



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Docket No. AO-SC-20-J-0011; AMS-SC-19-0082; SC19-984-1]

Walnuts Grown in California; Hearing on Proposed Amendment of Marketing Order No.984

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of hearing on proposed rulemaking; advance notice of proposed rulemaking.

SUMMARY: Notice is hereby given of a public hearing to receive evidence on proposed amendments to Federal Marketing Order No. 984 (Order) regulating the handling of walnuts grown in California. The California Walnut Board (Board), which locally administers the Order, recommended proposed amendments that would add authority for the Board to provide credit for certain market promotion expenses paid by handlers against their annual assessments due under the Order and establish requirements to effectuate the new authority. In addition, the Agricultural Marketing Service (AMS) proposes to make changes to the Order as may be necessary to conform to any amendment that may result from the hearing.

DATES: The hearing will be held March 16, 2020, from 9:00 a.m. to 5:00 p.m. and, if deemed necessary by the presiding

administrative law judge, will continue March 17, 2020, from 9:00 a.m. until 5:00 p.m. or until any other such time as determined by the judge.

ADDRESSES: The hearing will be held at the Sacramento Marriott Rancho Cordova, 11211 Point East Drive, Rancho Cordova, CA 95742.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, Post Office Box 952, Moab, UT 84532; Telephone: (435) 265-5092, Fax: (435) 259-1502, or Andrew Hatch, 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: Melissa.Schmaedick@usda.gov or Andrew.Hatch@usda.gov.

Small businesses may request information on this proceeding by contacting Richard E. 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 administrative action is instituted pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to

as the "Act." This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866, 13563 and 13175. AMS provided notice of the upcoming hearing to tribal governments through USDA's Office of Tribal Relations.

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) seeks to ensure that within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. Interested persons are invited to present evidence at the hearing on the possible regulatory and informational impacts of the proposals on small businesses.

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are 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. 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 the entry of the ruling.

The hearing is convened in accordance with the provisions of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments to Marketing Order No.984 (7 CFR 984) were recommended to the Secretary by the Board on September 13, 2019, and a request for a public hearing and proposed rulemaking was submitted to USDA on September 16, 2019. After reviewing the proposals and other information submitted by the Board, USDA concludes that the proposed amendments to part 984 (referred to as "the Order") will tend to effectuate the declared policy of the Act, and therefore, made a determination to schedule this matter for hearing.

The Board administers the Order, with the oversight of USDA. The Board's proposed change would authorize the Board to set aside funds every year during its budget discussions to fund a credit-back program. The proposal would also authorize

certain market promotion expenses paid directly by handlers within a marketing year to be "credited-back" to the handler against their assessment obligation paid to the Board. The credit-back amount available to each handler would be determined by that handler's percentage of the industry's total volume of walnuts handled during the prior marketing year multiplied by the current marketing year's credit-back program budget. If the new authority is approved by growers in a grower referendum, the resulting final rule would include rules and regulations to effectuate the new authority.

In its request to USDA for a public hearing, the Board stated that the proposed amendments are necessary to encourage handlers to undertake market promotion activities in addition to the marketing order's generic marketing efforts, and to increase market demand for the industry's increasing supply of walnuts.

The Board's request explained that the industry has grown since the program's inception in 1946, with production nearly doubling in the past decade to an estimated 672,000 short tons. Current bearing acres total 350,000 and an additional 60,000 are due to come into production over the next five years. As such, the Board is forecasting production to reach over 850,000 short tons, or a 26-percent increase, within that time.

The Board's justification for its recommendation stated that demand for walnuts needs to increase to stabilize future market returns. The Board stated that future increases in supply without additional increases in demand could result in weaker market returns. Further, the Board's analysis of domestic walnut consumption reveals untapped growth potential, with domestic household penetration only reaching 40 percent. Thus, the proposed credit-back authority could stimulate demand and stabilize future market prices.

The Board explained that it is only authorized to conduct generic marketing activities for the promotion of inshell and shelled walnuts under the Order. The Board has previously developed new product formulations for handler use; however, because the Board does not manufacture or otherwise sell walnuts, it is incumbent upon the handlers to further develop and deliver new products to the market. The proposal for credit-back authority is intended to encourage handler product development and overall marketing and promotion of California walnuts. If the proposal is approved, the Board would be authorized to establish a credit-back program and recommend an annual credit-back rate, subject to approval by the Secretary.

