



December 3, 2007

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Fruit and Vegetable Programs
Agricultural Marketing Services
U.S. Department of Agriculture
1400 Independence Ave. SW
STOP 0237
Washington, DC 20250-0237

Dear Mr. Durando:

Thank you for the opportunity to provide comments on the Agricultural Marketing Service's Advance Notice of Proposed Rulemaking on a possible handler marketing agreement for leafy greens. [Docket # AMS-FV-0090; FV07-962-1 AN]

We are pleased to submit these comments on behalf of the United Fresh Produce Association, a leading business trade association of more than 1,200 member companies engaged in the growing, packing, processing and marketing of fresh produce. Our views here are based on legal, regulatory, scientific and business principles affecting our members in both the leafy greens sector and other fresh produce commodities. In keeping with the nature of the ANPR, we will attempt to provide AMS with an analysis of issues you should consider in determining whether to proceed with proposing a specific marketing program related to leafy greens, and what shape such an agreement might take.

We ask that AMS consider the following comments in your further deliberations:

Perhaps the most key question at hand is the degree of nationwide industry support for various types of marketing programs, and a thorough explanation of various options at AMS's disposal. We note that the ANPR is a bit unusual compared with traditional development of federal marketing orders or agreements, in which industry proposals are usually submitted requesting AMS to take such action. However, AMS is correct to note that there is substantial current interest and motivation to ensure that best practices are adhered to in any given production area of leafy greens. In addition, there are many organizations – including this one – that strongly support produce safety standards that are commodity specific, based on the best available science, applicable widely to different production areas, and are federally mandated with sufficient oversight of compliance to be credible to the public.

In that context, we suggest that AMS should evaluate all the tools it has that can help industry achieve the goals stated above, and how the different options may provide varying benefits to the industry. Specifically, we believe it is important for AMS to be very clear about what marketing programs under its authority can and cannot do, and then allow the industry to provide its collective judgment on what programs industry wants to initiate.

In considering what tools AMS has to offer, it is important that the Department makes very clear that AMS is not a food safety regulatory agency, has no authority to set standards for food safety, and cannot be considered an alternative to regulation by the legally empowered

public health regulatory agency the U.S. Food and Drug Administration (FDA). We are aware of substantial confusion among industry members on this issue, and it is incumbent upon USDA to help our industry understand the food safety regulatory authority of FDA. The agency should be clear in communicating to producers and handlers that participation in any AMS marketing programs that impose food safety practices either through voluntary agreement or mandatory order does not absolve those producers and handlers of legal liability under the Food, Drug and Cosmetic Act and the responsibility to comply with all pertinent FDA rules and regulations.

Nevertheless, various AMS tools in the marketing arena *can* be helpful to industries in addressing common challenges, including those in which an industry wants to build common best practices among all operators. These include both marketing *orders* and marketing *agreements*. Under either of these types of programs, AMS should make clear that the actual actions taken – such as requiring certain best practices, funding of market promotion, etc. – are determined *after* the order or agreement is in place by a legally authorized marketing board/committee appointed by USDA. So long as the Board operates within legally established parameters, it is free to choose what best practices to adopt. Therefore, producers voting for a marketing order or handlers choosing to enter into a marketing agreement are not agreeing to a specific set of standards, but to a *process* in which a Board of its peers determines in the future what standards and practices will be enforced across the industry.

In addition to marketing orders and agreements, AMS also has useful tools to allow individual operators to get training, auditing and process verification needed to demonstrate best practices against some credible standard. AMS currently offers these types of programs for grower compliance with Good Agricultural Practices (GAPs) and for process verification in fresh cut processing under the Qualified Through Verification program.

We want to discuss here the potential applicability of these program types to the current challenges facing the leafy greens sector.

Mandatory Marketing Order Approved by a Producer Referendum

This is most typical form of a federal marketing program administered by AMS under the Agricultural Marketing Agreement Act of 1937. Marketing orders are designed to help an industry sector set common standards (most often for quality but potentially for food safety), provide for research, and support common market development and promotional activities. Marketing orders are the strongest tool an industry can choose for AMS to administer, as once approved by a grower/producer referendum, compliance with the order becomes a legal mandate subject to civil penalties.

Ideally, a marketing order for any commodity provides greater assurance that the growers of that commodity indeed support its implementation. Growers vote themselves for establishment of the order, and have the opportunity subsequently to vote out the order if no longer supported. Should AMS propose a marketing order for leafy greens, growers would be free to support or oppose its establishment.

Passing a grower marketing order for leafy greens may not be easy, but a strong national campaign in which growers receive comprehensive information about the order and choose to vote for its establishment would produce the most ideal conditions for industrywide consensus and collective action.

A marketing order passed by growers also offers several other benefits. Since the rules established under a marketing order would be mandatory, they would apply to all sectors of

the leafy greens industry. That is not to say that one set of practices would have to apply to every situation. In fact, the marketing order board could certainly take regional differences in production practices into account, establish best practices for different types of production techniques, etc. While a marketing order has teeth, it need not be universally prescriptive.

