

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. 6.5. Direct Marketing

INITIAL STATEMENT OF REASONS

The California Department of Food and Agriculture (the Department) proposes to amend the California Code of Regulations (CCR), Title 3, Division 3, sections 1392, 1392.1, 1392.2, 1392.4, 1392.4.1, 1392.5, 1392.6, 1392.8, 1392.8.1, 1392.9, 1392.9.1, 1392.10, and 1392.11 and repeal section 1391.7.

PROBLEM STATEMENT

The Certified Farmers' Market (CFM) Program provides 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 products directly to the public without the added expense of commercial preparation. There are over 2,000 certified producers and 800 CFMs in California.

In the fall of 2010, news reports highlighted instances of cheating at CFMs, including vendors selling fraudulently labeled products and reselling fruits and vegetables directly from wholesale markets. In response to these media reports, the Department held four listening sessions designed to solicit input for improving the CFM Program. Several common themes were echoed throughout the sessions – specifically that the Department, county agricultural commissioners, and market managers should enhance enforcement, communication, and education.

Upon conclusion of the listening sessions, the Department formed a CFM Technical Planning Committee for the purpose of reviewing various functions of the CFM Program (e.g., registration, enforcement, and administration) and evaluating current processes and procedures. The CFM Technical Planning Committee consisted of producers, market managers, agricultural commissioners, and industry affiliates. The CFM Technical Planning Committee spent a significant amount of time and effort reviewing mechanisms to prevent possible abuse at CFMs.

The CFM Technical Planning Committee recommended statutory changes to alleviate discrepancies in how current inspection and enforcement provisions are applied from county to county and expressed the need for uniform funding mechanisms at both the state and local level.

Ultimately, many of the recommendations of the CFM Technical Planning Committee were included in Assembly Bill (AB) 1871 (Dickinson) (Chapter 579, Statutes of 2014).

This measure modified several sections of the Food and Agricultural Code (FAC) related to direct marketing/CFMs. Specifically, this bill expanded responsibilities and requirements for operators, producers, county agricultural commissioners, and the state in order to prevent incidents of fraud and deception in the marketplace. These statutory changes bring the need for regulatory action so that the CFM Program can provide operators and producers with relevant direction while conducting effective enforcement with county agricultural commissioners.

PURPOSE

This regulatory action is intended to interpret and make specific the recent statutory changes incorporated under AB 1871 (Dickinson) (Chapter 579, Statutes of 2014). It is intended to promote consumer confidence in CFMs, thereby encouraging the continued growth of the direct marketing sector. Unless concerns related to the integrity of CFMs are mitigated, a lack of consumer confidence could hamper this growing industry. Promulgating regulations which align, interpret, and make the recent statutory changes related to CFMs and direct marketing specific is determined to be the most effective mechanism to protect and promote the direct marketing industry and ensure that selling activities at CFMs are free of fraud, deception, and mislabeling.

BENEFITS

Addressing changes in statute through 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 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.

SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE 11346.2(b)(1):

1392. Intent.

Section 1392 is amended to specify that it is the intent of the Direct Marketing Article to facilitate the sale of agricultural products from producers and certified producers within the state directly to “the public.” Previously, statutes governed the sale of agricultural products directly to “consumers.” This change is necessary to align with current statutes under FAC sections 47001 and 47002.

1392.1. Direct Marketing Authorized.

Subsection 1392.1(a) is amended to remove a reference to “Group” and replace it with the term “Chapter.” The submission of this regulatory action provides an opportunity to replace the term “Group” with a more readily understandable term, e.g., “Chapter.” This will ensure that notwithstanding other provisions of the Chapter related to Fruit and Vegetable Standardization, producers or certified producers are authorized to sell

specified products as defined in the Direct Marketing Article. In addition, the term “consumers” is replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002.

Existing subsections 1392.1(b) and 1392.1(c) are deleted because they are duplicative and addressed in subsection 1392.4(a). The Department has determined that it is more appropriate to include language specifying the conditions of the sale of certified and noncertifiable agricultural products under subsection 1392.4(b), which governs the conditions of direct marketing.

Existing subsections 1392.1(d) through 1392.1(h) are renumbered to 1392.1(b) through 1392.1(f), but are otherwise unchanged, with the exception of newly renumbered subsections 1392.1(b) and 1392.1(e).

Newly renumbered subsections 1392.1(b) and 1392.1(e) are amended to add the phrase “outlet or location” to correlate with FAC section 47002, which added the phrase “outlet or location” to places where direct marketing may take place. This is necessary to align with recently enacted statutory changes. In addition, under subsection 1392.1(b), the term “consumers” is replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002.

1392.2. Definitions.

Subsection 1392.2(a) is amended to add the requirements for timeframe, days of the week, and hours of operation to the definition of a CFM. Existing regulations under section 1392.8.1 mandate that CFM operators shall provide specified information to the Department, including market days and hours of operation. However, some CFM operators have recurring issues of being open during business hours and days not listed on their market certificate, which creates inequity amongst CFM operators. This regulatory change will provide clarity and specificity to the definition of a CFM to ensure that CFM operators adhere to their posted hours and days of operation. Consequently, it is anticipated that this regulatory change will enhance equity in the marketplace. In addition, the word “consumers” is again replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002.

Subsection 1392.2(b) is amended to add the requirements for months of operation, day of the week, and hours of operation to the definition of CFM certificate. Language is also included to make the CFM certificate valid only for the location, day, and time specified on the certificate. As mentioned above, existing regulations under section 1392.8.1 mandate that CFM operators shall provide specified information to the Department, including market days and hours of operation. However, some CFM operators have recurring issues of being open during business hours and days not listed on their market certificate. This creates inequity amongst CFM operators and this regulatory change will provide clarity and specificity to the definition of a CFM Certificate

to ensure that CFM operators adhere to their posted months, hours, and days of operation. Consequently, it is anticipated that this regulatory change will enhance equity in the marketplace. In addition, the word “consumers” is again replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002.

Subsection 1392.2(c) is amended to correspond with recently adopted statute under FAC subsection 47000.5(b) concerning the practice of the agricultural arts. This amendment, which further defines land which the producer or certified producer controls, will ensure that producers or certified producers are predominately responsible for the decisions and actions encompassing the various phases of producing an agricultural product, thus ensuring that individuals are not circumventing the intent of direct marketing statutes and regulations, which encourage the sale of agricultural products grown by the producer. This change is anticipated to promote equity in the marketplace.

Subsection 1392.2(d) is amended to align with recently adopted statute under FAC section 47000.5, which establishes a definition for a producer. This is necessary to provide the regulated industry and enforcement officers with a clear and understandable definition of a “producer.”

