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Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS-SC-21-0089]

Almonds Grown in a California; Amendments to the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rulemaking amends Marketing Order No. 981, which regulates the handling of almonds grown in California. This final rule modifies the definition of almonds and shelled almonds, establishes a definition for “almond biomass,” and changes dates when the Almond Board of California (Board) conducts elections to coincide with assessment collections and when the Board submits volume regulation recommendations to USDA. The amendments modify certain marketing order provisions to facilitate orderly administration of the program. Additionally, the amendments modernize, simplify, or align language with current industry practices and definitions.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Thomas Nalepa, Marketing Specialist, or Matthew Pavone, Chief, Rulemaking Services Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-8085, Fax: (202) 720-8938, or E-mail: Thomas.Nalepa@usda.gov or Matthew.Pavone@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-8085, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule 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." The Board locally administers the Order and is comprised of growers and handlers of almonds operating within the area of production.

The Agricultural Marketing Service (AMS) is issuing this final rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This final rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. AMS has determined this final rule is unlikely to have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the

distribution of power and responsibilities between the Federal Government and Indian Tribes.

This final rule has also been reviewed under Executive Order 12988, Civil Justice Reform. This rule shall not be deemed to preclude, preempt, or supersede any State program covering almonds grown in California.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608c(15)(A)), any handler subject to an order may file with the U.S. Department of Agriculture (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 8c(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 8c(17) of the Act and the 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 depending upon 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 in this final rule are not unduly complex, and the nature of the amendments is appropriate for utilizing the informal rulemaking process to amend the Order. This final rule encompasses changes that are primarily administrative or modernizing in nature.

Following are the amendments voted on and the results for each:

- Amendment 1 – “Modifying the definitions for “Almonds” and “Shelled almonds,” adding a definition for “Almond biomass,” changing the term “Control Board” to “Board,” and replacing listed approved outlets for inedible kernels with the term “accepted users.” This amendment was favored by 86.61 percent of voting almond producers, representing 94.99 percent of the production volume voted in the referendum.
- Amendment 2 - “Changing the date from December 31 to March 31 for determining handler weighted votes in the nomination process for handler positions on the Board.” This amendment was favored by 85.63 percent of voting almond producers, representing 94.28 percent of the production volume voted in the referendum.
- Amendment 3 - “Changing from August 1 to September 1 the date the Board is required to submit volume regulation estimates/ recommendations to the Secretary of Agriculture.” This amendment was favored by 86.61 percent of voting almond producers, representing 93.02 percent of the production volume voted in the referendum.
- Amendment 4 - “Removing language that requires separate accounting of certain excess funds and sets the reserve fund limit at approximately six months’ “expenses” instead of six months’ “budget.” This amendment was favored by 84.59 percent of voting almond producers, representing 80.65 percent of the production volume voted in the referendum.

- Amendment 5 - “Adding authority for the Board to accept advanced assessments from handlers or borrow funds from commercial lenders.” This amendment was favored by 63.59 percent of voting almond producers, representing 56.15 percent of the production volume voted in the referendum.

These changes simplify, clarify, or align Order language with current industry practices and definitions. A discussion of the potential regulatory and economic impacts on affected entities is discussed later in the “Final Regulatory Flexibility Analysis” section of this final rule. The amendments apply equally to all producers and handlers, regardless of size. The amendments also have no additional impact on the reporting, record-keeping, or compliance costs of small businesses.

The Board unanimously recommended seven proposed Order amendments following deliberations at a public meeting held on August 11, 2020. The Board submitted its formal recommendation to amend the Order through the informal rulemaking process on August 9, 2021. This final rule will amend the Order by modifying the definition of almonds and shelled almonds, establishing a definition for “almond biomass,” and changing dates when the Almond Board of California (Board) conducts elections to coincide with assessment collections and when the Board submits volume regulation recommendations to USDA.

A proposed rule soliciting public comments on the proposed amendments published in the **Federal Register** on April 27, 2023 (88 FR 25559). AMS received one comment in support of the proposed rule. After reviewing the comment, AMS republished the proposed rule without substantive change along with the referendum order in the Federal Register on October 4, 2023 (88 FR 68500). For the purposes of the referendum ballots, AMS combined Proposals 1, 3, and 4 of the republished proposed rule and referendum order. These were combined into Amendment 1 because they each simplify and modernize language to align the Order with current industry practice.

Therefore, the seven amendments in the originally proposed rule yielded five amendments on the referendum ballot. The proposed rule and referendum order directed that a referendum among California almond growers be conducted from October 30, 2023, through November 20, 2023, to determine whether they favor the proposals. To become effective, the amendments had to be approved by either two-thirds of the producers voting in the referendum or by those representing at least two-thirds of the volume of almonds grown by those voting in the referendum.

During the referendum, producers showed overwhelming support for Amendments 1, 2, 3, and 4, referenced above, which were related to definitions and timeframes. Amendment 5, which would have added authority for the Board to accept advanced assessments from handlers or borrow funds from commercial lenders, failed to achieve two-thirds support from producers by vote or volume voting.

