



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[AMS-SC-18-0018; SC18-981-3]

Almonds Grown in California; Proposed Amendments to Marketing Order 981 and Referendum Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rulemaking proposes amendments to Marketing Order No. 981, which regulates the handling of almonds in California. The Almond Board of California (Board) recommended changing the dates associated with the process to nominate members to the Board as well as the start of the term of office of members of the Board. The Board also recommended adding authority to allow future revisions of the nomination methods and term of office start date through the development of regulations using informal rulemaking.

DATES: The referendum will be conducted from March 25, 2019, through April 5, 2019. The representative period for the referendum is August 1, 2017, through July 31, 2018.

FOR FURTHER INFORMATION CONTACT: Debbie Wray, Senior Marketing Specialist, or Michelle Sharrow, Deputy Director, 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 Email:
Debbie.Wray@usda.gov or Michelle.Sharrow@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 email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This proposal, pursuant to 5 U.S.C. 553, proposes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposal is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (referred to as 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." Section 608c(17) of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorizes amendment of the Order through this informal rulemaking action.

The Department of Agriculture (USDA) is issuing this 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 proposed 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 proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rulemaking 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 no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 608c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 608c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments proposed are not unduly complex and the nature of the proposed amendments is appropriate for utilizing the informal rulemaking process to amend the Order.

The proposed amendments were unanimously recommended by the Board following deliberations at a public meeting held on December 4, 2017. The proposal would amend the Order by:

(1) changing the nomination deadline for Board nominees from January 20 to April 1, the deadline for presenting nominees to USDA for selection from February 20 to June 1, and the start of the term of office from March 1 to August 1; (2) adding the ability to propose future revisions to Board nomination methods

by developing regulations through informal rulemaking; and
(3) adding the ability to propose future revisions to the start date of the Board's term of office by developing regulations through informal rulemaking. In addition to these proposals, AMS proposes to make any additional changes to the Order as may be necessary to conform to any amendment that may result from this rulemaking action.

A proposed rule soliciting comments on the proposed amendments was issued on July 2, 2018, and published in the *Federal Register* on July 6, 2018 (83 FR 31473). One comment was received, but it did not pertain to this proposal; therefore, no changes were made to the proposed amendments. AMS will conduct a grower referendum to determine support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments favored by growers in the referendum.

The Board's proposed amendments would amend the Order by changing the dates associated with the process to nominate members to the Board, changing the start date for the term of office of members of the Board, and adding authority to the Order to allow future revisions of the nomination methods and term of office start date through the development of regulations using informal rulemaking.

Proposal 1 - Nomination and Term of Office Dates

Section 981.32 provides that, each year, nominees for open Board member and alternate member positions shall be chosen by ballot delivered to the Board. In support of this nomination process, § 981.32 further provides that on or before January 20 of each year, the Board shall mail to all handlers and growers, other than the cooperative(s) of record, the required ballots with all necessary voting information; and that nominees chosen shall be submitted by the Board to the USDA Secretary of Agriculture (Secretary) on or before February 20 of each year. If a nomination for any Board member or alternate is not received by the Secretary on or before February 20, the Secretary may select, without nomination, such member or alternate from persons belonging to the group to be represented.

Section 981.33 provides that the term of office of Board members and alternate members selected by the Secretary pursuant to § 981.32 shall begin on March 1.

This proposal would amend § 981.32 by changing the nomination deadline for Board nominees from January 20 to April 1 and the deadline for presenting nominees for selection to the Secretary from February 20 to June 1. It would also amend § 981.33 by changing the start of the term of office from March 1 to August 1. A clarifying change would also be made to

§ 981.33 to remove language related to a previous amendment to the Order that is no longer needed.

Changing the two nomination process dates from January 20 and February 20 to April 1 and June 1, respectively, could provide several benefits. First, preparing ballots to mail in January is very challenging for the Board because it prepares for and hosts major industry activities in December, including a Board meeting and a large, multi-day almond conference that is held at an off-site location. The Board office is also closed the last week of December every year. Because of these year-end activities, it is difficult for the Board to prepare for a nomination mailing in January. Changing the nomination dates would allow the Board enough time to prepare nominations for mailing.