Next, a mandatory marketing order gives stronger basis for imported leafy greens being compelled to comply with the same standards. That is contrasted with a handler marketing agreement discussed below, which could only compel compliance for non-domestically grown leafy greens if they are handled by a signatory to the agreement.

Finally, a true marketing order would spread the financial support for the order across the entire industry, requiring financial contributions from all sectors. This equanimity may be important to producers who are paying, as well as better able to support adequate funding for the priorities set by the marketing order board.

Voluntary Marketing Agreement Among Growers

While not specifically discussed in the ANPR, a voluntary marketing agreement among *growers* may provide a useful way to approach this issue. Growers themselves would be the entities to choose whether to participate, and the program would then have all the same ability to compel common action among those who chose to enter into the agreement.

In general, a voluntary marketing agreement offers perhaps the easiest means for companies to agree to collective action, and would most typically be used to share in joint research or promotion. This format allows only those companies that wish to enter into the agreement to share costs and commitment to common action, and does not compel funding or similar action by others within an industry.

This ease of implementation however makes an agreement more challenging when it comes to compelling specific quality or food safety practices across a diverse grower base. While it might be perfectly acceptable for 75% of growers of a certain commodity to join together to fund a promotional program, the implications of only 75% of those growers choosing to follow the same quality parameters or food safety practices may undercut some of the purpose of the agreement in the first place. However, this approach should not be ruled out as a potential marketing program under AMS to support the leafy greens industry.

Should AMS implement a voluntary marketing agreement among growers, even if only 75% of growers participate, the standards and verification of practices adopted by participating growers could still have significant impact in the marketplace. These growers would be signaling to shippers, processors, retailers and foodservice buyers that they have a clear choice for sourcing raw leafy greens from signatories to the grower marketing agreement. For those local growers who sell at farm markets or do not wish to participate, they would not be compelled.

Voluntary Marketing Agreement Among Handlers

AMS specifically discusses a voluntary marketing agreement for “handlers” as an option under consideration. Handlers are defined in the ANPR as “packers, processors, shippers and marketers.”

Similar to a marketing agreement among growers, a handler agreement would be relatively easy to implement. This format allows those handlers that wish to enter into the agreement to quickly share costs and commitment to common action. This approach was used by leafy

greens handlers in California this year when industry members felt an urgent need to implement common best practices as widely as possible given potential marketplace concerns about their products. That being the case, a national leafy green agreement may be the quickest means of action and a positive way to assist the industry in meeting its current marketing challenges.

Our association sees strong synergy and cooperation among the close-knit growers and handlers in the California Leafy Greens Marketing Agreement. Our scientists and technical experts helped develop the best practice GAP metrics for leafy greens that served as the basis for that agreement, and we urge that the process used to develop these practices be adopted as the basis for any public health regulatory standards including a national leafy green handler agreement. We have strongly supported our handler members participating in this agreement, and encouraged our grower members' active participation, as an immediate and important reaction to tackle today's marketplace challenges. We would encourage the same support through a national leafy green handler agreement.

If this is the process that compels the industry, it is important for USDA to carefully consider the longer-term implications of handler agreements beyond this immediate case. Conceptually, a USDA authorized agreement among handlers not to buy raw produce from growers who do not comply with what those handlers want may raise questions that a grower agreement does not. This could be particularly true depending upon the definition of handler in such an agreement. It would therefore be critical that USDA define handler more rigorously, looking to identify the first handler or that entity clearly closest to the grower.

The produce industry is also now facing significant challenges in the use of market power to compel compliance with a host of different food safety practices down the supply chain. Some of those practices may be wise and good steps that all producers should take; but, others may be less grounded in science or based more on the unique opinion of certain buyers upstream from growers. Beyond leafy greens specifically, USDA should carefully consider the wisdom of investing collective market power upstream in the supply chain to compel grower behavior on matters not required by law.

Therefore, USDA may want to consider a Voluntary Marketing Agreement Among *Handlers and Growers* as a means to utilize the benefits of a marketing agreement, vs. marketing order, and gain the rapid commitment to action of both handlers and growers, and yet avoid the challenges and potential criticism of investing buyers with sole authority to develop and oversee standards for the grower industry. Indeed, a marketing agreement in which all entities in the supply chain are involved in the formulation of such handling practices, with recognition of differing perspectives based on production region, sub-commodity, and even size of facility, provides the greatest potential for transparency, understanding and acceptance. Such an agreement must allow for periodic assessment and modifications as experience and science reveal opportunities for improvement.

Process Verification and AMS Audits

AMS offers another set of tools to the industry that may also be of interest to leafy greens growers and handlers in facing our current challenges. These are the process verification tools and audits for both GAPs and fresh-cut processing.

While not compelling *collective* action, these programs provide *individual* growers and processors an option of demonstrating compliance with appropriate food safety standards through credible and rigorous government audits. The cost of such audits is paid by direct users, rather than a collective assessment.

AMS GAP audits are available today for all fruit and vegetable growers to demonstrate compliance with FDA's *Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables*. This service to growers across the country is based on USDA's interpretation of the specific regulatory guidance mandated by FDA for all growers, thus providing a valuable option to demonstrate their compliance with the most current standards of practice.