Subsection 1392.2(e) is amended to revise the definition of a certified producer to add the phrase “outlet or location” to correlate with FAC section 47002, which added the phrase “outlet or location” to places where direct marketing may take place. This is necessary to align with statutory changes. In addition, the word “consumers” is again replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002.

New subsection 1392.2(f) is added to provide a definition for an authorized representative. FAC subsection 47004(b) provides that only a certified producer or the lawful authorized representative of the certified producer may sell agricultural products within the area defined as the CFM. This proposed regulation defines an authorized representative as a person approved by the certified producer to conduct business on behalf of the certified producer at a CFM. This amendment is intended to provide flexibility for certified producers to allow individuals to sell agricultural products within the area defined as a CFM on their behalf.

Existing subsections 1392.2(f) and 1392.2(g) are renumbered to 1392.2(g) and 1392.2(h), but are otherwise unchanged with the exception of newly renumbered subsection 1392.2(h), which only changed the reference within that subsection to 1392.4(j) from 1392.4(k) due to the renumbering of that subsection.

Existing subsections 1392.2(i) and 1392.2(j) are deleted since the definition of an authorized representative in subsection 1392.2(f) makes definitions for immediate family

and employee under subsections 1392.2(i) and 1392.2(j) unnecessary. The repeal of these subsections will allow certified producers to appoint an authorized representative to sell agricultural products within the area defined as a CFM on their behalf. Previously, in an effort to limit fraudulent activity at CFMs, only immediate family members or employees were authorized to sell agricultural products at a CFM. This change is intended to provide flexibility for certified producers to use family members, volunteers, or other authorized individuals to sell their agricultural products within the area defined as a CFM on their behalf.

Newly renumbered subsection 1392.2(i), which was previously subsection 1392.2(h) is amended to add the phrase “outlet or location” to the definition of “Direct Marketing” to correlate with FAC section 47002, which added the phrase “outlet or location” to places where direct marketing may take place. This is necessary to align with statutory changes. Under 1392.2(i) (1), (2), and (3), the word “consumers” is again replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002. In addition, the definition for “Near the Point of Production” is moved from 1392.2(z) to this subsection to clearly describe that direct marketing includes the sale near the point of production. Finally, under subsection 1392.2(i)(5), an outlet or location is defined as a place where only a certified producer may sell only their certified agricultural products directly to the consumer, exempt from container, labeling, and packaging requirements. An outlet is defined as any location operated by the producer selling certified product directly to the consumer. This definition is intended to clarify language included in FAC section 47002 for those producers who choose to sell commodities in outlets or locations other than CFMs, field retail stands, or near the point of production.

Existing subsection 1392.2(k) is renumbered to 1392.2(j) and is amended to reflect the statutory changes in the definition of an agricultural product for the purposes of direct marketing under FAC section 47000.5. This is necessary to give the regulated industry and enforcement officers a clear definition for “Agricultural Products.”

New subsection 1392.2(k) is added to clarify the definition of a nonagricultural product. FAC section 47000.5 defines nonagricultural products and this subsection is added to reflect those changes. This addition is necessary to give the regulated industry and enforcement officers a clear definition for “Nonagricultural Products.”

Subsection 1392.2(l) is amended to include mushrooms and herbs under the definition of a certified agricultural product. Historically, mushrooms and herbs have been considered certified agricultural products and were identified as vegetables under this subsection. By listing these commodities separately, this amendment makes it abundantly clear that mushrooms and herbs are certified agricultural products.

Subsection 1392.2(m) is amended to align the definition of noncertifiable products with current statute under FAC section 47000.5. This is necessary to give the regulated industry and enforcement officers a clear definition for “Noncertifiable Agricultural

Products.”

Subsection 1392.2(r) is amended to reflect the statutory changes to the definition of “agricultural production and practice of the agricultural arts” as defined in FAC section 47000.5. Additionally, this section is amended to provide specificity for the practice of agricultural arts for nursery stock. The Department has experienced ongoing questions regarding what constitutes the practice of the agricultural arts for nursery stock, i.e., does the certified producer have to own the nursery stock for a specified amount of time, does the certified producer have to take any measures to raise the nursery stock, etc. This proposed regulation is intended to provide clarity for the regulated industry and enforcement officers in regard to what constitutes the practice of the agricultural arts for nursery stock, e.g., planting or transplanting of seeds into containers in a planting medium, etc., and is intended to establish equity in the marketplace.

Existing subsections 1392.2(v), 1392.2(w), 1392.2(x), and 1392.2(y) are renumbered to 1392.2(u)(1), 1392.2(u)(2), and 1392.2(u)(3), and 1392.2(u)(4), but are otherwise unchanged with the exception of newly renumbered subsection 1392.2(u)(2).

Newly renumbered subsection 1392.2(u)(2), which was previously subsection 1392.2(w), is amended to provide clarity to the definition of spices. The phrase “granulated or powdered” is moved to ensure that processed products are not confused or inappropriately termed as a spice. This is intended to assist the regulated industry and enforcement officers by providing a more easily understandable definition of spices.

Subsection 1392.2(z) is deleted as a result of including the definition of “Near the Point of Production” under subsection 1392.2(i). This will allow for a more consistent definition of the term “Direct Marketing,” which is consolidated in one subsection of code.

1392.4. Conditions of Direct Marketing.

Subsection 1392.4(a) is amended to add the phrase “outlet or location” to correlate with FAC section 47002, which added the phrase “outlet or location” to places where direct marketing may take place. The word “consumers” is again replaced with “the public.” Previously, statutes governed the sale of agricultural products directly to consumers. This change is necessary to align with current statutes under FAC sections 47001 and 47002. In addition, language related to immediate family or employee is replaced with authorized representative in order to align with statutory changes included in FAC section 47004.

Language has been added to clarify that no certifiable agricultural product may be sold at a CFM, outlet, or location, unless such products are produced by the certified producer. This language prevents individuals from obtaining agricultural products that they did not produce and fraudulently reselling the products as their own. In addition, language has been added to prohibit noncertifiable agricultural products from being sold at CFMs unless all the products are produced by the agricultural producer. This is intended to establish a fair and equitable marketplace by clarifying FAC section 47004,

which authorizes only the producer or the lawful representative of the producer to sell agricultural products at a CFM.

Existing subsection 1392.4(b) is deleted because the Department has determined that this subsection is duplicative and simply lists various California Health and Safety Code provisions without providing any clarity or specificity in regard to their application. Any sale of agricultural products would still be governed by the requirements of these respective Health and Safety Code statutes, regardless of whether they are referenced in this subsection.

New subsection 1392.4(b) is added to prevent authorized representatives from acting on the behalf of more than one certified producer on any single day unless they are cross-referenced on a producer's certificate in accordance with subsection 1392.4(f). This is intended to promote the consumption of agricultural products purchased directly from producers at CFMs. It is anticipated that this proposed change will limit buying and selling activities at CFMs and create a more equitable marketplace.

