



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 986**

[Doc. No. AMS-SC-17-0027; SC17-986-1 PR]

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

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement a recommendation from the American Pecan Council (Council) to establish the initial assessment rates for the 2016 - 2017 and subsequent fiscal years at \$0.03 per pound for improved varieties, \$0.02 per pound for native and seedling varieties, and \$0.02 for substandard pecans handled under the pecan marketing order (order). The Council administers the order and is comprised of growers and handlers of pecans operating within the production area and a public member. Assessments upon pecan handlers would be used by the Council to fund reasonable and necessary expenses of the program. The fiscal year begins October 1 and ends

September 30. The assessment rates would remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or internet:

<http://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at:

<http://www.regulations.gov>. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional

Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Agreement and Order No. 986, (7 CFR part 986), regulating the handling of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this proposed 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) has exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017 titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, pecan handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rates as proposed herein would be applicable to all assessable pecans beginning on October 1, 2016, and continue until amended, suspended, or terminated.

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. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would establish continuing assessment rates for the 2016 - 2017 and subsequent fiscal years at \$0.03 per pound for improved varieties and \$0.02 per pound for native and seedling varieties and for substandard pecans handled. It is intended that the assessment rates as proposed herein would be applicable to

all assessable pecans beginning on October 1, 2016, and continue until amended, suspended, or terminated.

The order provides authority for the Council, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Council are growers and handlers of pecans and a public member. They are familiar with the Council's needs and with the costs for goods and services in their respective local areas and are thus in a position to formulate an appropriate budget and assessment rates. The assessment rates are formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2016 - 2017 fiscal year, the Council recommended, and USDA approved, the Council's budget and the assessment rates that would continue in effect from fiscal year to fiscal year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Council or other information available to USDA.

The Council met on November 17, 2016, and unanimously recommended 2016 - 2017 budget expenditures of \$6,000,000

and assessment rates of \$0.03 per pound for improved varieties, \$0.02 per pound for native and seedling varieties, and \$0.02 per pound for substandard pecans handled. These are the first budget of expenditures and assessment rates established under this order.

The major expenditures recommended by the Council for the 2016 - 2017 year include \$3,850,000 for marketing and promotion, \$900,000 for administration, \$250,000 for reporting and statistics, and \$200,000 for compliance.

The assessment rates recommended by the Council were derived by dividing anticipated expenses by expected shipments of pecans. Pecan shipments for the year are estimated at 260,000,000 pounds, with about 75 percent, or an estimated 195 million pounds of improved varieties, and about 25 percent of native and seedling varieties and substandard pecans. This should provide approximately \$6,000,000 in assessment income. Income derived from handler assessments would be adequate to cover budgeted expenses. As the Council has no established reserve, its budget also allocated \$500,000 for reserve funds to be carried into the next fiscal year. This would be within the maximum permitted by the order of approximately three

fiscal years' expenses. If the assessment rates generate less money than is anticipated, the Council and the Agricultural Marketing Service (AMS) will adjust the budget accordingly.

The proposed assessment rates would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Council or other available information.

Although these assessment rates would be in effect for an indefinite period, the Council would continue to meet prior to or during each fiscal year to recommend a budget of expenses and consider recommendations for modification of the assessment rates. The dates and times of Council meetings are available from the Council or USDA. Council meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Council recommendations and other available information to determine whether modification of the assessment rates is needed. Further rulemaking would be undertaken as necessary. The Council's budget for subsequent fiscal years would be reviewed and, as appropriate, approved by USDA.

The Council also recommended reporting requirements, to include information on pecans received, shipped, exported, or in inventory, which would facilitate the collection of the assessments. These requirements are being considered under a separate action.

### **Initial 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 proposed rule on small entities. Accordingly, AMS has prepared this initial 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 the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 2,500 producers of pecans in the production area and approximately 250 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business

Administration as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to information from the National Agricultural Statistics Service (NASS), the average grower price for pecans during the 2015 - 2016 season was \$2.20 per pound and 254 million pounds were utilized. The value for pecans in that year totaled \$558.8 million (\$2.20 per pound multiplied by 254 million pounds). Taking the total value of production for pecans and dividing it by the total number of pecan producers provides a return per grower of \$223,520. Using the average price and utilization information, and assuming a normal distribution, the majority of growers have annual receipts of less than \$750,000. Evidence presented at the order promulgation hearing indicates an average handler margin of \$0.58 per pound for in-shell pecans for an estimated handler price of \$2.78. With a total 2015 production of 254 million pounds, the total value of production in 2015 was \$706.12 million (\$2.78 per pound multiplied by 254 million pounds). Taking the total value of production for pecans and dividing it by

the total number of pecan handlers provides a return per handler of \$2,824,480. Using this estimated price, the utilization volume, number of handlers, and assuming a normal distribution, the majority of handlers have annual receipts of less than \$7,500,000. Thus, the majority of producers and handlers of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas may be classified as small entities.

