



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 982

[Doc. No. AO-SC-16-0136; AMS-SC-16-0074; SC16-982-1]

**Hazelnuts Grown in Oregon and Washington; Secretary's
Decision and Referendum Order on Proposed Amendments to
Marketing Order No. 982**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes amendments to Marketing Order No. 982 (order), which regulates the handling of hazelnuts grown in Oregon and Washington, and provides growers with the opportunity to vote in a referendum to determine if they favor the changes. Two amendments are proposed by the Hazelnut Marketing Board (Board), which is responsible for local administration of the order. The proposed amendments would add both the authority to regulate quality for the purpose of pathogen reduction and the authority to establish different regulations for different markets. In addition, the Agricultural Marketing Service (AMS) proposed to make any such changes as may be necessary to the order to conform to any amendment that may result from the public hearing. The proposals would aid in

pathogen reduction and the industry's ability to meet the needs of different market destinations.

DATES: The referendum will be conducted from October 16, 2017, through November 3, 2017. The representative period for the purpose of the referendum is July 1, 2016, through June 30, 2017.

ADDRESSES: Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, Post Office Box 952, Moab, UT 84532; Telephone: (202) 557-4783, Fax: (435) 259-1502, or Julie Santoboni, 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@ams.usda.gov or Julie.Santoboni@ams.usda.gov.

Small businesses may request information on this proceeding 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: Prior documents in this proceeding: Notice of Hearing issued on September 27, 2016, and published in the September 30, 2016, issue of the **Federal Register** (81 FR 67217) and a Recommended Decision issued on June 5, 2017, and published in the June 12, 2017, issue of the **Federal Register** (82 FR 26859).

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 Orders 12866, 13563, and 13175. 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).

Notice of this rulemaking action was provided to tribal governments through the Department of Agriculture's (USDA) Office of Tribal Relations.

Preliminary Statement

The proposed amendments are based on the record of a public hearing held on October 18, 2016, in Wilsonville, Oregon. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900). Notice of this hearing was published in the **Federal Register** September 30, 2016 (81 FR 67217). The notice of hearing contained two proposals submitted by the Board and one submitted by USDA.

The amendments in this decision would:

(1) Add authority to regulate quality for the purpose of pathogen reduction;

(2) Add authority to establish different outgoing quality regulations for different markets; and

(3) Make any such changes as may be necessary to the order to conform to any amendment that may be adopted, or to correct minor inconsistencies and typographical errors.

USDA is recommending one clarifying change to the language in the proposed new paragraph 982.45(c), which would add authority to regulate quality. USDA has determined that the language as presented in the Notice of Hearing was redundant and, therefore, confusing. USDA has

revised the proposed language in the new paragraph § 982.45 (c) so that its intent is more clearly stated. This new language is included in the proposed regulatory text of this decision.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on June 5, 2017, filed with the Hearing Clerk, USDA, a Recommended Decision and Opportunity to File Written Exceptions thereto by July 12, 2017. No exceptions were filed.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Hazelnut Industry Background and Overview

According to the hearing transcript, there are currently over 800 hazelnut growers in the production area. According to National Agricultural Statistics Service (NASS) data presented at the hearing, 2015 grower receipts averaged \$2,800 per ton. With a total 2015 production of 31,000 tons, the farm gate value for hazelnuts in that year totaled \$86.8 million (\$2,800 per ton multiplied by 31,000 tons). Taking the total value of production for hazelnuts and dividing it by the total number of hazelnut growers provides a return per grower of \$108,500. A small grower as defined by the Small Business Administration (SBA) (13 CFR 121.201) is one that grosses less than \$750,000 annually. Therefore, a majority of hazelnut growers are considered small entities under the SBA standards. Record evidence indicates that approximately 98 percent of hazelnut growers are small businesses.