At the processing level, AMS' Qualified Through Verification program also offers a useful option for fresh-cut processors to demonstrate their compliance with the latest FDA standards. While AMS conducts the actual audits, all standards of practice and compliance measures are based upon the specific FDA requirements contained in its *Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables*, and mandatory compliance with Good Manufacturing Practices (GMPs). The QTV program also includes verification that processors have adequate controls over their incoming supply of raw materials, thus demonstrating another means of grower compliance with appropriate safety standards.

We believe USDA would provide a useful service to the industry to consider adapting these general process verification programs to be applicable specifically to leafy greens.

One alternative AMS might pursue would be to offer *Commodity Specific* GAP audits for producers of leafy greens, in addition to the basic GAP audits. These audits could be based on standards and metrics similar to the *Commodity Specific Food Safety Guidelines for the Production and Harvest of Lettuce and Leafy Greens*, regionally adjusted and established by the same process used by the California Leafy Greens Marketing Agreement. In this fashion, AMS would be providing growers across the country the same credible and rigorous audit option contained under the California agreement. Buyers who want to assure that their growers outside of California were complying with these standards could easily request USDA leafy greens audits, with the results posted on USDA's website as are the current general GAP audits.

In addition, USDA might also investigate the possibility of any enhancements to the QTV program that would be specific to leafy greens processors.

Finally, we also ask AMS to consider whether these audits could be conducted outside of the United States. As an optional user-fee program, it would seem that growers or processors of leafy greens outside of the United States might also be able to contract with AMS to perform such audits.

In summary, these process verification programs offer individual growers and handlers the ability to have rigorous government audits against the most appropriate food safety standards. These could be useful marketplace tools for growers and their customers, should USDA not pursue specific marketing orders or agreements that seek to compel collective action.

Other General Questions

AMS also asked a specific set of general questions in the ANPR which we will address here.

1. Addressed above.
2. We believe any USDA AMS marketing program should be implemented nationally, rather than regionally.

3. Once a marketing order or agreement is in place, members of the Board should discuss variabilities in production in order to determine what regional variations might be appropriate for best practices.
4. Committee representation must be broad, taking into account not just volume but diverse growing regions.
5. This is an important question. Once a marketing order or agreement board is empowered, it needs to review and adopt potential best practices in an open and transparent manner. The board should consider appointing its own scientific advisory board, and ensure that all views from industry, academia and government are solicited in making its determinations. If any program such as this is to command respect in the marketplace, rather than become just one more set of standards, it must be open to wide input and hopefully reach consensus among all stakeholders.
6. While AMS' initial commentary in the ANPR is based primarily on ensuring good agricultural practices, a traditional value of marketing order and agreements is for market promotion and research. We suggest AMS – and potentially industry groups that might petition for a marketing program – take these important options into consideration. A self-funded research and promotion program for leafy greens could be very beneficial to the industry.
7. Any standards of practice adopted under USDA marketing programs must be based first on FDA regulatory standards for fruit and vegetables.
8. Depending upon AMS views in considering either marketing orders or agreements, and whether those are limited to growers or handlers, the list of commodities now included under the California Leafy Greens Agreement may be appropriate. For a specific grower marketing order, AMS might consider managing a more narrow list of commodities. For voluntary marketing agreements, a wider choice may be appropriate. In any case, we do not believe the basic inclusion of a commodity within the overall marketing program demands that the exact same GAPs apply universally to each commodity. For example, just as a new leafy greens marketing board may decide that different best practices should be applicable to desert production from that in more humid locales, it may also find that different practices should apply to cabbage than to baby leaf spinach. These are decisions that will evolve based on science, and are properly invested in the board.
9. If the industry chooses a national marketing program, it will find a way to schedule meetings, web conferences, etc.
10. Costs could certainly be extensive for this type of program. However, it is clearly not possible to forecast that until an approach is decided and proposed for industry consideration. We suggest that any specific proposal include a minimum and maximum per box assessment such that growers and handlers understand what the parameters of their decision are. Subsequent industry costs based on changing business practices to meet revised GAPs are impossible to forecast, and within the purview of the board's decisions.
11. USDA must be clear that AMS marketing programs cannot replace FDA food safety regulation. USDA will not defend a grower or handler in case of an outbreak, and cannot give authoritative approval to any set of standards that might be compelled through a marketing order. USDA AMS can, however, be extremely helpful to industry through the marketing programs discussed above in meeting marketplace expectations, helping growers compel industrywide actions when desired, and funding joint research and promotions.

12. Addressed above.

Conclusion

As stated above, we believe USDA AMS has an important role to play in assisting the industry with education and training, as well as marketplace verification and compliance programs dealt with in the ANPR.

Our association continues to believe that these types of USDA driven programs are an important part of the industry's tool box to ensure that all growers, handlers, processors and others understand and are implementing basic GAPs for all fruits and vegetables, commodity specific GAPs where appropriate, and GMPs for fresh-cut processing. USDA can play an extremely valuable role in continuing to expand educational and outreach programs promoting these basic steps as outlined in this letter.

We look forward to further dialogue as the Department considers the wide range of options at your discretion. Thank you.

Sincerely,



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