Final Regulatory Flexibility Analysis

Pursuant to 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 are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 7,600 almond growers in the production area and approximately 100 handlers subject to regulation under the Order. In the previous proposed rule published in the **Federal Register** on April 27, 2023 (88 FR 25559), the small agricultural almond producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$3,250,000, and small agricultural

service firms are defined as those having annual receipts of less than \$30,000,000 (13 CFR 121.201). Since that publication, the SBA updated the definition of small businesses to those having annual receipts of less than \$3,750,000 for producers (Tree Nut Farming, North American Industry Classification System code 111335), and \$34,000,000 for handlers (Postharvest Crop Activities, North American Industry Classification System code 115114) (13 CFR 121.201). Thus, AMS changed the thresholds to reflect the new SBA thresholds in this final rule. The changes do not impact AMS's ultimate determination regarding the impact of the rule on small entities.

The National Agricultural Statistics Service (NASS) reported in its 2022 Census of Agriculture (Census) that there were 7,596 almond farms with bearing acres in the production area. Additionally, the Census indicates that out of the 7,596 California farms with bearing acres of almonds, 4,805 (63 percent) have fewer than 100 bearing acres.

In its annual *Noncitrus Fruits and Nuts* publication, NASS reported a 2022 crop year average yield of 1,900 pounds per acre (shelled basis) and a season average grower price of \$1.40 per pound. Therefore, a 100-acre farm with an average yield of 1,900 pounds per acre would produce about 190,000 pounds of almonds (1,900 pounds times 100 acres equals 190,000 pounds). At \$1.40 per pound, that farm's production would be valued at \$266,000 (190,000 pounds times \$1.40 per pound equals \$266,000). Since the Census indicated that 63 percent of California's almond farms are less than 100 acres, it could be concluded that the majority of California almond growers had annual receipts from the sale of almonds of less than \$266,000 for the 2022 crop year, which is below the SBA threshold of \$3,750,000 for small producers. Therefore, the majority of growers may be classified as small businesses.

To estimate the proportion of almond handlers that would be considered small or large businesses, it was assumed that the unit value per 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 exported. Data from the Global Agricultural Trade System (GATS) database of USDA's Foreign Agricultural Service showed that the value of almond exports from August 2022 to July 2023 (shelled equivalent, combining shelled and inshell) was \$4.117 billion. The quantity of almond exports over that time-period was 1.784 billion pounds. Dividing the export value by the quantity yields a unit value of \$2.31 per shelled pound (\$4.117 billion divided by 1.784 billion pounds equals \$2.31).

NASS estimated that the California almond industry produced 2.511 billion pounds of almonds in 2022. Applying the \$2.31 derived representative handler price per pound to total industry production results in an estimated total revenue at the handler level of \$5.80 billion (2.511 billion pounds times \$2.31 per pound). With an estimated 100 handlers in the California almond industry, average revenue per handler would be approximately \$58.0 million (\$5.80 billion divided by 100). Assuming a normal distribution of revenues, most almond handlers shipped almonds valued at more than \$34,000,000 during the 2022 crop year. Therefore, the majority of handlers may be classified as large businesses.

AMS has determined that the amendments, as effectuated by this final rule, will not have a significant impact on a substantial number of small businesses. Rather, large and small entities alike would be expected to benefit from the Board's improved ability to address important issues of interest to all on a timely basis. No small businesses are unduly or disproportionately burdened.

The amendments to the Order are modernizing in nature and align Order provisions with current industry definitions and practices. They define commonly used industry terminology and simplify language to more broadly identify disposition outlets of almonds.

Additionally, the amendments are necessary to adjust or align dates to allow for

the inclusion of more available data when determining weighting of handler votes for Board nominations and providing volume regulation recommendations to the Secretary. These changes do not impact how volume is calculated for handler vote weighting, materially affect crop estimates, or adversely impact Board activities.

Finally, these amendments remove language that distinguishes between funds for administrative-research and funds for marketing promotion activities in the accounting of excess funds. It also sets the reserve fund limit at approximately six-months' expenses instead of the current six-months' budget. This is an administrative adjustment that provides technical clarification on the accounting of assessments and reserves. It does not impact the percentage of assessments available for refund, nor does it materially impact reserves.

The Board considered the benefits and costs of maintaining the status quo as an alternative to this action. However, AMS believes the amendments are beneficial in either clarifying or updating the language of the Order for industry or improving the Board's continuity of operations at no additional costs to industry.

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 are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

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

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

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

The Board's meetings are widely publicized throughout the California almond production area. All interested persons are invited to attend the meeting and encouraged to participate in Board deliberations on all issues. Like all Board meetings, the meetings held on December 9, 2019, August 11, 2020, and December 7, 2020, were public, and all entities, both large and small, were encouraged to express their views on the proposals.

