



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; Order Amending Marketing Order No. 982.

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends Marketing Order No. 982 (Order), which regulates the handling of hazelnuts grown in Oregon and Washington. The amendments were proposed by the Hazelnut Marketing Board (Board) and add the authority to regulate quality for the purpose of pathogen reduction and to establish different regulations for different markets. This final rule also makes administrative revisions to subpart headings to bring the language into conformance with the Office of Federal Register requirements.

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

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 Michelle
Sharrow, 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
Michelle.Sharrow@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); a Recommended Decision
issued on June 5, 2017, and published in the June 12, 2017,
issue of the *Federal Register* (82 FR 26859); and a
Secretary's Decision and Referendum Order issued September
14, 2017, and published in the September 28, 2017, issue of
the *Federal Register* (82 FR 45208).

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 the Office of Management and Budget's (OMB) 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

This action finalizes an amendment to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 982, as amended (7 CFR part 982), regulating the handling of hazelnuts grown in Oregon and Washington. Part 982 (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

final rule was formulated 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 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.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (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.

A Secretary's Decision and Referendum Order was published in the Federal Register on September 28, 2017 (82 FR 45208), directing that a referendum be conducted during the period of October 16 through November 3, 2017, among eligible Oregon and Washington hazelnut growers to determine whether they favored the proposed amendments to the Order. To become effective, the amendments had to be approved by at least two-thirds of those growers voting, or

by voters representing at least two-thirds of the volume of hazelnuts represented by voters voting in the referendum. The amendment adding authority to regulate quality was favored by 69.5 percent of the growers voting in the referendum, representing 71.6 percent of the total volume of hazelnuts produced by those voting. The amendment adding authority to establish different regulations for different markets was favored by 67.9 percent of the growers voting in the referendum, representing 69.5 percent of the total volume of hazelnuts produced by those voting.

The amendments favored by voters and included in this final order authorize the regulation of quality for the purpose of pathogen reduction and the establishment of different outgoing quality regulations for different markets.

USDA also made such changes as were necessary to the Order so that all of the Order's provisions conform to the effectuated amendments. USDA recommended one clarifying change to the language in the new paragraph 982.45(c), which adds authority to regulate quality. USDA determined that the language as presented in the Notice of Hearing was redundant and, therefore, confusing. USDA revised the language in the new paragraph § 982.45(c) so that its

intent is more clearly stated. This language is included in the regulatory text of this Order.

The amended marketing agreement was subsequently mailed to all hazelnut handlers in the production area for their approval. The marketing agreement was not approved by handlers representing more than 50 percent of the volume of hazelnuts handled by all handlers during the representative period of July 1, 2016, through June 30, 2017. Consequently, no companion handler agreement will be established.

Small Business Consideration

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 having annual receipts of 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 multiplied by 80 percent equals \$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 having annual receipts of less than \$7,500,000. Based on the above calculations, a majority of hazelnut handlers are considered small entities under the 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 is currently 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 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 amendments to the Order on small businesses. The evidence presented at the hearing shows that none of the amendments would have a significant economic impact on a substantial number of small agricultural growers or firms.

Material Issues

This action amends the Order to authorize the regulation of quality for the purpose of pathogen reduction and the establishment of different outgoing quality regulations for different markets. These authorities will aid in pathogen reduction in hazelnuts and increase the industry's ability to meet the needs of different market destinations.

During the hearing held on October 18, 2016, interested persons were invited to present evidence on the probable regulatory and informational impact of the amendments to the Order on small businesses. The evidence presented at the hearing shows that the amendments would

have no burdensome effects on small agricultural producers or firms.

In discussing the impacts of the amendments on growers and handlers, record evidence indicates that the authority to establish quality regulations that require hazelnuts to be treated prior to shipment to reduce pathogen load would not significantly impact the majority of handlers. Regulations implemented under that authority could impose additional costs on handlers required to comply with them. However, witnesses testified that establishing mandatory treatment regulations 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.

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. While regulations implemented under that authority could potentially impose additional costs on handlers required to comply with them, the record indicates the benefits of such regulation would

outweigh the potential future costs. The record indicates that allowing different regulations for different markets would likely lower the costs to handlers and prevent multiple treatments of hazelnuts while preserving hazelnut quality.

This final rule also makes administrative revisions to subpart headings to bring the language into conformance with the Office of Federal Register requirements. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. These amendments are intended to improve the operation and administration of the Order and to assist in the marketing of hazelnuts.

Paperwork Reduction Act

Current information collection requirements for Part 982 are approved by OMB, under 0581-0178 "Vegetable and Specialty 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 stated herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. The amendments do not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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.

**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

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.

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

(3) The Order, as amended, and as hereby 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 Order, as amended, and as hereby 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 Order 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) Handlers (excluding cooperative associations of growers who are not engaged in processing, distributing, or shipping hazelnuts covered by the order as hereby amended) who, during the period July 1, 2016, through June 30, 2017, handled 50 percent or more of the volume of such hazelnuts covered by said order, as hereby amended, have not signed an amended marketing agreement;

(2) The issuance of this amendatory Order, further amending the aforesaid Order, was favored or approved by at least two-thirds of the growers who participated in a referendum on the question of approval and who, during the period of July 1, 2016, through June 30, 2017 (which has

been deemed to be a representative period), have been engaged within the production area in the production of such hazelnuts, such growers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum; and

(3) The issuance of this amendatory Order advances the interests of growers of hazelnuts 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 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 amended as follows:

The provisions of the amendments to the Order contained in the Secretary's Decision issued on September 14, 2017, and published in the September 28, 2017, issue of the *Federal Register* (82 FR 45208) 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.

For the reasons set out in the preamble, 7 CFR part 982 is amended as follows:

PART 982 - HAZELNUTS GROWN IN OREGON AND WASHINGTON

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

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

[Subpart Redesignated as Subpart A]

2. Redesignate the "Subpart-Order Regulating Handling" as "Subpart A-Order Regulating Handling".

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, revise the section heading and add paragraphs (c) and (d) 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 Redesignated as Subpart B and Amended]

8. Redesignate "Subpart-Grade and Size Regulation" as subpart B and revise the heading to read as follows:

Subpart B - Grade and Size Requirements

[Subpart Redesignated as Subpart C]

9. Redesignate "Subpart-Free and Restricted Percentages" as "Subpart C-Free and Restricted Percentages".

[Subpart Redesignated as Subpart D]

10. Redesignate "Subpart-Assessment Rates" as "Subpart D-Assessment Rates".

[Subpart Redesignated as Subpart E and Amended]

11. Redesignate "Subpart-Administrative Rules and Regulations" as subpart E and revise the heading to read as follows:

Subpart E - Administrative Requirements

Dated: October 15, 2018

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

[FR Doc. 2018-22762 Filed: 10/18/2018 8:45 am; Publication Date: 10/19/2018]