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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 981**

[Doc. No. AMS-SC-16-0047; SC16-981-3 IR]

**Almonds Grown in California; Change in Quality Control Requirements**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule implements a recommendation from the Almond Board of California (Board) to change the quality control requirements currently prescribed under the California almond marketing order (order). The order regulates the handling of almonds grown in California. The Board locally administers the order and is comprised of growers and handlers operating within California. This rule relaxes incoming quality requirements by increasing the inedible kernel tolerance from 0.50 percent to 2 percent. This relaxation decreases California almond handlers' disposition obligation. This change also allows handlers more flexibility in their operations while continuing to maintain quality control and ensuring compliance with the order's requirements.

**DATES:** Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]; comments received by

[INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Andrea Ricci, Marketing Specialist or Jeffrey Smutny, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone:

(559) 487-5901, Fax: (559) 487-5906, or E-mail:

Andrea.Ricci@ams.usda.gov or Jeffrey.Smutny@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under

section 608c(15) (A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule implements a recommendation from the Almond Board of California (Board) to change the quality control requirements currently prescribed under the order. This rule relaxes incoming quality requirements by increasing the inedible kernel tolerance from 0.50 percent to 2 percent. This relaxation would decrease California almond handler's disposition obligation. This will allow handlers more flexibility in their operations while continuing to maintain quality control. In addition, this change will ensure that the reporting and outgoing quality requirements

of the order are met. The Board unanimously recommended this change at its April 12, 2016, meeting.

Section 981.42 of the almond marketing order provides authority for quality control regulations. Paragraph (a) of that section requires that almonds must be inspected prior to processing to determine the percentage of inedible kernels in each lot. Inedible kernels are defined in § 981.408. The Board, with the approval of the Secretary, may change the approved percentage of inedible kernels for any crop year. Inedible kernels in excess of the approved percentage of the kernel weight constitute the handlers' inedible disposition weight obligation. Handlers must satisfy their obligation by disposing of inedible kernels in Board-accepted, non-human outlets such as animal feed or oil.

Section 981.442(a)(4)(i) of the order's rules and regulations currently specifies that the weight of inedible kernels in excess of 0.50 percent of kernel weight shall constitute the handler's disposition obligation. Pursuant to § 981.442(a)(5), handlers must meet their disposition obligation by delivering inedible kernels to crushers, feed manufacturers, feeders, or dealers in nut wastes on record with the Board as accepted users.

In the past several years, the total inedible kernel percentages have been trending lower. This is partially due to good agricultural practices used by growers and better technologies in handler facilities. At the same time, the market value of almonds has increased significantly. As a result, some Board-accepted outlets have started to clean and repurpose the disposition obligation delivered by handlers. After the inedible disposition is delivered to Board-accepted outlets, these accepted outlets provide to the Board a record of disposition receipt, which indicates what was received by the accepted outlet from handlers and how the accepted outlet disposed of the inedible disposition. However, such record of disposition receipt does not indicate whether the almonds have been pasteurized or treated for human consumption. Thus the action of repurposing has led to concern that the order's outgoing quality requirements are not being met.

By increasing the inedible kernel tolerance, handlers' disposition obligation will decrease or become zero, therefore reducing the quantity of product delivered to those specified outlets. This action will also provide handlers with more control over low quality product

allowing one handler the flexibility to transfer the larger portion of low quality product to another handler for further cleaning. This action will require completion of an interhandler transfer form and help with traceability of low quality product. It also will help ensure that any product destined for human consumption was in compliance with the pertinent regulations under the order.

### **Initial Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 6,800 almond growers in the production area and approximately 100 handlers subject to regulation under the marketing order. Small agricultural

producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported in its 2012 Agricultural Census that there were 6,841 almond farms in the production area (California), of which 6,204 had bearing acres. The following computation provides an estimate of the proportion of producers (farms) and agricultural service firms (handlers) that would be considered small under the SBA definitions.

The NASS Census data indicates that out of the 6,204 California farms with bearing acres of almonds, 4,471 (72 percent) have fewer than 100 bearing acres.

For the almond industry's most recently reported crop year (2014), NASS reported an average yield of 2,150 pounds per acre, and a season average grower price of \$3.19 per pound. A 100-acre farm with an average yield of 2,150 pounds per acre would produce about 215,000 pounds of almonds. At \$3.19 per pound, that farm's production would be valued at \$685,850. Since Census of Agriculture indicates that the majority of California's almond farms

are smaller than 100 acres, it could be concluded that the majority of growers had annual receipts from the sale of almonds in 2014-15 of less than \$685,850, which is below the SBA threshold of \$750,000. Thus, over 70 percent of California's almond growers would be considered small growers according to SBA's definition.

According to information supplied by the Board, approximately 30 percent of California's almond handlers shipped almonds valued under \$7,500,000 during the 2014-15 crop year, and would, therefore, be considered small handlers according to the SBA definition.

This rule revises § 981.442(a)(4)(i) of the order's administrative rules and regulations regarding inedible kernel tolerance. Specifically, this action increases the inedible kernel tolerance from 0.50 percent to 2 percent, effectively decreasing handler's disposition obligation. Authority for this action is provided in § 981.42(a) of the order.

Regarding the impact of this action on affected entities, increasing the inedible kernel tolerance reduces disposition obligation on handlers and provides handlers with more flexibility and control over the poor quality product. This rule is not expected to change handler

inspection costs, as handlers currently are required to have all lots inspected to determine the percentage of inedible kernels.

The Board considered alternatives to this action. It formed a taskforce to examine the current inedible program and investigate alternatives. The taskforce reviewed the program and recent data, surveyed handlers, and reported their findings to the Almond Quality and Food Safety Committee (Committee). Recent data showed that the overall inedible kernel percentages have been trending lower, regardless of crop size. Surveyed handlers who did not agree with the change raised the concern that increasing the tolerance could result in more poor quality almonds entering the market. The Committee discussed the concerns raised and concluded that changing the tolerance would give handlers more flexibility in maintaining quality. After discussing the taskforce's findings, the Committee unanimously recommended this increase in inedible tolerance to the Board.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0178

(Vegetable and Specialty Crops.) No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large almond handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Board's meeting was widely publicized throughout the almond industry and all interested persons were invited to attend the meeting and participate in Board deliberations. Like all Board meetings, the April 12, 2016, meeting was a public meeting and all entities, both

large and small, were able to express their views on this issue.

Also, the Board has a number of appointed committees to review certain issues and make recommendations to the Board. The Board's Almond Quality and Food Safety Committee met on April 5, 2016, and discussed this issue in detail. That meeting was also a public meeting, and both large and small entities were able to participate and express their views. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on a change to the quality control requirements currently prescribed under the order. Any comments timely received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule relaxes the current rules and regulations; (2) this rule should be in place in time for the beginning of the crop year on August 1; (3) the Board unanimously recommended these changes at a public meeting and interested parties had an opportunity to provide input; and (4) this rule provides a 60-day comment period and any comments timely received will be considered prior to finalization of this rule.

**List of Subjects in 7 CFR Part 981**

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 981 is amended as follows:

PART 981 - ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 981.442(a)(4)(i) is revised to read as follows:

§ 981.442 Quality Control.

(a) \* \* \*

(4) Disposition obligation. (i) Beginning August 1, 2016, the weight of inedible kernels in excess of 2 percent of kernel weight reported to the Board of any variety received by a handler shall constitute that handler's disposition obligation. For any almonds sold inshell, the weight may be reported to the Board and the disposition obligation for that variety reduced proportionately.

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Dated: August 12, 2016.

Elanor Starmer,  
Administrator,  
Agricultural Marketing Service.

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