



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 986**

[Doc. No. AMS-SC-17-0032, SC17-986-2 FR]

**Pecans Grown in the States of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas; Establishment of Reporting**

**Requirements and New Information Collection**

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation made by the American Pecan Council (Council) to establish reporting requirements under the Federal marketing order for pecans (Order). The Council locally administers the Order and is comprised of growers and handlers of pecans operating within the production area and one public member. This action requires all pecan handlers to submit two forms to the Council: one for inter-handler transfers and another that includes year-end inventory and pecans handled throughout the year. The Council will use this information to facilitate assessment collection and provide valuable reports to the industry, including the annual marketing policy required by the Order.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@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 final rule is issued under Marketing Agreement and Order No. 986 (7 CFR part 986) regulating the handling of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, 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 final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Marketing Order now in effect, pecan handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the reporting requirements issued herein will be applicable to all assessable pecans beginning October 1, 2016, to facilitate the collection of assessments.

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 final rule establishes reporting requirements under the Order. This action requires all pecan handlers to submit to the Council reports of inter-handler transfers of pecans, inventory, and a summary of pecans handled. This information will be used to facilitate assessment collection and provide valuable reports to the industry, including the annual marketing policy required by the

Order. The Council unanimously recommended this action at its April 17, 2017, meeting.

Section 986.61 of the Order requires all handlers warehousing pecans as of August 31 be identified as the handler of those pecans and pay the assessment rate accordingly. Section 986.62 provides the Council, with the approval of the Secretary of Agriculture (Secretary), authority to establish methods and procedures, including necessary reports, to maintain accurate records for inter-handler transfers. Sections 986.75, 986.76, and 986.77 provide authority to prescribe reports of handler inventory, merchantable pecans handled, and pecans received by handlers, respectively. Section 986.78 further provides the Council, with the approval of the Secretary, authority to collect other reports and information from handlers needed to enable the Council to perform its duties. This final rule would utilize these authorities to establish new §§ 986.162 and 986.175 under the rules and regulations of the Order. These new sections would require handlers of pecans to report to the Council any inter-handler transfers, and the volume of shelled, inshell, and total volume of pecans handled each fiscal year by type using specific Council forms.

At its November 16, 2016, meeting, the first meeting following the Order's promulgation, the Council discussed its initial budget, assessment rates, and necessary reporting requirements in order to set up a program that is efficient and responsive to industry needs. During these discussions, the Council established a Statistics and Reporting Committee (Committee) to develop reporting requirements.

Members of the Committee discussed the reporting needs of the industry, reviewed examples of reporting forms from other marketing orders, and met and worked with the staff of another marketing order in developing the reporting requirements. The Committee also worked with USDA to ensure the recommended information collection would provide the information necessary to facilitate the administration of the Order.

At its February 23, 2017, meeting, the Council reviewed drafts of seven reporting forms as developed and recommended by the Committee. The Council expressed its interest in having as much electronic reporting as possible but recognized that many handlers may prefer a paper submission. The Council also considered the timing of when forms would be due and submission dates that would work for

all parts of the industry. After a thorough review and some modifications, seven forms were approved by the Council.

At a meeting on April 17, 2017, the Council revisited the recommended reporting requirements and the accompanying forms. Acknowledging the industry was more than halfway through the fiscal year at that time, the Council took action to move forward with the minimum reports necessary to facilitate the collection of assessments and to provide the other information needed for the 2016-17 fiscal year. Specifically, the Council voted to utilize two forms for that fiscal year: one focusing on inter-handler transfers, and one containing information regarding year-end inventory and pecans handled throughout the fiscal year. The Council agreed it still wanted to move forward with all seven forms for the 2017-18 fiscal year but considered year-end reporting on two forms as the most viable option for the first fiscal year of the Order. The remaining five forms will be proposed in a subsequent rulemaking action.

This final rule adds two new reporting requirements and two new forms to the rules and regulations under the Order by adding §§ 986.162 and 986.175. The pecan industry includes a subset of handlers, defined in the Order as

accumulators, who compile pecans for the purpose of resale or transfer to another handler. Additionally, small handlers may also sell or transfer pecans to other handlers. During the formal rulemaking hearing, the industry expressed concern that it may be difficult to track pecans moved through accumulators or transferred between handlers. Further, some handlers and accumulators that are small operations may find reporting, recordkeeping, and paying assessments burdensome.

The report of inter-handler transfers includes information on the month of transfer, type of pecans transferred, the volume transferred, the amount of assessments owed on the pecans transferred, identification information and signatures for the two handlers involved, and whether the transferring handler or receiving handler would be responsible for reporting and paying the assessments. This report helps ensure that transferred pecans are not counted twice for volume reporting purposes and will help facilitate the collection of assessments. It will also allow receiving handlers to assume the reporting burden from smaller entities and ensure payment of corresponding assessments.

