified farmers' market operator. Amending Section 1392.9 (a) (1), (3), (4), (5), and (6) makes non-technical grammatical changes and adopting (7) requires market managers to ensure compliance with subsections (k) and (l) of Section 1392.4.

The purpose of amending Section 1392.9 (b) (1) is to require the operator of certified farmers' markets to keep records of processed products as they currently do for fresh products.

Creating Section 1392.9 (e) will require market operators to provide participants the right to appeal consistent with Section 1392.6 (g).

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.

Adoption of these regulations will not:

1. Create or eliminate jobs within California;
2. Create new businesses or eliminate existing businesses within California; or
3. Affect the expansion of businesses currently doing business within California.

Significant effect on housing costs: None.

EFFECT ON SMALL BUSINESS

The Department has determined that the proposed changes to the regulations would result in no added costs to small businesses affected by these proposed changes. The proposed changes allow the certified producers increased flexibility in marketing their commodities and will increase the variety of products offered for sale at certified farmers' markets.

CONSIDERATION OF ALTERNATIVES

The Department has determined that no reasonable alternative considered by the Department, 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 these regulations are proposed, or would be as effective and less burdensome to affected private persons than the proposed regulations.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Steve Patton, Compliance Chief
Inspection and Compliance Branch
California Department of Food and Agriculture
1220 N Street, Sacramento, CA 95814
Telephone: (916) 445-2180; Fax: (916) 445-2427

The backup contact person for these inquiries is:

Susan Shelton, Supervising Special Investigator
Inspection and Compliance Branch
California Department of Food and Agriculture
1220 N Street, Sacramento, CA 95814
Telephone: (916) 445-2180; Fax: (916) 445-2427

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 Ms. Shelton 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 560 J Street, Suite 220, Sacramento, CA 95814. 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 minutes to various Certified Farmers' Market Advisory Committee meetings. Copies may be obtained by contacting Ms. Shelton at the address or phone number listed on the previous page.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, the Department may adopt 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 Ms. Shelton at the address indicated 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 Ms. Shelton at the address listed on the previous page.

AVAILABILITY 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 our website at: <http://www.cdfa.ca.gov/is/Regulations.html>

DEPARTMENT OF FOOD AND AGRICULTURE

7/14/2010

Date

Original signed by

Nate Dechoretz, Deputy Secretary