According to the industry, there are 17 hazelnut handlers, four of which handle 80 percent of the crop. While market prices for hazelnuts were not included among the data presented at the hearing, an estimation of handler receipts can be calculated using the 2015 grower receipt value of \$86.8 million. Multiplying \$86.8 million by 80 percent (\$86.8 million x 80 percent = \$69.4 million) and dividing by four indicates that the largest hazelnut

handlers received an estimated \$17.3 million each. Dividing the remaining 20 percent of \$86.8 million, or \$17.4 million, by the remaining 13 handlers, indicates average receipts of \$1.3 million each. A small agricultural service firm is defined by the SBA as one that grosses less than \$7,500,000. Based on the above calculations, a majority of hazelnut handlers are considered small entities under SBA's standards.

The production area regulated under the order covers Oregon and Washington. According to the record, Eastern Filbert Blight has heavily impacted hazelnut production in Washington. One witness stated that there currently is no commercial production in that state. As a result, production data entered into the record pertains almost exclusively to Oregon.

NASS data indicates bearing acres of hazelnuts reached a fifteen-year high during the 2013-2014 crop year at 30,000 acres. Acreage has remained steady, at 30,000 bearing acres for the 2015-2016 crop year. By dividing 30,000 acres by 800 growers, NASS data indicate there are approximately 37.5 acres per grower. Industry testimony estimates that due to new plantings, there are potentially 60,000 bearing acres of hazelnuts, or an estimated 75 bearing acres per hazelnut grower.

During the hearing held October 18, 2016, interested parties were invited to present evidence on the probable regulatory impact of the proposed amendments to the order on small businesses. The evidence presented at the hearing shows that none of the proposed amendments would have a significant economic impact on a substantial number of small agricultural growers or firms.

Material Issue Number 1 - Adding Authority to regulate quality

The proposal described in Material Issue 1 would amend § 982.45 to authorize the Board to establish minimum quality requirements and § 982.46 to allow for certification and inspection to enforce quality regulations.

Presently, the Board is charged with assuring hazelnuts meet grade and size standards. The Board also has the authority to employ volume control. If finalized, this proposal would authorize the Board to propose quality regulations that require a treatment to reduce pathogen load prior to shipping hazelnuts. Witnesses supported this proposal and stated that treatment regulation would not significantly impact the majority of handlers since most handlers already treat product prior to shipment. Witness testimony indicated that the proposed amendment would lower

the likelihood of a product recall incident and the associated negative economic impacts. Witnesses noted that the proposed amendment would give the Board flexibility to ensure consumer confidence in the quality of hazelnuts.

It is determined that the additional costs incurred to regulate quality would be greatly outweighed by the increased flexibility for the industry to respond to changing quality regulation and food safety. There is expected to be no financial impact on growers. Mandatory treatment requirements should not cause dramatic increases in handler operating costs, as most already voluntarily treat hazelnuts. Handlers bear the direct cost associated with installing and operating treatment equipment or contract out the treatment of product to a third party.

According to the industry, most domestic hazelnut product is shipped to California for treatment with propylene oxide. The cost to ship and treat product is estimated to be 10 cents per pound or less. Using 2014-2015 shipment data, at 10 cents per pound, the cost to ship and treat the 6.5 million pounds of Oregon hazelnuts shipped to the domestic market is not expected to exceed \$650,000. Shipments to foreign markets typically do not require treatment and therefore have no associated treatment costs. Large handlers who wish to install

treatment equipment may face costs ranging from \$100,000 to \$5,000,000 depending on the treatment system.

One witness noted that mandatory treatment would benefit the industry by addressing the free-rider situation in which handlers who do not treat the product benefit from consumer confidence while incurring additional risks. Handlers that do treat product absorb all costs of treatment while building the reputation of the industry.

The record shows that the proposal to add authority to establish different outgoing quality requirements for different markets would, in itself, have no economic impact on growers or handlers of any size. Regulations implemented under that authority could impose additional costs on handlers required to comply with them. However, witnesses testified that establishing mandatory regulations for different markets could increase the industry's credibility and reduce the risk that shipments of substandard product could jeopardize the entire industry's reputation. Record evidence shows that any additional costs are likely to be offset by the benefits of complying with those requirements.

