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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 932

[AMS-SC-19-0081; SC-19-932-2]

Olives Grown in California; Proposed Amendments to the Marketing Order No. 932 and Referendum Order.

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rulemaking proposes amendments to Marketing Order No. 932, which regulates the handling of olives grown in California. The proposed amendments would change the California Olive Committee's (Committee) quorum requirements. In addition, USDA is proposing a clarifying change stating that alternate members acting as members to form a quorum would also be eligible to cast votes.

DATES: The referendum will be conducted from March 9 through March 20, 2020. The representative period for the referendum is August 1 through July 31, 2019.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Senior Marketing Specialist, or Andrew Hatch, Chief, Rulemaking Services Branch, 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: Melissa.Schmaedick@usda.gov or Andrew.Hatch@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. 932, as amended (7 CFR part 932), regulating the handling of olives grown in California. Part 932 (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 procedural requirements governing the formulation of marketing agreements and orders (7 CFR part 900) authorize 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 proposed rule is not intended to have retroactive effect. This proposed rule would not preclude, preempt, or supersede any State program covering olives grown in California.

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 procedural requirements to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 608c(17) of the Act and additional supplemental procedural requirements 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. A discussion of the potential regulatory and economic impacts on affected entities is discussed later in the "Final Regulatory Flexibility Analysis" section of this proposed rule.

The Committee unanimously recommended the amendments following deliberations at a public meeting held on July 29, 2019. The proposed action would amend the Order by changing the

Committee's quorum requirements. USDA is proposing an additional clarifying change to the Order's quorum requirements by stating that alternate members acting as members to form a quorum would also be eligible to cast votes. In addition to these proposals, USDA 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 November 1, 2019 and published in the *Federal Register* on November 6, 2019 (84 FR 59736). No comments were received. 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 Committee's proposed amendments would amend the Order by removing the requirement of having five producer members and five handler members in attendance to form a quorum and clarify that alternate members acting as members could satisfy the quorum requirement. USDA is proposing a clarifying change to the Order's quorum requirements by stating that alternate members acting as members to form a quorum would also be eligible to cast votes.

Proposal - Quorum requirement.

Section 932.25 establishes the Committee, with 16 members (eight producer members and eight handler members) and further allows the Committee to be increased by a public member (who is not to be a producer or handler of olives nor an officer, employee or director of any producer or handler of olives) for a potential total of 17 members. In addition, this section requires that each member has an alternate who meets the same qualifications as the member. The Committee currently operates with 17 members and 17 alternate members.

Section 932.30 further states that each alternate member shall act in the place and stead of such member (a) during such member's absence, and (b) in the event of such member's removal, resignation, disqualification or death, until a successor for such member's unexpired term has been selected and has qualified.

Section 932.36 establishes the Committee's quorum requirements. Current requirements state that a quorum must consist of at least 10 members of whom at least five must be producer members and at least five must be handler members and, if the Committee is increased by the addition of a public member, a quorum must consist of at least 11 members of which at least five must be producer members and at least five must be handler members. Given that the Committee currently has a

public member, a quorum of 11 members of which five must be producers and five must be handlers is required.

This proposed action would amend § 932.36 by removing the requirement of having five producer members and five handler members in attendance to form a quorum. The proposed modified language would define a quorum as consisting of at least 10 members and, if the committee is increased by the addition of a public member, a quorum would consist of at least 11 members.

The proposed modification would also clarify that alternate members acting as members could satisfy the quorum requirement. The Committee's recommended amendment, that would modify the second sentence of the current § 932.36, adds a phrase recognizing that alternate members who are serving in place of an absent member should be counted as full Committee members in the context of constituting a quorum. This proposed phrase reiterates the authority of alternate members as specified in § 932.30.

For clarity and consistency, USDA proposes adding the same phrase to the first sentence of § 932.36. The proposed revision to the sentence would read as follows: "Decisions of the committee shall be by majority vote of the members, including alternates acting as members, present and voting, and a quorum must be present:..." This proposed additional revision would clarify that alternate members acting as members could not only

fulfill quorum requirements, but they would also be able to vote as members on matters of Committee business in the absence of their member.

Since promulgation of the Order in 1965, the California olive industry has seen reductions of 64 percent (from 2500 to 900) and 93 percent (from 28 to two) in the number of California olive producers and handlers, respectively. Industry consolidation has resulted in increased difficulties in filling Committee member seats as well as fulfilling quorum requirements at meetings.

Given the current quorum requirement of a minimum of five producers and five handlers in attendance, the absence of just one individual may result in the lack of a quorum. Without a quorum, the Committee is unable to vote on business decisions or make regulatory recommendations to USDA. Meetings without a quorum are also costly as attendees must travel to attend the meeting, thus incurring travel costs in addition to time lost operating their businesses.

Adjusting the current quorum requirement as proposed would lower the risk of not reaching a quorum during scheduled meetings due to the absence of the required number of producer or handler members. This change would streamline the Committee's operations and increase its effectiveness by allowing the Committee to conduct business as long as the

minimum number of members are in attendance. It would also reduce the risk of members incurring costs from traveling to meetings at which business cannot be conducted due to lack of a quorum.

For the reasons stated above, it is proposed that § 932.36, Quorum requirement, be amended by removing the requirement of having five producer members and five handler members in attendance to form a quorum and clarify that alternate members acting as members could satisfy the quorum requirement. It is also proposed that § 932.36 be further amended by USDA's proposed clarifying change. This proposed addition has been incorporated into the amendatory text of this document.