This proposal would establish the assessment rates to be collected from handlers for the 2016 - 2017 and subsequent fiscal years. The Council unanimously recommended 2016 - 2017 expenditures of \$6,000,000 and an assessment rate of \$0.03 per pound for improved varieties, \$0.02 per pound for native and seedling varieties, and \$0.02 per pound for substandard pecans handled. The quantity of pecans for the 2016 - 2017 year is estimated at 260,000,000 pounds, with about 75 percent, or 195 million pounds of improved varieties, and about 25 percent of native and seedling varieties and substandard pecans. Thus, the proposed rates should provide \$6,000,000 in

assessment income and be adequate to meet this year's expenses. If the assessment rates generate less money than is anticipated, the Council and AMS will adjust the budget accordingly.

The major expenditures recommended by the Council for the 2016 - 2017 fiscal year include \$3,850,000 for marketing and promotion, \$900,000 for administration, \$250,000 for reporting and statistics, and \$200,000 for compliance.

These are the first budget of expenditures and assessment rates established under this order. The Council's budget also includes a reserve of \$500,000.

These are initial assessment rates for the order. The order establishes a range of assessment rates that are permissible during the initial four years of the order. Specifically improved varieties shall be initially assessed at \$0.02 to \$0.03 per pound and native, seedling, and substandard pecans shall be initially assessed at \$0.01 to \$0.02 per pound. Prior to arriving at this budget and assessment rates, the Council considered information from various sources, such as the Council's Governance Committee, and its Marketing, Research, and Development

Committee. Alternative expenditure levels were discussed by these groups, based upon the relative value of various activities to the pecan industry.

The Council also considered different assessment levels. Some members expressed concern regarding a \$0.02 assessment on native, seedling, and substandard pecans given the prices of those pecans. Another member suggested the idea of establishing a lower rate for substandard pecans. The need to collect sufficient assessments to fund the start-up costs for the order and the development of a marketing program was also noted. After consideration and discussion, the Council unanimously supported the levels as recommended.

A communication from one of the states in the production area recommending postponing the establishment of an assessment rate was also considered. The Council determined waiting until the next fiscal year to establish assessment rates would be costly in terms of time lost for a program that had been anticipated by the industry to improve its marketing. The Council also recognized that the industry had been notified through multiple outlets of communication of the possible range of assessments in the

order. The Council expressed a preference to establish these rates and begin its work immediately rather than borrowing funds and being limited in its operations until the coming fiscal year. Therefore, these alternatives were rejected, and the Council ultimately determined that 2016 - 2017 expenditures of \$6,000,000 were appropriate, and the recommended assessment rates would generate sufficient revenue to meet its expenses.

A review of historical information and preliminary information pertaining to the upcoming production year indicates the grower price for the 2016 - 2017 season could range between \$1.73 and \$2.31 per pound for improved varieties, and between \$0.88 and \$1.36 per pound for native and seedling pecans. Therefore, the estimated assessment revenue for the 2016 - 2017 crop year as a percentage of total grower revenue could range between 1.3 and 1.7 percent for improved pecans and 1.5 and 2.2 percent for native and seedling pecans.

This action would establish an assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform for all handlers. Some of the additional costs may

be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Council's meeting was widely publicized throughout the pecan industry and all interested persons were invited to attend the meeting and participate in Council deliberations on all issues. Like all Council meetings, the November 17, 2016, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

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 the Office of Management and Budget (OMB) and assigned OMB No. 0581-0291 "Pecans Grown in AL, AR, AZ, CA, FL, GA, KS, LA, MO, MS, NC, NM, OK, SC and TX." No changes in those requirements are necessary as a result of this action. However, the Council is recommending reporting requirements, to include information on pecans received, shipped, exported, or in inventory, which would facilitate

the collection of the assessments. These requirements are being considered under a separate action. Should any changes to the information collection requirements become necessary, they would be submitted to OMB for approval.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large pecan 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.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the

previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. A 30-day period is deemed appropriate because: (1) The 2016 - 2017 fiscal year began on October 1, 2016, and the marketing order requires that the rate of assessment for each fiscal year apply to all pecans handled during such fiscal year; (2) the Council needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; and (3) handlers are aware of this action which was unanimously recommended by the Council at a public meeting. All written comments timely received will be considered before a final determination is made on this matter.

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

Marketing agreements, Pecans, Reporting and recordkeeping requirements.

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

PART 986 - PECANS GROWN IN THE STATES OF ALABAMA, ARKANSAS, ARIZONA, CALIFORNIA, FLORIDA, GEORGIA, KANSAS, LOUISIANA,

MISSOURI, MISSISSIPPI, NORTH CAROLINA, NEW MEXICO,  
OKLAHOMA, SOUTH CAROLINA, AND TEXAS

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

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

2. Amend part 986 by adding Subpart - Assessment Rates consisting of § 986.161 to read as follows:

Subpart - Assessment Rates

**§ 986.161 Assessment rates.**

On and after October 1, 2016, assessment rates of \$0.03 per pound for pecans classified as improved, \$0.02 per pound for pecans classified as native and seedling, and \$0.02 per pound for pecans classified as substandard pecans are established.

Dated: June 6, 2017

Bruce Summers  
Acting Administrator  
Agricultural Marketing Service

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