For the reasons described above, it is determined that the costs attributed to the above-proposed changes are minimal; therefore, the proposal would not have a

significant economic impact on a substantial number of small entities.

Material Issue Number 2 - Adding Authority for Different Market Regulations

The proposal described in Material Issue 2 would allow for the establishment of different outgoing quality regulations for different markets.

Witnesses testified that allowing different regulations for different markets would likely lower the costs to handlers and prevent multiple treatments of hazelnuts while preserving hazelnut quality.

Certain buyers of hazelnuts do not require prior treatment and perform their own kill-step processes such as roasting, baking or pasteurization. A witness stated that two of the largest buyers of hazelnuts, Diamond of California and Kraft Foods, Inc. choose to treat product after arrival.

Shipments to foreign markets often do not require treatment and are treated after exportation. Testimony indicated that during the 2014-2015 season, of the 9.5 million pounds of kernel hazelnuts shipped to Canada, almost all were further treated by the customers. In conjunction with the proposed quality authority discussed in Material Issue 1, specific regulation could be developed

to exempt exported product, subject to further pathogen-reduction treatment in the country of purchase, from mandatory treatment. In Canada, the purchaser, not the handler, is responsible for providing pathogen reduction treatment. Requiring handlers to treat hazelnuts before export would be duplicative in cost and treatment. At 10 cents per pound, it is estimated that on sales to Canada alone, handler savings could reach as much as \$950,000 (9.5 million pounds of shipments multiplied by 10 cents per pound), if exempted from the mandatory treatment requirement. Hazelnuts shipped to China are typically processed after arrival and also do not necessitate treatment by handlers in the United States.

China is a major export market for inshell hazelnuts. According to the hearing transcript, from 2011-2015, 54 percent of inshell hazelnuts were exported. The total value of inshell exports was approximately \$41,340,780, if 54 percent is multiplied by the \$76,557,000 total hazelnut exports. In 2015-2016 China received 90 percent of U.S. inshell hazelnut exports. The 2015-2016 value of U.S. hazelnut exports to China is estimated to be approximately \$37,206,702, or 90 percent of the value of all U.S. inshell exports. Oregon hazelnuts compete primarily with Turkish (kernel) and Chilean (inshell) hazelnuts. Testimony

indicates that multiple treatments of hazelnuts would likely affect the quality of hazelnuts. Allowing for different regulations for different markets would help Oregon and Washington hazelnuts compete in foreign markets and maintain U.S. market share. It is estimated that 80 to 90 percent of product is already being treated, and thus, the cost has already been incorporated into the price purchasers pay.

One witness noted that shipments to the European Union may require different regulations since this market prefers certain treatment processes.

The record shows that the proposal to add authority to establish different outgoing quality requirements for different markets would, in itself, have no economic impact on growers or handlers of any size. Regulations implemented under that authority could potentially impose additional costs on handlers required to comply with them.

For the reasons described above, it is determined that the benefits of adding authority for different market regulations to the order would outweigh the potential costs of future implementation.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are intended to improve the

operation and administration of the order and to assist in the marketing of hazelnuts.

Board meetings regarding these proposals, as well as the hearing date and location, were widely publicized throughout the Oregon and Washington hazelnut industry, and all interested persons were invited to attend the meetings and the hearing to participate in Board deliberations on all issues. All Board meetings and the hearing were public forums, and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory impacts of this action on small businesses.

Paperwork Reduction Act

Current information collection requirements for Part 982 are approved by OMB, under OMB Number 0581-0189 - "Generic OMB Fruit Crops." No changes are anticipated in these requirements as a result of this proceeding. Should any such changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the Government Paperwork Elimination Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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.

Civil Justice Reform

The amendments to the order proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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.

Findings and Conclusions

The findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the June 12, 2017, issue of the **Federal Register** (82 FR 26859) 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 Hazelnuts Grown in Oregon and Washington." 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 decision be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400-407) to determine whether the annexed order amending the order regulating the handling of hazelnuts grown in Oregon and Washington is approved or favored by growers, as defined under the terms of the order, who during the representative period were engaged in the production of hazelnuts in the production area.