In addition, the Board believes that more industry members might participate in the nomination process if it occurred later in the calendar year. This is because many industry members are busy with or returning from winter holiday season activities in December and January and, therefore, may be less likely to participate in nomination proceedings that are occurring at that time.

In addition to the challenges the Board faces in meeting the January nomination deadline, there is currently only one month between the deadline for mailing ballots (January 20) and

the date that the Board must process returned ballots and prepare a nomination package to submit to USDA (February 20). In addition to this short timeframe, there are only 9 or 10 days between the February 20 deadline by which the Board must submit nominations to USDA and the March 1 term of office start date. This short timeframe does not provide adequate time for the nominations to be processed and new member selections to be made prior to the new term of office. The proposed changes would provide 60 days between the April 1 and June 1 nomination process deadline dates, compared to the existing 30 days between the current dates of January 20 and February 20. The proposed changes would also provide 60 days between the June 1 deadline for the Board to submit the nominations to USDA and the new August 1 term of office start date, compared to the existing 10 days between the current dates of February 20 and March 1. Extending the times between these dates would improve the overall preparation and processing of nominations.

The proposal to change the term of office start date would improve Board cohesiveness because the Board would then operate on the same timeline as the crop year and the Board's committees. The Order's crop year is defined in § 981.19 as August 1 through July 31. The Board is responsible for all program planning and budgeting for each crop year. However, with the current term of office beginning on March 1, Board

members responsible for annual program planning and budget recommendations leave office prior to the end of the crop year; conversely, new Board members also begin serving in the middle of a crop year. Starting the term of office on August 1 would allow Board members to administer activities for an entire crop year as well as provide valuable insight related to the next crop year's activities. Changing the start of the term of office to August 1 would align with the appointment of individuals to various committees that operate under the Board, which occurs at the beginning of each crop year.

Changing the term of office start date from March 1 to August 1 would require current members and alternates to serve a few additional months, beyond the original March 1 start date, until their respective successors were selected and qualified pursuant to § 981.33(a).

These changes to the nomination and term of office dates that appear in two sections of the Order (§§ 981.32 and 981.33) are being proposed as a single amendment because of the relation of the nomination process to the start date of the term of office; that is, if the nomination process dates are changed to occur later in the calendar year (on April 1 and June 1, respectively, as described above), then the start date of the term of office would also need to change from March 1 to a date that would follow the new nomination process dates. As noted

above, the Board recommended the term of office start date be changed to August 1.

For the reasons stated above, it is proposed that § 981.32, Nominations, be amended by changing the nomination deadline for Board nominees from January 20 to April 1 and the deadline for presenting nominees for selection to the Secretary from February 20 to June 1. Further, it is proposed that § 981.33, Selection and term of office, be amended by changing the start of the term of office from March 1 to August 1 and by making a clarifying change to remove language related to a previous amendment to the Order that is no longer needed.

Proposal 2 - Regulation Authority for Nomination Methods

Section 981.32 provides the methods by which nominations for open Board member and alternate member positions shall be chosen, including the dates by which (1) ballots and voting information shall be mailed by the Board to all handlers and growers, other than cooperative(s) of record, and (2) nominations shall be submitted by the Board to the Secretary. Changes to these dates are included in Proposal 1 above.

This proposal would change § 981.32 by adding authority to modify the nomination methods described in paragraph (a) through the future development of regulations using the informal rulemaking process. Currently, changes to the nomination

methods require formal rulemaking. The Board would still be required to discuss future proposed changes at its meetings and to vote on whether to recommend changes to USDA. If amended, future changes would still require notice be given to the public with an opportunity for the public to comment on the proposed changes. However, it is anticipated that this proposed amendment would streamline future changes to the Order by allowing such changes to be proposed and finalized using informal rulemaking.

For the reasons stated above, it is proposed that § 981.32, Nominations, be amended by adding a new paragraph that would provide the Board with authority to modify its nomination methods by developing regulations using the informal rulemaking process.

Proposal 3 - Regulation Authority for Term of Office Start Date

Section 981.33 provides that the term of office of Board members and alternate members selected by the Secretary pursuant to § 981.32 shall begin on March 1. A change to this term of office start date is included in Proposal 1.