Subsection 1392.4(d) is amended to replace the term "embossed" with "county-issued" due to all counties not having a consistent approach for issuing valid producer certificates. This amendment will provide counties with an opportunity to include additional security features in their respective certified producer's certificates.

Subsection 1392.4(f) is amended to replace the terms immediate "family member" or "employee" with the term "authorized representative" in order to align with statutory changes included in FAC section 47004. Previously, if a market operator chose to allow a certified producer or his or her immediate family member to sell at a CFM for one or two other certified producers (the common term in the industry is "second certificates"), the Department required market operators to adopt the rules and regulations specified in subsection 1392.4(f)(1) through 1392.4(f)(10) in their respective market rules. Rather than requiring the provisions governing second certificates to be duplicated in both CFM rules and regulations and the CCR, the Department has determined that it would be less burdensome to the regulated industry to have the rules identified in subsection 1392.4(f) without a mandate that market operators also adopt rules.

Additionally, within subsection 1392.4(f), the following subsections are amended. Under subsection 1392.4(f)(1), language is included to require an authorized representative to not represent, nor be represented by more than two other certified producers in a 12-month period. This is intended to maintain the integrity and intent of the program, which is to promote the consumption of agricultural products purchased directly from producers at CFMs. Allowing an authorized representative to represent more than two certified producers in a 12-month period would circumvent the longstanding intent of CFMs and potentially turn CFMs into wholesale markets. Subsection 1392.4(f)(2), is amended to incorporate signage requirements as specified in FAC subsection 47004(c). Subsection 1392.4(f)(7) is amended to specify that buying and reselling of any agricultural product between certified producers is prohibited. This will give a clear definition for industry that can be consistently enforced by market regulators.

Subsection 1392.4(f)(9) is amended to align recordkeeping requirements for certified producers who sell products on behalf of another certified producer or whose products are sold by another certified producer at a CFM. Specifically, for the date of transfer to the seller and date of sale of the products, each separate product and amount is required to be recorded as listed on the county issued certified producer's certificate rather than according to variety as currently written. In addition, requiring the producer to maintain records of the names of both certified producers involved as listed on the county issued certified producer's certificate rather than the names of both certified producers involved is intended to ensure consistency in recordkeeping. These amendments are intended to provide consistency for market regulators in order to enable the review of records between producers and their cross referenced producers. These requirements may potentially limit fraud and deception in the marketplace, thus enhancing consumer confidence. These amendments are not anticipated to have an impact on the direct marketing industry since second certificate holders are currently required to have a copy of the certificate(s) from the person(s) that they are selling on behalf.

Subsection 1392.4(g) is deleted. The requirements and terms for certified producer certificates are detailed in section 1392.5, making this subsection unnecessary.

Existing subsections 1392.4(h), 1392.4(i), 1392.4(j), 1392.4(k), and 1392.4(l) are renumbered to 1392.4(g), 1392.4(h), 1392.4(i), 1392.4(j), and 1392.4(k), but are otherwise unchanged, with the exception of newly renumbered subsections 1392.4(j) and 1392.4(k). Newly renumbered subsection 1392.4(k) only changed the reference within that subsection from (k) to (j) due to the renumbering of that subsection.

Newly renumbered subsection 1392.4(j) is amended to align with FAC subsection 47002(e). FAC subsection 47002(e) mandates that a farmer who is implementing any exemption to size, standard pack, container, or labeling requirements and sells or transfers the agricultural products under such an exemption to any individual, organization, or entity that intends to sell or distribute the product to end users, to provide a memorandum that lists the identity and address of the producer and the identity and quantity of the produce purchased. FAC subsection 47002(e) specifies that a bill of sale or a container label including this information shall meet the requirements. Consequently, subsection 1392.4(j) is amended to give the option for a bill of sale or container to meet the requirements. In addition to minor renumbering for consistency purposes, e.g., replacing Roman numerals with numbers, the transaction date is added as a component of the memorandum, bill of sale, or container label. Including the transaction date will allow enforcement officers to verify the transfer of agricultural products that are exempt from size, standard pack, container, or labeling requirements. It is anticipated that this requirement will enhance equity in the marketplace and benefit the consumer by limiting the sale of fraudulently labeled agricultural products in the direct marketing industry.

New subsection 1392.4(l) is added to clarify and make specific the signage

requirements within the boundaries of a CFM. This is intended to align the direct marketing regulations with the requirements under FAC subsection 47004(c). Specifically, new subsection 1392.4(l) requires every person selling agricultural products within a CFM to post conspicuous, legible signage clearly visible to all consumers specifying the name and production counties of the producer and a statement of “We Grow What We Sell” or a similar statement. This language will potentially enhance consumer confidence in the direct marketing industry by deterring vendors from making false and misleading claims within the confines of a CFM.

Subsection 1392.4(m) is amended to align with labeling requirements mandated under FAC subsection 47004(c)(2). Specifically, under this subsection, a seller of processed agricultural products is required to document, “in a clear manner via label or signage,” compliance with specified production requirements. This language is intended to enhance consumer confidence in the direct marketing industry by deterring vendors from making false and misleading claims within the confines of the CFM. In addition, a reference to subsection 1392.4(k) is changed to 1392.4(j), due to a renumbering of section 1392.4.

New subsection 1392.4(n) is adopted to compliment market operator requirements detailed in subsection 1392.9(b). New subsection 1392.4(n) will require each person participating in the sale of agricultural products in the area designated as a CFM to provide the market operator with an itemized list of all products sold at the CFM each market day. The itemized list is required to contain specified information, such as the commodity, variety, and the quantity of each product sold at the market and must include the commodities which are used in processed agricultural products the producer sells at the markets. In addition, new subsection 1392.4(n) requires this information to be listed as it appears on the certified producer’s certificate, in the same units of measure or count that appear on the certified producer’s certificate.

Requiring this information as a condition of direct marketing is intended to assist market operators in their requirements that they collect this information from the producer. It is also anticipated that the collection of this information may limit incidents of fraud and deception at CFMs, since individuals participating at the market are required to submit specified sales information (load lists) to market operators. Load lists are a critical enforcement tool utilized to ensure that selling activities at CFMs are conducted without fraud, deception, or misrepresentation. Load lists provide enforcement staff with a mechanism to verify the commodities and volume of product sold by a certified producer. This information is often critical when building a case against a producer that is fraudulently buying and reselling agricultural products at a CFM. Without the load lists, the Department and county agricultural commissioners would not be able to meet their statutory mandates of ensuring that direct marketing is a viable marketing system. Accordingly, this new subsection is anticipated to create equity in the marketplace and promote consumer confidence in the industry.