The representative period for the conduct of such referendum is hereby determined to be July 1, 2016, through June 30, 2017.

The agents of the Secretary to conduct such referendum are hereby designated to be Dale Novotny and Gary Olson, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1220 SW Third Avenue, Suite 305, Portland, Oregon 97204; telephone: (503)326-2724; or fax: (503) 326-7440 or E-mail: DaleJ.Novotny@ams.usda.gov or GaryD.Olson@ams.usda.gov, respectively.

**Order Amending the Order Regulating the Handling of
Hazelnuts Grown in Oregon and Washington¹**

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations that 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.

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

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon proposed further amendment of Marketing Order No. 982, regulating the handling of hazelnuts grown in Oregon and Washington.

Upon the basis of the record, it is found that:

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.

(1) The marketing 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 marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of hazelnuts grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

(3) The marketing order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area that 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 marketing order, as amended, and as hereby proposed to be further 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 hazelnuts grown in Oregon and Washington; and

(5) All handling of hazelnuts grown in the production area as defined in the marketing 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 hazelnuts grown in Oregon and Washington 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 Recommended Decision issued on June 5, 2017, and published in the June 12, 2017, issue of the **Federal Register** (82 FR 26859) 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 982

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

Recommended Further Amendment of the Marketing Order

For the reasons set out in the preamble, 7 CFR part 989 is proposed to be amended as follows:

PART 982 - HAZELNUTS GROWN IN OREGON AND WASHINGTON

1. The authority citation for 7 CFR part 982 continues to read as follows:

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

SUBPART A – [AMENDED]

2. Designate the subpart labeled “Order Regulating Handling” as subpart A.

3. Revise § 982.12 to read as follows:

§ 982.12 Merchantable hazelnuts.

Merchantable hazelnuts means inshell hazelnuts that meet the grade, size, and quality regulations in effect pursuant to § 982.45 and are likely to be available for handling as inshell hazelnuts.

4. Amend § 982.40 by revising paragraph (d) to read as follows:

§ 982.40 Marketing policy and volume regulation.

(d) Grade, size, and quality regulations. Prior to September 20, the Board may consider grade, size, and quality regulations in effect and may recommend modifications thereof to the Secretary.

5. Revise the undesignated center heading prior to § 982.45 to read as follows:

Grade, Size, and Quality Regulation

6. In § 982.45:

- a. Revise the section heading; and
- b. Add new paragraphs (c) and (d).

The revisions to read as follows:

§ 982.45 Establishment of grade, size, and quality regulations.

(c) Quality regulations. For any marketing year, the Board may establish, with the approval of the Secretary, such minimum quality and inspection requirements applicable to hazelnuts to facilitate the reduction of pathogens as will contribute to orderly marketing or will be in the public interest. In such marketing year, no handler shall handle hazelnuts unless they meet applicable minimum quality and inspection requirements as evidenced by certification acceptable to the Board.

(d) Different regulations for different markets. The Board may, with the approval of the Secretary, recommend different outgoing quality requirements for different markets. The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this provision.

7. Amend § 982.46 by adding paragraph (d) to read as follows:

§ 982.46 Inspection and certification.

(d) Whenever quality regulations are in effect pursuant to § 982.45, each handler shall certify that all product to be handled or credited in satisfaction of a restricted obligation meets the quality regulations as prescribed.

SUBPART B – Grade and Size Requirements

8. Designate the subpart labeled “Grade and Size Regulation” as subpart B and revise the heading as shown above.

SUBPART C – [AMENDED]

9. Designate the subpart labeled “Free and Restricted Percentages” as subpart C.

SUBPART D – [AMENDED]

10. Designate the subpart labeled “Assessment Rates” as subpart D.

SUBPART E – Administrative Requirements

11. Designate the subpart labeled “Administrative Rules and Regulations” as subpart E and revise the heading as shown above.

Dated: September 14, 2017.

Bruce Summers,

Acting Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

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