This proposal would change § 981.33 by adding authority to modify the term of office start date through the future development of regulations using the informal rulemaking process. Currently, changes to the term of office start date require formal rulemaking. The Board would still be required to

discuss a future proposed change at its meetings and to vote on whether to recommend a change to USDA. If amended, a future change to the term of office start date would still require notice be given to the public with an opportunity for the public to comment on the proposed change. However, it is anticipated that this proposed amendment would streamline future changes to the Order by allowing such changes to be proposed and finalized using informal rulemaking.

For the reasons stated above, it is proposed that § 981.33, Selection and term of office, be amended by adding a new paragraph that would provide the Board with authority to modify the term of office start date by developing regulations using the informal rulemaking process.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), 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 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 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 almond handlers subject to regulation under the Order. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000 (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 agricultural 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 (2016), NASS reported an average yield of 2,280 pounds per acre and a season average grower price of \$2.44 per pound. A 100-acre farm with an average yield of 2,280 pounds per acre would produce about 228,000 pounds of almonds. At \$2.44 per pound,

that farm's production would be valued at \$556,320. The Census of Agriculture indicates that the majority of California's almond farms are smaller than 100 acres; therefore, it could be concluded that the majority of growers had annual receipts from the sale of almonds in 2016-17 of less than \$556,320, which is below the SBA threshold of \$750,000. Thus, over 70 percent of California's almond growers would be classified as small entities according to SBA's definition.

To estimate the proportion of almond handlers that would be considered small businesses, it was assumed that the unit value per shelled pound of almonds exported in a particular year could serve as a representative almond price at the handler level. A unit value for a commodity is the value of exports divided by the quantity. Data from USDA's Foreign Agricultural Service showed that the value of almond exports from August 2016 to July 2017 (combining shelled and inshell almonds) was \$4.072 billion. The quantity of almond exports over that period was 1.406 billion pounds, combining shelled exports and the shelled equivalent of inshell exports. Dividing the export value by the quantity yields a unit value of \$2.90 per pound. Subtracting this figure from the NASS 2016 estimate of season average grower price per pound (\$2.44) yields \$0.46 per pound as a representative grower-handler margin. Applying the \$2.90 representative handler price per pound to 2016-17 handler

shipment quantities provided by the Board showed that approximately 40 percent of California's almond handlers shipped almonds valued under \$7,500,000 during the 2016-17 crop year and would therefore be considered small entities according to the SBA definition.

The proposed amendments would change the dates associated with the process to nominate Board members and alternates as well as the start of the term of office of Board members. The proposed amendments would also add authority to allow future revisions of the nomination methods and term of office dates through the development of regulations using informal rulemaking. These amendments would improve the nomination process, align the term of office with the crop year and appointment of Board committees, and streamline the process for making similar changes in the future.

The Board's proposed amendments were unanimously recommended at a public meeting of the Board on December 4, 2017. The proposed amendments are administrative in nature; therefore, if any or all the proposals are approved in referendum, there should be no economic impact on growers or handlers. Changing the nomination dates could encourage greater industry participation on the Board because the timing of the current nominations occurs immediately after the winter holiday season, when many industry members are just returning to their

operations and may be less inclined to participate. The changes to the nomination process dates and the term of office start date are expected to streamline and improve operations of the Board. Adding authority to allow the development of regulations through informal rulemaking for making future changes to the nomination methods and term of office start date could reduce the time it takes to implement the changes, thereby allowing the Board to function more effectively.

Alternatives to the proposals, including recommending no changes, were considered. However, the Board believes that changing the nomination process dates and term of office start date, as well as adding authority to make similar changes in the future by creating regulations through informal rulemaking, will be beneficial to the industry by enhancing Board operations and effectiveness.

Paperwork Reduction Act

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 OMB and assigned OMB No. 0581-0178 (Vegetable and Specialty Crops). No changes in those requirements because of this action would be necessary. Should any changes become necessary, they would be submitted to OMB for approval.