A proposed rule concerning this action published in the **Federal Register** on April 27, 2023 (88 FR 25559). A copy of the rule was sent via email to the Board staff for distribution to all Board members and California almond growers and handlers. The proposed rule was also made available by USDA through the Internet and the Office of the Federal Register. A 60-day comment period ending June 26, 2023, was provided to allow interested persons to respond to the proposals. AMS received one comment during the comment period. The comment supported the proposed amendments. Based on all the information available to AMS at this time, including the comments received in response to the proposed rule, no substantive changes will be made to the amendments as proposed.

A second proposed rule and referendum order was then published on October 4, 2023 (88 FR 68500). That document directed that a referendum among California almond growers be conducted from October 30, 2023, through November 20, 2023, to determine whether they favor the proposals. To become effective, the amendments had to be approved by either two-thirds of the producers voting in the referendum or by those representing at least two-thirds of the volume of almonds grown by those voting in the

referendum. The referendum results show producers supported four amendments related to definitions and time frames by an average of 85.9 percent of producers voting, who represented 90.7 percent of the volume of almonds produced by those voting. Results also show that producers did not support by two-thirds voting or volume voting, the amendment to add authority for the Board to accept advanced assessments from handlers or borrow funds from commercial lenders.

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.

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

Findings and Determinations¹

(a) Findings and Determinations Upon the Basis of the Rulemaking Record

The findings and determinations hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of Marketing Order 981; 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. Marketing Order 981, as amended, and as hereby amended, and all the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

¹ This 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.

2. Marketing Order 981, as amended, and as hereby further amended, regulates the handling of almonds grown in California and is applicable only to persons in the respective classes of commercial and industrial activity specified in the Order;

3. Marketing Order 981 as amended, and as hereby 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 marketing orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. Marketing Order 981, as amended, and as hereby amended, prescribes, 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 or packed in the production area; and

5. All handling of almonds grown or handled in the production area, as defined in Marketing Order 981, is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects such commerce.

(b) Determinations.

It is hereby determined that:

1. The issuance of this amendatory Order, amending the aforesaid Order, is favored or approved by producers representing at least two-thirds of the volume of almonds produced by those voting in a referendum on the question of approval and who, during the period of August 1, 2022, through July 31, 2023, were engaged within the production area in the production of such almonds.

2. The issuance of this amendatory Order advances the interests of producers of citrus in the production area pursuant to the declared policy of the Act.

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 amending the Order contained in the proposed rule and referendum issued by the Administrator and published in the **Federal Register** (88 FR 68500) on October 4, 2023, 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

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 981 as follows:

PART 981 – ALMONDS GROWN IN CALIFORNIA.

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

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

2. Revise § 981.4 to read as follows:

§ 981.4 Almonds and almond biomass.

(a) *Almonds* means (unless otherwise specified) all varieties of almonds (except bitter almonds), either shelled or unshelled, grown in the State of California, and, for the purposes of research includes almond biomass.

(b) *Almond biomass* means the hulls, shells, and skins of harvested almonds and woody biomass derived from almond trees (e.g. tree limbs, bark, prunings).

4. Revise the first sentence of § 981.6 to read as follows:

§ 981.6 Shelled almonds.

Shelled almonds mean almonds after the shells are removed and includes any form those almonds might take. * * *

5. Revise § 981.32(b)(2) to read as follows:

§ 981.32 Nominations.

* * * * *

(b) * * *

(2) Each handler may vote for a nominee for each position representing the group to which the handler belongs. Each handler vote shall be weighted by the quantity of almonds (kernel weight basis computed to the nearest whole ton) handled for the handler's own account through March 31 of the crop year in which nominations are made. The nominee for each position shall be the person receiving the highest weighted vote for the position.

* * * * *

§ 981.41 [Amended]

6. Amend § 981.41(b) by removing the word "Control".

§ 981.42 [Amended]

7. Amend the second sentence of § 981.42(a) by removing the words "accepted crushers, feed manufacturers, or feeders" and adding, in their place, "approved accepted users."

§ 981.49 [Amended]

8. Amend § 981.49 introductory text by removing the word "August" and adding in its place the word "September".

§ 981.59 [Amended]

9. Amend § 981.59(a) by removing the word "Control".

10. Amend § 981.81 by:

- a. Revising the third and fourth sentences in paragraph (b); and
- b. Revising the first sentence in paragraph (c).

The revisions read as follows:

§ 981.81 Assessment.

* * * * *

(b) * * * Any amounts, not credited pursuant to §981.41 for a crop year may be used by the Board for its marketing promotion expenses of the succeeding crop year, and any unexpended portion of those amounts at the end of that crop year shall be retained in the operating reserve fund. Any funds of the operating reserve fund in excess of the level authorized pursuant to paragraph (c) of this section shall be refunded to handlers or used to reduce the assessment rate of the subsequent crop year, as the Board may determine. *

* *

(c) *Reserves.* The Board may maintain an operating reserve fund which shall not exceed approximately six-months' expenses or such lower amount as the Board may establish with the approval of the Secretary: *Provided*, That this limitation shall not restrict the temporary retention of excess funds for the purpose of stabilizing or reducing the assessment rate of a crop year. * * *

* * * * *

Erin Morris,

Associate Administrator.

Agricultural Marketing Service.

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