1392.4.1. Administrative Civil Penalties for Direct Marketing.

Section 1392.4.1 is amended to emphasize that when taking an enforcement action pursuant to statutes governing direct marketing enforcement, the Department and county agricultural commissioners are required to use the provisions of this section to determine any length of the suspension. Section 1392.10 grants county agricultural commissioners the authority to suspend, for a period of up to 18 months, the privilege of participation under the provisions of this article. However, this amendment makes it abundantly clear that when taking any enforcement action pursuant to FAC section 47025, the Department and county agricultural commissioners shall use the provisions of this section to determine the violation class and the amount of the penalty and/or length of the suspension. This amendment may potentially enhance equity in the marketplace by ensuring that enforcement provisions are consistently applied throughout the state. In addition, this amendment may benefit consumers since uniform enforcement will ensure that direct marketing selling activities are conducted without fraud and deception.

Subsection 1392.4.1(a) is amended to provide additional clarity to the definitions of the “serious” and “moderate” violation classes. For “serious” violations, the language is amended to reflect that the respondent has a history of violations or convictions or that the respondent failed to cooperate in the investigation of the incident or allow a lawful inspection. For “moderate” violations, the language is amended to provide that the respondent has a history of violations which resulted in conviction of an infraction or misdemeanor charge or an administrative civil penalty. These amendments are intended to provide additional guidance to enforcement officers in order to ensure the consistent application of administrative civil penalties. By amending this section as described, the Department is intending to promote equity and limit incidents of fraud in the marketplace.

Existing subsection 1392.4.1(b) is deleted to align with recent statutory changes under FAC subsection 47004(g). Previously, market operators with more than one participating certified producer were required to adopt written rules and procedures governing the operation of the market. Recent statutory amendments under FAC subsection 47004(g) are permissive, allowing market operators to adopt rules if desired. Consequently, due to the changes in statute, it is no longer a requirement for market operators to adopt rules. Therefore, any penalties associated with not having rules are deleted, making existing subsection 1392.4.1(b) unnecessary.

Existing subsection 1392.4.1(c) is renumbered to subsection 1392.4.1(b). Table A (penalty matrix) is amended to adopt violations for those sections which require additional enforcement, and repeal violations for those sections which are no longer applicable to the penalty matrix. These changes provide the county agricultural commissioner with guidance when conducting enforcement activities and are applicable to their level of seriousness with regard to the fine amount. By encouraging uniformity in the assessment of civil penalties, the Department is intending to promote equity and limit incidents of fraud and deception in the marketplace. Any fines collected from

conducting enforcement following the penalty matrix are applied to the cost of conducting investigations and hearings for the penalties and notices of proposed action issued. No revenue is generated from this enforcement.

Table A was completely renumbered due to the addition and deletion of Certified Producer and Market Operator violations. Under the serious violation column within Table A, the term “and/or suspension” was added to clarify that a fine and/or suspension may be imposed for serious violations. Section 1392.10 grants county agricultural commissioners the authority to suspend, for a period of up to 18 months, the privilege of participation under the provisions of this article. This amendment makes it clear that serious violations warrant a fine and/or suspension of 0 to 18 months. This amendment is intended to enhance equity in the marketplace by ensuring that enforcement provisions are consistently applied throughout the state. In addition, this amendment may benefit consumers since uniform enforcement will ensure that direct marketing selling activities are conducted without fraud and deception. The changes to Table A are discussed below in order of the newly renumbered sections.

Section 1. Certified Producer Violations.

1. FAC 47002 is amended to clarify that NC means noncompliance, but otherwise remains unchanged.

3. FAC 47004(b) is added to specify that the penalty for the resale of agricultural products in a CFM is a serious violation. The Department has determined that the buying and resale of agricultural products is a significant false, misleading, and deceptive business practice that threatens the integrity of the direct marketing industry. In order to deter this practice, the Department is proposing that the resale of agricultural products in a CFM is a serious violation.

5. FAC 47022.1 is amended to increase the penalty for deceptive pack from a minor violation after two noncompliances in 12 months to a moderate violation. The Department is attempting to deter deception in the marketplace by increasing this penalty. Increasing this penalty is anticipated to promote fairness in the marketplace for producers and will benefit the consumer by ensuring that the products they purchase are not deceptively packed.

6. FAC 47022.2 is amended to increase the penalty for mislabeling and misleading statements from a minor violation after two noncompliances in 12 months to a moderate violation. By increasing this penalty, the Department is attempting to deter misleading and mislabeling practices in the marketplace. Increasing this penalty is anticipated to promote fairness in the marketplace for producers and will benefit the consumer by ensuring that they are not misled.

12. CCR 1392.1(d) is renumbered to 1392.1(b) due to renumbering of section 1392.1. In addition, a grammatical error is corrected, replacing the term “farmers” with “farmers” in order to ensure consistency throughout the penalty matrix.

13. CCR 1392.1(g) is renumbered to 1392.1(c) in order to reconcile a mistake in Table A, which incorrectly referenced subsection 1392.1(g). This penalty is reordered as a result. Consequently, the sale of products not under exemption that do not comply with all regulations regarding quality and labeling is punishable as a minor violation after a second noncompliance in 12 months. In addition, a grammatical error is corrected, replacing the term “month” with “months” in order to ensure consistency throughout the penalty matrix.

14. CCR 1392.1(e) is renumbered to 1392.1(d) due to renumbering of section 1392.1. In addition, a grammatical error is corrected, replacing the term “month” with “months” in order to ensure consistency throughout the penalty matrix.

15. CCR 1392.1(f) is renumbered to 1392.1(e) due to renumbering of section 1392.1. In addition, a grammatical error is corrected, replacing the term “month” with “months” in order to ensure consistency throughout the penalty matrix.

16. CCR 1392.2(k)(1) is added to specify that the selling of agricultural products combined with nonagricultural products or services that materially increases the price of the product within a CFM is a minor violation. In order to ensure that only agricultural products are sold within CFMs, the Department has determined that it is appropriate to issue a minor penalty for vendors that are selling a product that combines an agricultural product with a nonagricultural product or service that materially increases the price of the product within the CFM. Establishing this penalty is anticipated to promote fairness in the marketplace for producers.

17. CCR 1392.4(a) is renumbered to 1392.1(a)(2) due to renumbering of subsection 1392.1(a) and is amended to reflect the changes to the subsection.

18. CCR 1392.4(a) is renumbered to 1392.1(a)(2) due to renumbering of subsection 1392.1(a). In addition, a grammatical error is corrected, replacing the term “month” with “months” in order to ensure consistency throughout the penalty matrix.

19. CCR 1392.4(a)(3) is added to provide that the selling of noncertifiable products not produced by the agricultural producer within a CFM constitutes a serious violation. The Department has determined that this practice is a significant false, misleading, and deceptive business practice that threatens the integrity of the direct marketing industry. In order to deter this practice, the Department is proposing that the violation is punishable as a serious violation. In addition to deterring this practice, the Department anticipates that it may potentially enhance consumer confidence in the marketplace.