In its hearing request, the Board stated the need to implement a credit-back program for the 2020/2021 marketing

year, which begins September 1, 2020. The Board is recommending a credit-back rate of \$0.70 cents for each handler dollar spent on qualified activities up to each handler's pro-rata share of assessments paid into the allocated credit-back fund. During its annual budget process, the Board would designate a credit-back fund based on forecasted production and anticipated assessment revenue. The per handler pro-rata share of the credit-back fund would be calculated by multiplying the budgeted credit-back fund by each handler's percentage of walnuts handled of the previous marketing year's total walnuts. The Board would then communicate to handlers the availability of the credit-back fund and their pro-rata portion of that fund.

Handlers would be able to apply for credit-back on the expenses of qualified activities completed within the marketing year. Handlers would provide proof of payment and documentation of qualified activities to the Board for review. Once the Board has approved the claim, the handler would receive a reimbursement for 70 percent of the expense of the qualified activity up to the handler's pro-rata share of the credit-back fund. If a credit-back claim for expenses is made prior to the end of the marketing year, the handler must also have paid sufficient assessments into the credit-back fund to cover their reimbursement. The Board's proposal also states that claims for

credit-back on expenses must be made within 15 days after the end of the marketing year. If a claim for credit-back is not sufficiently documented or does not reflect qualified credit-back activities, the Board will deny a claim. An appeal process would afford a handler with a denied claim the opportunity to appeal the denial.

Regarding activities qualified for credit-back, the Board stated that direct expenditures for marketing promotion, including paid advertising, that promote the sale of walnuts, walnut products, or their uses could be eligible. The Board recommended that qualified activities would include: Paid media directed to end-users, trade or industrial users, and paid advertising space or time, including, but not limited to, newspapers, magazines, radio, television, online, transit, and outdoor media (including standard agency commission costs not to exceed 15 percent of gross expense); market promotion, marketing research (except pre-testing and test-marketing of paid advertising), and trade and consumer product public relations (not including advertising or public relations agency fees); in-store demonstrations, production of promotional materials, sales and marketing presentation kits, etc. (excluding couponing); and trade show booth rentals, services, and promotional materials.

The Board's recommendation also addresses promotional activities involving joint activities, handler-owned distribution of products, and promotional activities conducted under a State or Federal trade program.

For qualified credit-back activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, the Board recommended the amount allowed for credit-back should reflect that portion of the activity represented by walnuts. In addition, the handler's name or brand may be included on the product packaging, but the words "California Walnuts" must always be included on the product packaging.

For products owned or distributed by the handler, the Board recommended that the product must list the ownership or distributorship on the package and display the handler's name and the handler's brand. The words "California Walnuts" must always be included on the primary face label.

Regarding handler promotional activities pursuant to a contract with the Foreign Agricultural Service (FAS), USDA, and/or the California Department of Food and Agriculture (CDFA), the Board recommended that these activities not be eligible for credit-back unless the Board is administering the foreign

marketing program, and the handler certifies that he or she would not be reimbursed by either FAS or CDFA for the amount claimed for credit-back. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA would not be eligible for credit-back.

In its recommendation, the Board states that the proposed changes have the broadest possible support from the industry. The proposed amendments were presented and discussed at several meetings involving California walnut handlers and growers. Ultimately, the Board recommended the proposed amendments at a public meeting on September 13, 2019, where stakeholders were provided the opportunity to express their views and provide input. The proposed amendments were unanimously supported by the Board.

In addition to the proposed amendments submitted by the Board, AMS proposes to make any such changes to the Order as may be necessary to conform to any amendment that may result from the hearing, or to correct minor inconsistencies and typographical errors.

USDA will oversee this formal rulemaking proceeding. The issuance of this notice of public hearing is the first of several steps in the amendatory rulemaking process, including the issuance of a recommended decision, public comment period,

Secretary's decision, grower referendum, and handler sign-up (if the prior steps prove favorable).

The public hearing process will further explain the industry's barriers to marketing and the merits of the proposed amendments in addressing these issues. At the hearing, interested persons may provide testimony in support of or in opposition to the proposed amendments. In addition, interested persons will be invited to testify on the possible regulatory and informational impact of the proposed amendments on small businesses.