The Council selected the tenth day of the month following the month of transfer as the due date for reports of inter-handler transfers. Should the tenth day of the month fall on a weekend or holiday, reports would be due by the first business day following the tenth day of the month. Given that the final rule will publish after the September date, the due date will be extended to [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. For subsequent fiscal years, reports of inter-handler transfers will be due on a monthly basis as specified above.

In order to correctly collect assessments, provide industry data, and complete a marketing policy for the coming fiscal year, the Council requires accurate reports of what has been handled and what is in inventory going into the next fiscal year. Based on Council discussions, it is also important for the industry to know the variety and form of the pecans in inventory. This information will be vital to the industry as it enters the next harvest, as the amount and type of inventory impacts prices of the new crop. Collection of this data was one of the industry's goals in promulgating the Order, as currently there is no source for this type of information across the 15-state

production area. This information will be captured in the year-end inventory report.

The year-end inventory report includes information on the handler submitting the form, total pounds by type of pecans inshell and shelled in inventory, inventory committed but not shipped for both export and domestic, and any uncommitted inventory. It also includes information on pecans handled throughout the year, as well as data for total inventory, including both shelled and inshell, with shelled volume converted to an inshell basis using the conversion specified in the order (volume shelled X 2). In addition, it includes information regarding total assessments owed, assessments paid to date, and remaining assessments due for that handler.

The Order specifies that on August 31 of each year, every handler warehousing inshell pecans shall be identified as the first handler of those pecans and shall be required to pay the required assessment rate. The Order also specifies that the marketing policy include an estimate of the handler inventory as of August 31. Consequently, the Council selected September 10 as the due date for the year-end inventory report, or the first business day following the tenth of September, should the

tenth fall on a weekend or a holiday. The Council believes this would give all handlers sufficient time to submit the information to the Council after August 31. Further, handlers would be required to pay to the Council all remaining unpaid assessments by the due date of the year-end inventory report. As the recommended September 10 due date has passed, for the 2016-17 fiscal year, this report will be due [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

This action requires all pecan handlers to provide the Council with reports of any inter-handler transfers, year-end inventory, and pecans handled throughout the year. This information will facilitate assessment collections, provide valuable reports to the industry, and allow the Council to complete the annual marketing policy required by the order.

The Council also recommended additional reporting requirements, which would be effective for the 2017-18 fiscal year. These requirements are being considered under a separate action.

### **Final 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 final regulatory flexibility analysis.

The purpose of the RFA is to determine whether the regulatory action will have a significant economic impact on a substantial number of small entities and 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 2,500 growers of pecans in the production area and approximately 250 handlers subject to regulation under the marketing order. Small agricultural growers are defined by the Small Business Administration (SBA) as those having annual receipts 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).

According to information from the National Agricultural Statistics Service (NASS), the average grower

price for pecans during the 2015-16 season was \$2.20 per pound, and 254 million pounds were utilized. The value for pecans that year totaled \$558.8 million (\$2.20 per pound multiplied by 254 million pounds). Taking the total value of production for pecans and dividing it by the total number of pecan growers provides an average return per grower of \$223,520. Using the average price and utilization information, and assuming a normal bell-curve distribution of receipts among growers, the majority of growers receive less than \$750,000 annually.

Evidence presented at the formal rulemaking hearing indicates an average handler margin of \$0.58 per pound. Adding this margin to the average grower price of \$2.20 per pound of inshell pecans results in an estimated handler price of \$2.78 per pound. With a total 2015 production of 254 million pounds, the total value of production in 2015 was \$706.12 million (\$2.78 per pound multiplied by 254 million pounds). Taking the total value of production for pecans and dividing it by the total number of pecan handlers provides an average return per handler of \$2,824,480. Using this estimated price, the utilization volume, number of handlers, and assuming a normal bell-curve distribution of receipts among handlers, the majority

of handlers have annual receipts of less than \$7,500,000. Thus, the majority of growers and handlers of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas may be classified as small entities.

This final rule establishes reporting requirements under the order. This action requires all pecan handlers to provide the Council with reports of any inter-handler transfers, year-end inventory, and pecans handled throughout the year. This information will facilitate the Council's collection of assessments and provide valuable reports to the industry. This rule establishes new §§ 986.162 and 986.175 under the rules and regulations of the order. The authority for this action is provided for in §§ 986.62, 986.75, 986.76, 986.77, and 986.78 of the order.

Requiring reports of transfers, handler inventory, and pecans handled throughout the year will impose an increase in the reporting burden on all pecan handlers. However, this data is already recorded and maintained by handlers as a part of their daily business. Handlers, regardless of size, should be able to readily access this information.

Consequently, any additional costs associated with this change would be minimal (not significant) and apply equally to all handlers.