The violation previously referenced as 17. CCR 1392.4(b), described as “Selling products at a certified farmers market not in compliance with specified California Health and Safety Code Requirements” is deleted to align with the changes provided in this regulatory action.

20. CCR 1392.4(b) is added to specify that an authorized representative representing

more than one certified producer at a single CFM on a single day is a moderate violation. In order to limit buying and reselling activities at CFMs and create a more equitable marketplace, the Department has determined that a violation of subsection 1392.4(b) is a moderate violation which undermines enforcement and may lead to the potential for an intermediate level of consumer or competitive harm.

21. CCR 1392.4(c) is amended to correct a grammatical error, replacing the term “farmers” with “farmers” in order to ensure consistency throughout the penalty matrix.

22. CCR 1392.4(d) is amended to reflect the changes to subsection 1392.4(d).

23. CCR 1392.4(d) is amended to reflect the changes to subsection 1392.4(d). In addition, a grammatical error is corrected, replacing the term “month” with “months” in order to ensure consistency throughout the penalty matrix.

25. CCR 1392.4(f)(1) is amended to reflect the changes to subsection 1392.4(f)(1).

26. CCR 1392.4(f)(2) is amended to reflect the changes to subsection 1392.4(f)(2). In addition, under the violation category, the penalty is increased from a minor after two noncompliances in 12 months to a minor after one occurrence. The Department has determined that increasing this penalty will benefit the consumer by providing a clear differentiation of products sold by certified producers at CFMs, allowing for an informed choice in regard to the producer of the product.

The violation previously referenced as 24. CCR 1392.4(f)(2) described as “Failure to post Certified Producer Certificate of producer for whom another Certified Producer is selling” is deleted. This violation is consolidated with new section 26. CCR 1392.4(f)(2) referenced above.

29. CCR 1392.4(f)(5) is amended to increase the penalty for a certified producer offering for sale product for another certified producer in greater volume than the certified producer is offering for sale. The penalty is increased from a minor violation after two noncompliances in 12 months to a minor violation after one occurrence. The Department has determined that increasing this penalty will benefit the consumer and the regulated industry by encouraging the sale of agricultural products directly from the producer.

30. CCR 1392.4(f)(7) is amended to reflect the changes in subsection 1392.4(f)(7).

33. CCR 1392.4(h) is renumbered to 1392.4(g) due to renumbering of section 1392.4.

34. CCR 1392.4(i) is renumbered to 1392.4(h) due to renumbering of section 1392.4.

35. CCR 1392.4(j) is renumbered to 1392.4(i) due to renumbering of section 1392.4.

36. CCR 1392.4(k) is renumbered to 1392.4(j) due to renumbering of section 1392.4.

37. CCR 1392.4(l)(1) is added to provide that a failure to clearly and visibly post signage stating the name and county of production is a minor violation. In order to ensure that every person selling agricultural products within a CFM is following their statutory and regulatory obligations related to signage, the Department is proposing a minor violation. The Department has determined that a failure to clearly and visibly post the required signage would have minimal adverse effect on consumers or equitable competition in the marketplace, thus warranting placement in the minor violation category.

38. CCR 1392.4(l)(2) is added to provide that a failure to clearly and visibly post a banner stating "We Grow What We Sell" or similar statement is a minor violation. In order to ensure that every person selling agricultural products within a CFM is following their statutory and regulatory obligations related to signage, the Department is proposing a minor violation. Again, the Department has determined that a failure to clearly and visibly post the required signage would have minimal adverse effect on consumers or equitable competition in the marketplace, thus warranting placement in the minor violation category.

39. CCR 1392.4(m) is amended to reduce the penalty for certified producers who do not have documents in their possession at the point of sale demonstrating compliance with the production requirements referenced in subsection 1392.4(k), e.g., health department certificate for processing facility, written agreement or bill for rent from a certified kitchen, etc. After reviewing the penalty matrix, the Department has determined that a failure to produce the documents upon the request of an enforcement officer should be included in the minor violation category as such a violation has a minimal adverse effect on consumers or equitable competition in the marketplace.

40. CCR 1392.4(n) is added to specify that a failure to provide load lists required on any single market day, and/or failure to ensure that each load list contains all required information is a moderate violation. Load lists are an integral enforcement tool for market enforcement officers and provide a mechanism to verify what the producer sold at a CFM on any particular day. These lists are used to verify that the producer is growing what he or she is selling. The failure to provide load lists would significantly undermine enforcement and has the potential to cause an intermediate level of consumer and competitive harm, thus warranting placement in the moderate category.

41. CCR 1392.5(c) is amended to clarify that refusing to provide documentation "upon request" constitutes a serious violation.

42. CCR 1392.9.1(d) is added to specify that a failure to report to a county agricultural commissioner any change in partnership agreement and/or surrender invalid certificates to the county agricultural commissioner constitutes a moderate violation. Establishing this violation is intended to limit invalid certified producer certificates from remaining in circulation, which potentially can be used to commit fraud and misrepresentation in the marketplace. This section corresponds with 43. CCR 1392.9.2(d) in Table A. The failure to report any change in partnership agreement and/or surrender invalid certificates to the county agricultural commissioner would significantly undermine enforcement and

has the potential for an intermediate level of consumer and competitive harm, thus warranting placement in the moderate category.

Section II. Market Operator Violations

The violations previously referenced as 1. CCR 1392.6(d); 2. CCR 1392.6(d), (e), (f); and 3. CCR 1392.6(g) are deleted since this proposed regulatory action is repealing requirements that market operators develop and submit rules to county agricultural commissioners. Previously, market operators with more than one participating certified producer were required to adopt written rules and procedures governing the operation of the market. Recent statutory amendments under FAC subsection 47004(g) are permissive, allowing market operators to adopt rules if desired. Consequently, due to the changes in statute, it is no longer a requirement for market operators to adopt rules. Therefore, any penalties associated with not having rules are deleted.

1. CCR 1392.9(b)(4) is added to specify that a market operator's failure to submit a certified producer's itemized list of products for inspection upon the request of an enforcement officer within 48 hours constitutes a moderate violation. The itemized products list is an integral enforcement tool and provides a mechanism to verify what the producer sold at a CFM. The failure to provide these lists for inspection would significantly undermine enforcement and has the potential to cause an intermediate level of consumer and competitive harm, thus warranting placement in the moderate category.

2. CCR 1392.8.1. is amended to remove a period, which should not have been included at the end of 1392.8.1. This is intended to ensure consistency throughout the matrix.

3. CCR 1392.9(a)(1) is amended to reflect the changes in subsection 1392.9(a)(1).

4. CCR 1392.9(a)(2) is amended to correct a grammatical error, replacing the term "farmers" with "farmers'" in order to ensure consistency throughout the penalty matrix.