Interested persons will also be provided the opportunity to file briefs in support of or in opposition to the proposed amendments after the hearing, as well as file exceptions to any recommended decision that may be issued. Finally, any proposed amendments must be approved in a grower referendum before they can be implemented.

USDA will hold the public hearing for the purposes of: (i) receiving evidence about the economic and marketing conditions which relate to the proposed amendments of the Order; (ii) determining whether there is a need for the proposed amendments to the Order; (iii) determining if there are other alternatives to this program or duplicates of the proposed program; and (iv) determining whether the proposed amendments or appropriate

modifications thereof will tend to effectuate the declared policy of the Act.

Testimony is invited at the hearing on all the proposals and recommendations contained in this notice, as well as any appropriate modifications or alternatives.

All persons wishing to submit written material as evidence at the hearing should be prepared to submit four copies of such material at the hearing. Four copies of prepared testimony for presentation at the hearing should also be made available. To the extent practicable, eight additional copies of evidentiary exhibits and testimony prepared as an exhibit should be made available to USDA representatives on the day of appearance at the hearing. Any requests for preparation of USDA data for this rulemaking hearing should be made at least 10 days prior to the beginning of the hearing.

From the time the notice of hearing is issued until the issuance of a final decision in this proceeding, USDA employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an *ex parte* basis with any person having an interest in the proceeding. The prohibition applies to employees in the following organizational units: Office of the Secretary of Agriculture; Office of the

Administrator, AMS; Office of the General Counsel; and the Specialty Crops Program, AMS.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

USDA would make other such changes to the Order as may be necessary to conform with amendments that may result from the hearing, or correct minor inconsistencies and typographical errors.

List of Subjects in 7 CFR Part 984

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

Testimony is invited on the recommended proposals to 7 CFR part 984, or appropriate alternatives or modifications to such proposals, as follows:

PART 984 - WALNUTS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 984 continues to read as follows:

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

2. Revise §984.46 to read as follows:

§984.46 Research and development.

(a) *Research and development authorities.* The Board, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and

development projects, and marketing promotion, including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of walnuts. The expenses of such projects shall be paid from funds collected pursuant to §984.69 and §984.70, and may be credited back pursuant to paragraph (c) of this section.

(b) *Credit-back for promotion expenses.* The Board may provide for crediting the pro rata expense assessment obligations of a handler with such portion of his or her direct expenditure for marketing promotion, including paid advertising, as may be authorized. The credit-back amount available to each handler shall be determined by that handler's percent of the industry's total volume of walnuts handled during the prior marketing year multiplied by the current marketing year's credit-back program budget. No handler shall receive credit back for any creditable expenditures that would exceed the total amount of credit-back available to him or her for the applicable marketing year. Further, no handler shall receive credit back in an amount that exceeds that handler's assessments paid in the applicable marketing year at the time the credit-back application is made. Marketing promotion expenses shall be credited at a rate recommended by the Board and approved by the Secretary, where the credit rate is based on the amount per

dollar of marketing promotion expenses for creditable expenditures paid by a handler during the applicable marketing year. Credit may be paid directly to the handler as a reimbursement of assessments paid or may be issued as recommended by the Board and approved by the Secretary. The Board may also establish, subject to the approval of the Secretary, different credit rates for different products or different marketing promotion activities according to priorities determined by the Board and its marketing plan.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may credit-back all or any portion of a handler's direct expenditures for marketing promotion including paid advertising that promotes the sale of walnuts, walnut products or their uses. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspapers, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent, or as otherwise recommended by the Board and approved by the Secretary.

3. Add subpart D to read as follows:

Sec

984.546 Credit for marketing promotion activities, including paid advertising

984.547 [Reserved]

Subpart D - Research and Development Requirements

§984.546 Credit for marketing promotion activities, including paid advertising.