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 900 producers of olives in the production area and two handlers subject to regulation under the Order. The Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of less than \$1,000,000, and small agricultural service firms as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) data, as of June 2019 the average price to producers for the 2018 crop year was \$766.00 per ton, and total assessable volume for the 2018 crop year was 17,953 tons. Based on production, the total number of California olive producers, and price paid to those producers, the average annual producer revenue is less than \$1,000,000 (\$766.00 times 17,953 tons equals \$13,751,998 divided by 900 producers equals an average annual producer revenue of \$15,280.00). Therefore, most olive producers may be classified as small entities. Both handlers may be classified as large entities under the SBA's definitions because their annual receipts are greater than \$30,000,000.

The proposed change would revise the quorum requirement for Committee meetings by removing the requirement of having five producer members and five handler members in attendance to form a quorum. The proposed modified language would define a quorum as consisting of at least 10 members and, if the Committee is

increased by the addition of a public member, a quorum would consist of at least 11 members.

The Committee unanimously recommended the proposed amendment at a public meeting on July 29, 2019. If this proposed amendment is approved in a referendum, there would be no direct financial effects on producers or handlers as it is primarily administrative in nature. The proposed amendment would increase the efficiency of the Committee's operations and allow it to respond more quickly to the industry's needs.

The number of producers and handlers operating in the industry has decreased significantly since the marketing order was established in 1965, dropping from 2,500 to 900 (64 percent) and from 28 to two (93 percent), respectively. Industry consolidation has made it difficult to find enough members to fill positions on the Committee. Moreover, fulfilling quorum requirements at meetings has also become increasingly challenging.

Changing the quorum requirement from the current 11-member requirement, of which five must be producers and five must be handlers, to simply the attendance of 11 members would increase meeting efficiency by making the quorum requirement more easily fulfilled. This proposed change would also reduce costs to members, Committee staff, and USDA employees who travel to meetings where a quorum is not established. If implemented, the

proposed amendment is not expected to result in any increases in economic costs or burden to industry members, USDA staff or consumers.

Alternatives to this proposed amendment, including making no changes at this time, were considered by the Committee. One alternative included lowering the required number of producer or handler members in attendance. However, given that there are only two handlers in operation within the industry, this option was still considered too restrictive by the Committee. Therefore, the alternatives were not considered viable by the Committee.

AMS believes the proposed amendment is justified and necessary to ensure the Committee's ability to locally administer the program. Modifying the quorum requirement as proposed in this rule would ensure a more efficient and orderly flow of business.

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, USDA would submit them to OMB for approval. This proposed rule would impose no additional

reporting or recordkeeping requirements on either California olive handler.

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 Committee publicizes all of its meetings throughout the California olive production area and encourages interested parties to participate in its deliberations. Like all Committee meetings, the July 29, 2019, meeting was public, and all entities, both large and small, were encouraged to express their views on the proposed amendment.

A proposed rule concerning this action was published in the *Federal Register* on November 6, 2019 (84 FR 59736). Copies of the proposed rule were sent via email to all Committee members and California olive handlers. The rule was also made available through the internet by USDA and the Office of the Federal

Register. A 30-day comment period ending December 6, 2019, allowed interested persons to respond to the proposal. No comments were received; 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 November 6, 2019, 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 Olives 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 part 900.400-407) to determine whether the annexed order amending the Order regulating the handling of olives grown in California is approved by growers who have engaged in the production of olives within the production area during the representative period. The representative period for the conduct of such referendum is hereby determined to be August 1 through July 31, 2019.

The agents of the Secretary to conduct such referendum are designated to be Kathie Notoro 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: Kathie.Notoro@usda.gov or Terry.Vawter@usda.gov, respectively.

List of Subjects in 7 CFR Part 932

Olives, Marketing agreements, Reporting and recordkeeping requirements.

Dated: February 21, 2020

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

**Order Amending the Order Regulating the Handling of Olives Grown
in California ¹**

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 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 olives 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

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.

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 olives produced in the production area; and

5. All handling of olives 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 olives 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 November 1, 2019, and published in the *Federal Register* (84

FR 59736) on November 6, 2019, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

PART 932 - OLIVES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 932 continues to read as follows:

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

2. Revise § 932.36 to read as follows:

§ 932.36 Procedure.

Decisions of the committee shall be by majority vote of the members, including alternates acting as members, present and voting, and a quorum must be present: *Provided*, That decisions requiring a recommendation to the Secretary on matters pertaining to grade and size regulations shall require at least 10 affirmative votes, at least 5 of which must be from producer members and at least 5 of which must be from handler members and, if the committee is increased by the addition of a public member, at least 11 affirmative votes shall be required, at least 5 of which must be from producer members and at least 5 of which must be from handler members. A quorum shall consist of at least 10 members, including alternates acting as members, and, if the committee is increased by the addition of a public member, a quorum shall consist of at least 11 members, including alternates acting as members. Except in case of an emergency, a

minimum of 5 days advance notice shall be given with respect to any meeting of the committee. In case of an emergency, to be determined within the discretion of the chairman of the committee, as much advance notice of a meeting as is practicable in the circumstances shall be given. The committee may vote by mail or telegram upon due notice to all members, but any proposition to be so voted upon first shall be explained accurately, fully, and identically by mail or telegram to all members. When voted on by such method, at least 14 affirmative votes, of which seven shall be producer member votes and seven shall be handler member votes, shall be required for adoption and, if the committee is increased by the addition of a public member, votes by mail or telegram shall require at least 15 affirmative votes, of which at least 7 shall be producer member votes and at least 7 shall be handler member votes. The committee may recommend for the Secretary's approval changes in the number of affirmative votes required for adoption of any proposition voted upon by means of a mail or telegram ballot: *Provided*, That the number of affirmative votes required for adoption shall not be less than 10, and in any case an equal number of producer member and handler member votes shall be required for adoption and, if the committee is increased by the addition of a public member, the number of affirmative votes required for adoption shall be increased by 1.

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