8. CCR 1392.9(a)(5) is amended to reflect the changes in subsection 1392.9(a)(5).

10. CCR 1392.9(a)(8) is added to specify that a market operator's failure to ensure that certified producers post conspicuous signage with their products at a CFM is a minor violation. In order to ensure that every person selling agricultural products within a CFM is following their statutory and regulatory obligations related to signage, the Department is proposing that a market manager's failure to ensure proper posting of signage is a minor violation after a second noncompliance in 12 months. The Department has determined that a failure to clearly and visibly post the required signage would have a minimal adverse effect on consumers or equitable competition in the marketplace, thus warranting placement in the minor violation category.

11. CCR 1392.9(b) is amended to provide that a failure to collect all of the load lists required on any single market day, and/or a failure to ensure that each load list contains

all required information, and/or a failure to keep load lists constitutes a moderate violation. The Department is proposing to increase the penalty for this violation due to the integral role load lists play in market enforcement. Prior to this regulatory action, market operators were required to provide load lists; however, there was no specific requirement for producers to provide load lists. Since this proposed regulatory action mandates that certified producers provide load lists to market operators and there is a corresponding moderate penalty for a producer failing to do so, the Department has determined that a failure of a market manager to follow his or her duties related to load lists constitutes a moderate violation. A failure to collect load lists would significantly undermine enforcement and has the potential to cause an intermediate level of consumer and competitive harm, thus warranting placement in the moderate category.

The violation previously referenced as 15. CCR 1392.9(e), "Deny right to appeal" is deleted as subsection 1392.9(e), which required an operator of a CFM to provide market participants with the right to appeal the imposition of a fine or suspension or expulsion from the market is deleted.

14. FAC 47004(e) is added to provide that allowing the sale of fresh whole fruits, nuts, or vegetables in the area adjacent to and under the control of the CFM operator is a moderate violation. Given that this type of activity is expressly prohibited under FAC subsection 47004(e) and vendors selling whole fruits, nuts, or vegetables in the area adjacent to and under control of the CFM operator may have an unfair market advantage, e.g., receiving the benefits of the CFM while not being required to follow some of the regulations specifically related to vendors within the boundaries of a CFM. Allowing this type of sales activity in the area adjacent to and under the control of the CFM operator has the potential to cause an intermediate level of consumer and competitive harm, thus warranting placement in the moderate category.

16. FAC 47022.3 is amended to provide a more accurate description of the violation. This is intended to benefit both industry and enforcement officers by providing additional clarity.

1392.5. Producer Certification Procedures.

Subsection 1392.5(a) is amended to clarify that a producer becomes registered with the Department upon approval of a certified producer's certificate issued by the county agricultural commissioner of the county where the producer's farm is located. This is intended to clarify recent changes to FAC subsection 47020(c), which mandates that a producer shall register with the Department before selling at a CFM. In addition, the phrase "outlet or location" is added to correlate with FAC section 47002, which added the phrase "outlet or location" to places where direct marketing may take place.

Subsection 1392.5(b) is amended to clarify that a certified producer certificate and application shall include an agreement signed by the applicant that the applicant and all authorized representatives shall comply with the terms of the Direct Marketing Article. Terminology related to authorized representative is added to align with FAC subsection 47004(b), which provides that only a certified producer or the lawful authorized

representative of the certified producer may sell agricultural products within the area defined as the CFM. A reference to the director is replaced with the Secretary due to the change in the title of the Department's civil executive officer.

This subsection is amended to provide that the certificate and application shall include specified information, e.g., applicant and authorized representative contact information; production sites and storage locations; all commodities, acreage, and production information, and; a list of authorized counties where the commodities may be sold.

The Department has determined that the amendments to subsection 1392.5(b) are necessary in order to effectively provide enforcement in the marketplace. The certified producer's certificate is a vital mechanism used to verify production of agricultural products. Consequently, the information provided on the certificate and application will assist with enforcement, thereby benefitting both the consumer and the industry by limiting incidents of fraud in the marketplace.

Subsection 1392.5(c) is amended to mandate that a producer shall provide a list of all authorized representatives to any enforcement officer or market manager upon request. This requirement is intended to assist enforcement officers and market managers in determining who is authorized to sell on behalf of a producer. The Department anticipates that this will limit incidents of fraud and deception in the marketplace by giving enforcement officers and market managers an additional tool to show that the conditions of direct marketing regulations are being met.

Subsection 1392.5(d) is amended to clarify that the county agricultural commissioner is required to review a certified producer's application and determine that the applicant meets the requirements of a certified producer. This is intended to clarify FAC subsection 47020(c), by specifying the process for issuing certified producer certificates. The Department anticipates that these proposed changes will benefit the regulated industry by ensuring a consistent approach to the issuance of certificates.

New subsection 1392.5(e) is added to mandate that a county agricultural commissioner shall perform at least one on-site inspection of each property listed on each new producer's initial application prior to issuing a certificate. This subsection is added to align with FAC subsection 47020(c)(3), which requires county agricultural commissioners to perform at least one onsite inspection for all new certified producer applicants. This requirement is intended to verify the production and storage capabilities of each applicant and is anticipated to benefit both the industry and consumers by reducing fraud and deception in the marketplace.

Existing subsection 1392.5(e) is renumbered to subsection 1392.5(f) and is amended to clarify the procedures for issuing certified producer's certificates. Specifically, the term "embossed photocopy of the original" is replaced with "official" due to all counties not having a consistent approach for issuing valid certified producer certifications. In addition, these amendments clarify procedures governing the issuance of official copies of certified producer certificates. The Department anticipates that these

proposed changes will benefit the regulated industry by ensuring a consistent approach to the issuance of certificates.

Subsection 1392.5(g) is added to incorporate language under subsection 1392.7(c), which specifies that a certified producer's certificate shall be valid for not more than 12 months from the date of issuance. This language is unchanged and is being consolidated under section 1392.5 in order to provide the regulated industry and enforcement officers with one point of reference for regulations governing producer certification procedures, rather than spreading the requirements throughout the Direct Marketing Article.

Existing subsection 1392.5(f) is renumbered to subsection 1392.5(h), but is otherwise unchanged.

1392.6. Certification Requirements of a Certified Farmers' Market.

Subsection 1392.6(a) is amended to clarify that a CFM becomes registered with the Department upon approval of a CFM certificate issued by the county agricultural commissioner of the county where the CFM is located. This is intended to clarify recent changes to FAC subsection 47020(a), which mandates that a CFM shall annually register with the Department.