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

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 Board's meeting was widely publicized throughout the almond industry. All interested persons were invited to attend the meeting and encouraged to participate in Board deliberations on all issues. Like all Board meetings, the December 4, 2017, meeting was public, and all entities, both large and small, were encouraged to express their views on these proposals.

A proposed rule concerning this action was published in the *Federal Register* on July 6, 2018 (83 FR 31473). Copies of the proposed rule were sent via email to all Board members and almond 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 4, 2018, was provided to allow interested persons to respond to the proposal. One

comment was received, but it did not pertain to this proposal; therefore, no changes were made to the proposed amendments.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://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.

Findings and Conclusions

The findings and conclusions and general findings and determinations included in the proposed rule set forth in the July 6, 2018, issue of the *Federal Register* are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Almonds Grown in California." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions. It is hereby ordered that this entire rule be published in the *Federal Register*.

Referendum Order

It is hereby directed that a grower referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400-407) to determine whether the annexed order amending

the Order regulating the handling of almonds grown in California is approved by growers who have engaged in the production of almonds within the production area during the representative period. The representative period for the conduct of such referendum is hereby determined to be August 1, 2017, to July 31, 2018.

The agents of the Secretary to conduct such referendum are designated to be Peter Sommers and Terry Vawter, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or Email: PeterR.Sommers@usda.gov or Terry.Vawter@usda.gov., respectively.

Order Amending the Order Regulating the Handling of Almonds Grown in California¹

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations

¹This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

may be in conflict with the findings and determinations set forth herein.

1. The Order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The Order, as amended, and as hereby proposed to be further amended, regulates the handling of almonds grown in California in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the Order;

3. The Order, as amended, and as hereby proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The Order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of almonds produced in the production area; and

5. All handling of almonds produced in the production area as defined in the Order is in the current of interstate or

foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of almonds grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the Order contained in the proposed rule issued by the Administrator on July 2, 2018, and published in the *Federal Register* (83 FR 31473) on July 6, 2018, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

List of Subjects in 7 CFR Part 981

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

Dated: November 7, 2018

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

For the reasons discussed in the Preamble, 7 CFR part 981 is proposed to be 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. Amend § 981.32 by revising paragraph (a)(1) and adding paragraph (a)(3) to read as follows:

§ 981.32 Nominations.

(a) *Method.* (1) Each year the terms of office of three of the members elected pursuant to § 981.31(a) and (b) shall expire, except every third year when the term of office for two of those members shall expire. Nominees for each respective member and alternate member shall be chosen by ballot delivered to the Board. Nominees chosen by the Board in this manner shall be submitted by the Board to the Secretary on or before June 1 of each year together with such information as the Secretary may require. If a nomination for any Board member or alternate is not received by the Secretary on or before June 1, the Secretary may select such member or alternate from persons belonging to the group to be represented without nomination. The Board shall mail to all handlers and growers, other than the cooperative(s) of record, the required ballots with all necessary voting information including the names of incumbents willing to accept

renomination, and, to such growers, the name of any person proposed for nomination in a petition signed by at least 15 such growers and filed with the Board on or before April 1.

Distribution of ballots shall be announced by press release, furnishing pertinent information on balloting, issued by the Board through newspapers and other publications having general circulation in the almond producing areas.

* * * * *

(3) The Board may recommend, subject to the approval of the Secretary, a change to the nomination method, should the Board determine that a revision is necessary.

* * * * *

3. Amend § 981.33 by revising the first sentence of paragraphs (a) and (b), revising the last sentence of paragraph (c), and adding paragraph (d) to read as follows:

§ 981.33 Selection and term of office.

(a) Members and their respective alternates for positions open on the Board shall be selected by the Secretary from persons nominated pursuant to § 981.32, or, at the discretion of the Secretary, from other qualified persons, for a term of office beginning August 1. * * *

(b) The term of office of members of the Board shall be for a period of three years beginning on August 1 of the years selected except where otherwise provided. * * *

(c) * * * This limitation on tenure shall not apply to alternate members.

(d) The Board may recommend, subject to approval of the Secretary, revisions to the start date for the term of office of members of the Board.

[FR Doc. 2018-24727 Filed: 11/13/2018 8:45 am; Publication Date: 11/14/2018]