(a) *Timeliness of reimbursement claim and credit-back rate.*

For a handler to receive credit-back for his or her own marketing promotional activities pursuant to §984.46, the Board shall determine that such expenditures meet the applicable requirements of this section. Credit-back may be granted in the form of reimbursement for all creditable expenditures paid within the applicable marketing year subject to the effective credit-back rate; *Provided*, that such creditable expenditures are documented to the satisfaction of the Board within 15 days after the end of that marketing year. Credit may be granted for a handler's creditable expenditures in an amount not to exceed that handler's pro-rata share of the credit-back fund. No more than 70 cents (\$0.70) shall be credited back to a handler for every dollar spent on qualified activities.

(b) *Assessment payments.* The handler assessment is due as defined in §984.69. A handler shall be current on all assessment payments prior to receiving credit-back for creditable expenditures.

(c) *Handler eligibility for reimbursement.* The Board shall grant credit-back for qualified activities only to the handler who performed such activities and who filed a claim for credit-back in accordance with this section.

(d) *Applicability to marketing year.* Credit-back shall be granted only for creditable expenditures for qualified activities that are conducted and completed during the marketing year for which credit-back is requested.

(e) *Qualified activities.* The following requirements shall apply to all creditable expenditures resulting from qualified activities:

(1) Credit-back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for credit-back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar activities.

(2) The clear and evident purpose of each qualified activity shall be to promote the sale, consumption or use of California walnuts.

(3) No credit-back will be given for any activity that targets the farming or grower trade.

(4) Credit-back will not be allowed in any case for travel expenses, or for any promotional activities that result in price discounting.

(5) Credit-back shall be granted for those qualified activities specified below:

(i) Credit-back shall be granted for paid media directed to end-users, trade or industrial users, and for money spent on paid advertising space or time, including, but not limited to, newspapers, magazines, radio, television, online, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

(ii) Credit-back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

(B) Trade and consumer product public relations: Provided, that no credit-back shall be given for related fees charged by an advertising or public relations agency;

(C) Sales Promotion (in-store demonstrations, production of promotional materials, sales and marketing presentation kits, etc., excluding couponing);

(D) Trade shows (booth rental, services, and promotional materials).

(iii) For any qualified activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or the words "California Walnuts", the amount allowed for credit-back shall reflect that portion of the activity represented by walnuts. If the product is owned or distributed by the handler, in order to receive any amount of credit back, the product must list the ownership or distributorship on the package and display the handler's name and the handler's brand. The words "California Walnuts" must be included on the primary, face label. Such activities must also meet the requirements of paragraphs (e) (1), (2), (3), (4), and (5) of this section.

(iv) If the handler is engaged in marketing promotion activities pursuant to a contract with the Foreign Agricultural Service (FAS), USDA, and/or the California Department of Food and Agriculture (CDFA), unless the Board is administering the foreign marketing program, such activities shall not be eligible for credit-back unless the handler certifies that he or she was not and will not be reimbursed by either FAS or CDFA for the amount claimed for credit-back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA.

Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA shall not be eligible for credit-back.

(6) *Credit-back Reimbursement claims.* A handler must file claims with the Board to obtain credit-back for creditable expenditures, as follows:

(i) All claims submitted to the Board for any qualified activity must include:

(A) A description of the activity and when and where it was conducted;

(B) Copies of all invoices from suppliers or agencies;

(C) Copies of all canceled checks or other proof of payment issued by the handler in payment of these invoices; and

(D) An actual sample, picture or other physical evidence of the qualified activity.

(ii) Handlers may receive reimbursement of their paid assessments up to their pro-rata share of available dollars to be based on their percentage of the prior marketing year crop total. In all instances, handlers must remit the assessment to the Board when billed, and reimbursement will be issued to the extent of proven, qualified activities.

(iii) Checks from the Board in payment of approved credit-back claims will be mailed to handlers within 30 days of receipt of eligible claims.

(iv) Final claims for the marketing year pertaining to such qualified activities must be submitted with all required elements within 15 days after the close of the Board's marketing year.

(f) *Appeals*. If a determination is made by the Board staff that a particular marketing promotional activity is not eligible for credit-back because it does not meet the criteria specified in this section, the affected handler may request the Executive Committee review the Board staff's decision. If the affected handler disagrees with the decision of the Executive Committee, the handler may request that the Board review the Executive Committee's decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. Handlers have the right to request anonymity in the review of their appeal. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his or her discretion.

§984.547 [Reserved]

February 3, 2020

Bruce Summers,

Administrator

Agricultural Marketing Service

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