Subsection 1392.6(b) is amended to interpret and make specific the requirements of a CFM application under FAC subsection 47020(a). This proposed amendment specifies that on a form authorized by the Secretary, the CFM operator application is required to contain the following: name of the operator and specified contact information; the market name and specified contact information; the market location, days and hours of operation, and estimated number of vendors per day; applicant's name, signature, and specified information, map that clearly locates and identifies the boundaries of the certified, noncertified, and/or nonagricultural product areas of the market as well as documentation of qualification to operate a CFM. The CFM certificate is an important tool for enforcement officers to locate and inspect CFMs. The Department has determined that the amendments to subsection 1392.6(b) are necessary in order to effectively provide enforcement in the marketplace and may potentially limit incidents of fraud and deception, benefiting both the industry and the consumer.

Subsections 1392.6(d), 1392.6(e), 1392.6(f), 1392.6(g) are deleted since current statutes do not require market managers to adopt written rules and procedures. Previously, market operators with more than one participating certified producer were required to adopt written rules and procedures governing the operation of the market. Recent statutory amendments under FAC subsection 47004(g) are permissive, allowing market operators to adopt rules if desired. Consequently, due to the changes in statute, it is no longer a requirement for market operators to adopt rules. Therefore, any language mandating market operators to promulgate rules is deleted, making existing subsections 1392.6(d), 1392.6(e), 1392.6(f), and 1392.6(g) inapplicable.

New subsection 1392.6(d) is added to provide that the Secretary or a county

agricultural commissioner may deny a certificate to any market operator who is determined to be delinquent in the payment of fees or penalties required under FAC Chapter 10.5 of Division 17 or this article. This section is added to align with FAC subsection 47020(d) and provide a mechanism for enforcement officers to deny certificates for individuals who have failed to pay any fees or penalties assessed. This new subsection is intended to promote equity in the marketplace by ensuring that all market operators are paying applicable fees.

New subsection 1392.6(e) is added to mandate that the issuing county agricultural commissioner is required to notify the Secretary upon approval of a CFM certificate, thereby completing registration of the CFM. In addition, this subsection provides that any revocation or suspension of a CFM certificate by the Secretary or a county agricultural commissioner pursuant to FAC section 47025 shall cause concurrent revocation or suspension of the CFM registration with the Secretary. This addition is intended to provide a mechanism for registration of a CFM after a county agricultural commissioner issues a CFM certificate. In addition, this subsection provides for the concurrent revocation of a CFM certificate and registration. This is intended to benefit the direct marketing industry and the consumer by ensuring that CFMs with revoked or suspended certificates are prohibited from remaining registered with the Department.

New subsection 1392.6(f) is added to provide that a CFM certificate shall be valid for 12 months from the date of issue only during specified months of operation, day of the week, and hours of operation listed on the certificate. The timeframe for a valid certificate was previously included in section 1392.7 and is being consolidated under this subsection in order to provide the regulated industry and enforcement officers with one point of reference governing CFM certificates, rather than spreading the requirements throughout this article. The language is expanded to provide that a CFM certificate is only valid during specified months of operation, day of the week, and hours of operation listed on the certificate. As mentioned previously, existing regulation under section 1392.8.1 mandates that CFM operators shall provide specified information to the Department, including market days and hours of operation. However, some CFM operators have recurring issues of being open during business hours and days not listed on their market certificate. This creates inequity amongst CFM operators and this regulatory change will provide clarity and specificity to the certification requirements for a CFM certificate and ensure that CFM operators adhere to their posted months, hours, and days of operation. Consequently, it is anticipated that this regulatory change will enhance equity in the marketplace.

1392.7. Certificates Issued.

Section 1392.7 is deleted as the procedures governing the issuance of certified producer and CFM certificates have been consolidated in sections 1392.5 and 1392.6, respectively. This change is intended to assist the regulated industry and county agricultural commissioners by providing points of reference for certified producer certificates (section 1392.5) and one section for CFM certificates (section 1392.6), rather than cross referencing several sections.

1392.8. Fees.

Section 1392.8 is amended to add language specifying that the county agricultural commissioner may charge a fee for inspection, as authorized by the board of supervisors of that county. This language is added to align with FAC subsection 47020(b), which provides that at the time of application or renewal, the county agricultural commissioner shall provide a schedule of fees that reflects an estimate of expenses for inspections and may charge a certification and inspection fee equal to the actual expenses incurred. In addition, the term “embossed” is replaced with the term “official” due to all counties not having a consistent approach for issuing valid producer certificates. This amendment is intended to provide consistency throughout the Direct Marketing Article and is anticipated to provide counties with an opportunity to include additional security features in their respective certified producer certificates.

1392.8.1. Certified Farmers’ Market Fees.

Section 1392.8.1 is amended to provide consistency in the numbering of subsections throughout the Direct Marketing Article. Accordingly, primary subsections are renumbered from 1, 2, and 3 to a, b, and c. Secondary subsections are renumbered from a, b, and c to 1, 2, and 3, and so on. The amendments to section 1392.8.1 are discussed below in the order of the newly renumbered subsections.

Subsection 1392.8.1(a)(1) is amended to replace the term market “sponsor” with market “operator.” This change is intended to provide consistency throughout the Direct Marketing Article. In addition, a contact e-mail address through which a market representative can be reached is added to the requirements a market operator is required to remit to the Department. Finally, under subsection viii, language is amended to include the number of vendors in the non-agricultural section for each market day in order to align with subsection 1392.8.1(a) and FAC subsection 47021(a). Under the previously referenced codes, every operator of every CFM is required to remit to the Department two dollars (\$2) for each vendor participating and selling goods under the authority and management of the CFM. However, without clearly specifying the number of participating producers and the number of vendors in the nonagricultural section for each market day, the Department has no way of determining any applicable fees. Accordingly, this change will align with current changes in statute and provide a mechanism for calculating the fee. These changes are anticipated to create equity in the marketplace by providing the Department with a mechanism to determine whether all market operators are paying applicable fees.

1392.9. Direct Marketing, Compliance Requirements for the Operator of a Certified Farmers’ Market.

Subsection 1392.9(a) is amended to replace the terms “members of the producer’s immediate family” and “employee” with “authorized representative,” in order to align with changes throughout this article. This amendment is intended to provide flexibility for certified producers to use family members, volunteers, or other authorized individuals to

sell their agricultural products within the area defined as a CFM on their behalf. In addition, under subsection 1392.9(a)(5), language is updated to provide a more applicable reference specifying that market operators are required to ensure that each person selling products in the CFM is required to sell all noncertifiable agricultural products in compliance with applicable rules governing the sale of noncertifiable agricultural products. Under subsection 1392.9(a)(7), references to 1392.4(k) and (l) are replaced with subsections 1392.4(j) and (k), due to the renumbering of those respective subsections. In addition, subsection 1392.9(a)(8) is added to require market operators to ensure that each person participating in the sale of agricultural products in the area designated as a CFM is in compliance with applicable signage requirements under subsections 1392.4(l) and (m). This is intended to align the direct marketing regulations with the requirements under FAC subsection 47004(c). This language will potentially enhance consumer confidence in the direct marketing industry by deterring vendors from making false and misleading claims within the confines of a CFM.