This action should also help the entire industry by providing comprehensive data on pecans handled and year-end inventory. Collection of this data was one of the industry's goals in promulgating the order as there is no other source for this type of data. This information should help with marketing and planning for the industry, as well as provide important information for the collection of assessments and in preparing the annual marketing policy required by the order. The benefits of this rule are expected to be equally available to all pecan growers and handlers, regardless of their size.

The Council discussed other alternatives to this action, including having additional reporting requirements, but determined that in order to efficiently carry out the objectives of the marketing order this first fiscal year, the information collected in these two reports would be sufficient. The Council also considered requiring the inter-handler transfer form to be submitted for each transfer. However, the Council determined that could be burdensome for some handlers, and a monthly report would

provide the necessary documentation. Therefore, the alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this collection has been submitted to OMB with the reference number 0581-0303. Upon approval, the collection will be merged with OMB No. 0581-0291, "Federal Marketing Order for Pecans." This final rule establishes the use of two new Council forms, which impose a total annual burden increase of 185 hours. The forms, Report of Inter-Handler Transfer of Pecans and Year End Inventory Report, require the minimum information necessary to effectively carry out the requirements of the order. The information would enable the Council to facilitate assessment collection and provide valuable reports to the industry.

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.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule. Further, the public comment received concerning the

proposal did not address the initial regulatory flexibility analysis.

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.

The Council's meetings were widely publicized throughout the pecan industry and all interested persons were invited to attend the meetings and participate in Council deliberations on all issues. Additionally, the Council's Committee meetings held February 23, 2017, and April 17, 2017, were also public meetings and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the *Federal Register* on July 21, 2017 (82 FR 33829). Copies of the rule were sent via email to all Council members and known pecan handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending September 19, 2017, was provided to allow interested persons to respond to the proposal.

One comment was received in favor of the proposed information collection. The commenter stated the proposed requirements were necessary in order to better assess the pecan crop. Accordingly, no changes will be made to the rule as proposed, based on the comments received. Minor editorial changes were made to the rule for the purpose of clarity. The name of Subpart B was corrected to read as SUBPART B - Administrative Provisions and the lists in §§ 986.162 and 986.175 now include an "and."

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.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Council and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 986**

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

For the reasons set forth in the preamble, 7 CFR part 986 is amended as follows:

PART 986 - PECANS GROWN IN THE STATES OF ALABAMA, ARKANSAS, ARIZONA, CALIFORNIA, FLORIDA, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MISSISSIPPI, NORTH CAROLINA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, AND TEXAS

1. The authority citation for 7 CFR part 986 continues to read as follows:

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

2. Add § 986.162 to read as follows:

**§ 986.162 Inter-handler transfers.**

(a) Inter-handler transfers of inshell pecans, pursuant to § 986.62, shall be reported to the Council on APC Form 4. Handlers shall file reports by the tenth day of the month following the month of transfer. Should the tenth day of the month fall on a weekend or holiday, reports are due by the first business day following the tenth day of the month; Provided, that for the 2016-17 fiscal year, all inter-handler transfer forms shall be submitted by [INSERT DATE 30 DAYS AFTER THE DATE OF

PUBLICATION IN THE FEDERAL REGISTER]. The report shall contain the following information:

- (1) Month of transfer;
- (2) The type and weight of pecans transferred;
- (3) The amount of assessments owed on the pecans transferred;
- (4) The names and signatures for both the transferring and receiving handlers; and
- (5) Handler assuming the reporting and assessment obligations on the pecans transferred.

3. Add § 986.175 to read as follows:

**§ 986.175 Handler inventory.**

(a) Handlers shall submit to the Council a year-end inventory report following August 31 each fiscal year. Handlers shall file such reports by September 10. Should September 10 fall on a weekend, reports are due by the first business day following September 10; Provided, that for the 2016-17 fiscal year, all inventory reports shall be submitted by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Such reports shall be reported to the Council on APC Form 7 and include:

- (1) The name and address of the handler;

(2) The total weight and type of inshell pecans in inventory, regardless of country of origin;

(3) The total weight and type of shelled pecans in inventory, regardless of country of origin;

(4) The total weight and type of inshell pecans committed, not shipped, for export and domestic shipments, and any uncommitted inventory, regardless of country of origin;

(5) The total weight and type of shelled pecans committed, not shipped, for export and domestic shipments, and any uncommitted inventory, regardless of country of origin;

(6) The combined total inventory for inshell and shelled pecans calculated on an inshell basis, and combined weight committed, not shipped, for exports and domestic shipments, and any uncommitted inventory;

(7) Total weight and type of domestic pecans handled for the fiscal year; and

(8) Total assessments owed, assessments paid to date, and remaining assessments due to be paid by the due date of the year-end inventory report for the fiscal year.

Dated: November 22, 2017.

**Bruce Summers,**

*Acting Administrator,*

*Agricultural Marketing Service.*

*BILLING CODE 3410-02 P*

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