

Rules and Regulations

Federal Register

Vol. 70, No. 231

Friday, December 2, 2005

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Docket No. FV05-984-1 FIR]

Walnuts Grown in California; Suspension of Provision Regarding Eligibility of Walnut Marketing Board Members

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule suspending the provision of the walnut marketing order (order) pertaining to eligibility of members to serve on the Walnut Marketing Board (Board). The order regulates the handling of walnuts grown in California, and the Board is responsible for local administration of the order. This action is an interim measure that addresses a change in industry structure affecting cooperative marketing association related positions. This allows the Board to continue to represent the industry's interests while the order is amended to reflect the change in industry structure. The Board unanimously recommended a suspension action by mail balloting in early July 2005.

EFFECTIVE DATE: January 3, 2006.

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Senior Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (559) 487-5901, Fax: (559) 487-5906; or Kathleen M. Finn, Formal Rulemaking Team Leader, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237;

telephone: (202) 720-2491, or Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 984, both as amended (7 CFR part 984), hereinafter referred to as the "order", regulating the handling of walnuts grown in the State of California. The marketing agreement and order are effective pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will 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 not later than 20 days after the date of the entry of the ruling.

This rule continues in effect an action that suspended a provision of the order pertaining to the eligibility of members to serve on the Board. The order regulates the handling of walnuts grown in California, and the Board is

responsible for local administration of the order. This action is an interim measure that addresses a change in the industry structure affecting cooperative marketing association related positions. This allows the Board to continue to represent the industry's interests while the order is amended to reflect the change in industry structure. The Board unanimously recommended a suspension action by mail balloting in early July 2005.

Section 984.35 of the order establishes the Board as the administrative body appointed by USDA to administer the order. That section also specifies composition of the Board, and allocates seats to cooperative and independent growers and handlers. The Board is comprised of ten members and ten alternate members. Two members represent handlers that are cooperative marketing associations of growers (cooperative handlers), and two members represent growers who market their walnuts through cooperative handlers. Two members represent handlers that are not cooperative marketing associations of growers (independent handlers), and two members represent growers that market their walnuts through independent handlers. One member represents growers that market their walnuts through either cooperative or independent handlers, whichever category handled over fifty percent of the walnuts handled by all handlers in the industry in the immediately preceding two marketing years. In recent years, this Board position has been allocated to the independent category. One member represents neither growers nor handlers (public member).

Prior to implementation of the interim final rule, § 984.38 of the order provided, in part, that no person shall be selected or continue to serve as a member or alternate member of the Board unless that person is engaged in the business of the group he or she was nominated to represent.

A change recently occurred in the walnut industry that impacts composition of the Board. A large cooperative marketing association recently converted to a publicly held corporation. The former cooperative association held two grower and two handler positions on the Board.

In order to address this change, § 984.38 of the order needed to be suspended to allow a representative Board to continue in place while the order is amended to reflect the new industry structure. Therefore, the Board recommended through a mail ballot vote in early July 2005, to suspend the order provision. USDA reviewed the recommendation and determined that suspending § 984.38 of the order regarding eligibility requirements of Board members would accomplish that objective. As previously discussed, § 984.38 provided that no person shall be selected or continue to serve as a member or alternate member of the Board unless that person is engaged in the business of the group he or she was nominated to represent.

If the eligibility requirements were not suspended, four of the Board members that represented the cooperative would be ineligible to serve on the Board. However, these members continue to represent a significant portion of the industry. Suspending the order provision regarding eligibility of Board members allows a complete Board to remain in place. This action enables a Board that is representative of the walnut industry to continue to administer the order without disruption while the order is being amended to reflect changes in the industry structure.

This action continues to suspend § 984.38 of the order entitled "Eligibility." This action is in the best interest of handlers and growers in the California walnut industry as the industry transitions through a structural change.

Final Regulatory Flexibility Act

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule 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 business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 5,000 producers of walnuts in the production area and 50 walnut handlers subject to regulation under the marketing order. Small agricultural service firms are defined as those whose annual receipts

are less than \$6,000,000 and small agricultural producers have been defined by the Small Business Administration as those having annual receipts less than \$750,000 (13 CFR 121.201).

Current industry information from the Board indicates that 35 of the 50 walnut handlers, or 70 percent, shipped less than \$6,000,000 worth of walnuts and could be considered small businesses by the Small Business Administration. In addition, it is estimated that less than 1 percent of walnut producers have annual receipts in excess of \$750,000. Based on the foregoing, the majority of walnut producers and handlers regulated under the marketing order may be classified as small entities.

This rule continues in effect an action that suspended provisions of the order pertaining to eligibility of members to serve on the Board. The order regulates the handling of walnuts grown in California, and the Board is responsible for local administration of the order. Specifically, this action suspends § 984.38 of the order entitled "Eligibility."

Due to structural changes in the industry, the order provisions regarding Board composition no longer accurately reflect the industry composition. If the eligibility requirements were not suspended, four of the Board members that represented the cooperative become ineligible to serve on the Board. However, these members continue to represent a significant portion of the industry. Suspending the order provision regarding eligibility of Board members allows a complete Board to remain in place. This action enables a Board that still represents the walnut industry to continue to administer the order without disruption while the order is being amended to reflect changes in the industry structure. The Board unanimously recommended suspending order language by mail balloting in early July 2005.

Alternatives to this action were considered. One alternative was to remove the former cooperative members from the Board, which would result in a 6-member Board. This was not considered a preferred option because it would limit the size of the Board.

This rule continues to suspend order language pertaining to membership eligibility on the Board. Accordingly, this action does not impose any additional reporting or recordkeeping requirements, or any other costs, on either small or large walnut 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. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

An interim final rule concerning this action was published in the **Federal Register** on August 26, 2005 (70 FR 50151). Copies of the rule were also mailed or sent via facsimile to all Walnut handlers. In addition, the rule was made available through the Internet by USDA and the Office of the **Federal Register**. That rule provided for a 60-day comment period which ended October 25, 2005. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that the order language being suspended, as hereinafter set forth, no longer tends to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 984

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

■ For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ Accordingly, the interim final rule amending 7 CFR part 984 which was published at 70 FR 50151 on August 26, 2005, is adopted as a final rule without change.

Dated: November 22, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05-23552 Filed 12-1-05; 8:45 am]

BILLING CODE 3410-02-P