Subsection 1392.9(b) is amended to require additional recordkeeping requirements for CFM operators. Specifically, subsection 1392.9(b)(1) is amended to provide that the product list shall state the name of the certified producer and the identity and quantity of each product sold at the market as it appears on the certified producer's certificate. Under subsection 1392.9(b)(2), the product list is also required to include all noncertifiable agricultural products and the quantity of their products as they are commonly sold. In addition, subsection 1392.9(b)(4) is added to require, upon the request of an enforcing officer, that the market operator submit the itemized list of products sold for inspection within 48 hours.

Load lists are a critical enforcement tool utilized to ensure that selling activities at CFMs are conducted without fraud, deception, or misrepresentation. Specifically, load lists assist enforcement officers in determining whether a certified producer is buying and reselling agricultural products or supplementing agricultural products with products not of their own production. Without load lists, the Department and county agricultural commissioners would not be able to ensure that direct marketing is a viable marketing system. Accordingly, these amendments are anticipated to create equity in the marketplace and promote consumer confidence in the industry.

Subsection 1392.9(e) is repealed, as recent changes under FAC subsection 47004(h) establish that operators of CFMs are considered private entities and may take actions, adopt rules, and impose requirements they deem necessary for the proper and honest operation of their market. Consequently, the Department has determined that it will not be involved in any private disputes between a market operator and market participant, and this section is thereby repealed.

1392.9.1. Direct Marketing. Requirements for Partnerships, Sharecropping Agreements, and Similar Contractual Agreements.

1392.9.2 Direct Marketing. Requirements for Farm Leases.

Subsections 1392.9.1(d) and 1392.9.2(d) are amended to replace the term

“embossed” with the term “official” due to all counties not having a consistent approach for issuing valid producer certificates. This amendment is intended to provide consistency throughout the Direct Marketing Article and is anticipated to provide counties with an opportunity to include additional security features in their respective certified producer certificates.

1392.10. Penalties.

Subsection 1392.10(a) is amended to clarify the notice and hearing process county agricultural commissioners may initiate to determine whether a violation of Direct Marketing Article provisions has occurred. Specifically, the hearing process is amended to provide that the county agricultural commissioner may review the actions of the certificate holder or his or her authorized representative. Since the definition of an authorized representative makes language regarding family member and employee unnecessary, these definitions are deleted. In addition, since an authorized representative is the only individual allowed to sell on behalf of a certified producer, subsection (3) related to any other person is deleted. These changes are intended to align with notice and hearing processes established under FAC section 47025.

Subsection 1392.10(b) is amended to remove language specifying that the notice of hearing shall “be on a form approved by the director.” Alternatively, the Department has determined that the notice of hearing must contain the information specified under subsections 1392.10(b)(1) through 1392.10(b)(3). This is intended to provide county agricultural commissioners with the flexibility to issue a notice of hearing provided the three criteria under subsection 1392.10(b) are met.

1392.11. Appeals.

Section 1392.11 is amended to reflect that the civil executive officer of the Department is known as the “Secretary” not the “director.” In addition, the terms “state” and “county” are added to provide that any person may appeal for a hearing if aggrieved by one of the following state or county actions or decisions. Recent changes under FAC subsection 47004(h) establish that operators of CFMs are considered private entities and may take actions, adopt rules, and impose requirements they deem necessary for the proper and honest operation of their market. Consequently, the Department has determined that it will not be involved in any private disputes between a market operator and this section is amended to provide that any person may request a hearing if aggrieved by specified state or county actions or decisions.

Subsection 1392.11(d) is amended to remove language authorizing individuals to file appeals concerning the adoption of more stringent rules or regulations pertaining to the operation of CFMs. This language was deleted to align with recent statutory changes to FAC subsection 47004(g). Previously, market operators with more than one participating certified producer were required to adopt written rules and procedures governing the operation of the market. Recent statutory amendments under FAC subsection 47004(g) are permissive, allowing market operators to adopt rules if desired. Consequently, due to the changes in statute, it is no longer a requirement for market

operators to adopt rules, making this language unnecessary. Alternatively, language is included to allow an individual to file an appeal for any administrative penalty, including, but not limited to fines. This is intended to align with FAC section 47025 and provide due process to the any person aggrieved.

Subsection 1392.11(e) is deleted as a result of the repeal of subsections 1392.6(g) and 1392.9(e). Recent changes under FAC subsection 47004(h) establish that operators of CFMs are considered private entities and may take actions, adopt rules, and impose requirements they deem necessary for the proper and honest operation of their market. Consequently, the Department has determined that it will not be involved in any private disputes between a market operator and market participant, and this section is thereby repealed.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Purpose

The purpose of this proposed regulatory action is to interpret and make specific the recent statutory changes incorporated under AB 1871 (Dickinson) (Chapter 579, Statutes of 2014). This regulatory action is intended to promote consumer confidence in CFMs, thereby encouraging the continued growth of the direct marketing sector. Promulgating regulations which align, interpret, and make the recent statutory changes related to CFMs and direct marketing specific is determined to be the most effective mechanism to promote the direct marketing industry and ensure that selling activities at CFMs are free of fraud, deception, and mislabeling.

The Creation or Elimination of Jobs Within the State of California

The proposed regulations will neither create nor eliminate jobs within the State of California.

The Creation of New Businesses or the Elimination of Existing Businesses Within the State of California

The Department has determined that this regulatory action will not have a significant impact on the creation of new businesses or the elimination of existing businesses in the State of California.

The Expansion of Businesses Currently doing Business Within the State of California

The Department has determined that these regulatory proposals will not have an impact on the expansion of existing businesses in the State of California.

Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The proposed rulemaking will have no impact on the general public and protection of public health and safety.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has initially determined that these proposed changes to the regulations would not have a significant adverse economic impact directly affecting businesses including the ability of California business to compete with businesses in other states. This regulatory action is intended to interpret and make specific the recent statutory changes incorporated under AB 1871 (Dickinson) (Chapter 579, Statutes of 2014). It is intended to promote consumer confidence in CFMs, thereby encouraging the continued growth of the direct marketing sector. Unless concerns related to the integrity of CFMs are mitigated, a lack of consumer confidence could hamper this growing industry. Promulgating regulations which align, interpret, and make the recent statutory changes related to CFMs and direct marketing specific is determined to be the most effective mechanism to protect and promote the direct marketing industry and ensure that selling activities at CFMs are free of fraud, deception, and mislabeling.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Department must determine that no reasonable alternatives 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 this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, 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 has made an initial determination that no reasonable alternatives to this regulatory action have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination.