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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 981

[Docket No. AO-214-A7; AMS-FV-07-0050; FV07-981-1]

#### Almonds Grown in California; Order Amending Marketing Order No. 981

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing order for almonds grown in California. The amendments were proposed by the Almond Board of California (Board), which is responsible for local administration of the order. The amendments will authorize the establishment of different outgoing quality requirements for different markets and authorize the establishment of bulk container marking and labeling requirements. The amendments are intended to provide additional flexibility in administering the quality control provisions of the order and provide the industry with additional tools for the marketing of almonds.

**DATES:** This rule is effective August 5, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102-B, Fresno, California 93721; Telephone: (559) 487-5110, Fax: (559) 487-5906, or E-mail: [Martin.Engeler@usda.gov](mailto:Martin.Engeler@usda.gov); or Laurel May, 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: [Laurel.May@usda.gov](mailto:Laurel.May@usda.gov).

Small businesses may request information on this proceeding 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](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on June 29, 2007, and published in the July 6, 2007, issue of the *Federal Register* (72 FR 36900); a Recommended Decision issued on December 21, 2007, and published in the December 28, 2007, issue of the *Federal Register* (72 FR 73671); and a Secretary's Decision and Referendum Order issued on February 27, 2008, and published in the March 3, 2008, issue of the *Federal Register* (73 FR 11360).

This action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

#### Preliminary Statement

This final rule was formulated on the record of a public hearing held on August 2, 2007, in Modesto, California. Notice of this hearing was issued on June 29, 2007, and published in the July 6, 2007, issue of the *Federal Register* (72 FR 36900). The hearing was held to consider the proposed amendment of Marketing Order No. 981, hereinafter referred to as the "order".

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 marketing orders (7 CFR part 900).

The Notice of Hearing contained two amendment proposals submitted by the Almond Board of California (Board), which is responsible for local administration of the order. Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on December 21, 2007, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by January 17, 2008. No exceptions were filed.

A Secretary's Decision and Referendum Order was issued on

February 27, 2008, directing that a referendum be conducted during the period March 24 through April 11, 2008, among almond 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 producers voting or by voters representing at least two-thirds of the volume of almonds represented by voters in the referendum. Each of the two proposed amendments were favored by at least 80 percent of the voters voting in the referendum.

The amendments approved by voters and included in this order will:

1. Authorize the establishment of different outgoing almond quality requirements for different markets; and
2. Authorize the establishment of container marking and labeling requirements.

The U.S. Department of Agriculture (USDA) also proposed to allow such changes as may be necessary to the order so that all of the order's provisions conform to the effectuated amendments. None were deemed necessary.

An amended marketing agreement was subsequently provided to all almond handlers in the production area for their approval. The marketing agreement was not approved by handlers representing at least 50 percent of the volume of almonds handled by all handlers during the representative period of August 1, 2006, through July 31, 2007.

#### Small Business Consideration

Pursuant to the 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 business 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.

Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual

receipts of less than \$6,500,000. Small agricultural producers have been defined as those with annual receipts of less than \$750,000.

There are approximately 104 handlers of almonds subject to regulation under the order and approximately 6,000 producers of almonds in the regulated area. Information provided at the hearing indicates that approximately 50 percent of the handlers would be considered small agricultural service firms. According to data reported by the National Agricultural Statistics Service (NASS), the two-year average crop value for 2005–06 and 2006–07 was \$2.283 billion. Dividing that average by 6,000 producers yields average estimated producer revenues of \$380,500, which suggests that the majority of almond producers would also be considered small entities according to the SBA's definition.

The order regulates the handling of almonds grown in the state of California. The California almond bearing acreage increased nearly 40 percent between 1996 and 2006, from 418,000 to 585,000 acres. Approximately 1.115 billion pounds (shelled basis) of almonds were produced during the 2006–07 season. Bearing acreage for the 2007–08 season is estimated to be 615,000 acres. NASS has forecasted that the 2007–08 crop will reach 1.330 billion pounds (shelled basis). More than two thirds of California's almond crop is exported to approximately 90 countries worldwide, and comprises nearly 80 percent of the world's almond supply.

Under the order, incoming and outgoing quality regulations are established, statistical information is collected, production research projects are conducted, and marketing research and generic promotion programs are sponsored. Program activities administered by the Board are designed to support large and small almond producers and handlers. The 10-member Board is comprised of both producer and handler representatives from the production area. Board meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Board deliberations, and each Board member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Board's Food Quality and Safety Committee discussed the need for amendments to the order at meetings held on May 12, 2005; July 20, 2005; and November 1, 2006. The Board approved language for two proposed amendments to the order at their meeting on November 28, 2006. During

a conference call on February 27, 2007, the Board confirmed that the two amendments should be proposed to USDA. The views of all participants were considered throughout this process.

In addition, the hearing to receive evidence on the proposed changes was open to the public and all interested parties were invited and encouraged to participate and provide their views.

The amendments are intended to provide the Board and the industry with additional flexibility in the marketing of California almonds. Record evidence indicates that the amendments are intended to benefit all producers and handlers under the order, regardless of size. There are no cost implications for handlers or growers from adding the new order authorities. Costs of implementation will be incurred only if specific additional requirements are established following future informal rulemaking. All grower and handler witnesses supported the amendments and commented on the implications of implementing specific requirements in the future. In that context, witnesses stated that they expected the benefits to be substantial and the costs of any future requirements to be minimal.

A description of the amendments and their anticipated economic impact on small and large entities is discussed below.

#### **Proposal 1—Adding the Authority To Establish Different Outgoing Quality Requirements for Different Markets**

The record shows that the amendment adding authority to establish different outgoing quality requirements for different markets will, in itself, have no economic impact on producers 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.

Witnesses cited decreased delays and demurrage charges, as well as fewer rejected loads and increased customer confidence, as expected benefits. Recently, almonds have been rejected in the EU due to aflatoxin levels exceeding its importing tolerances. Information provided at the hearing shows that the rejection of a 44,000 pound container of almonds in the EU costs about \$10,000,

or 22.7 cents per pound. The cost includes demurrage for unanticipated delays at port, warehousing product while awaiting official import testing results, shipping rejected almonds back to the U.S., and shipping a replacement container back to the EU.

To reduce the risk of rejections, the California almond industry developed a voluntary aflatoxin testing protocol. Witnesses estimated that the cost of the pre-export testing, including the value of the sample, analytical fees, courier fees, and sampling labor is less than 2 cents per pound, which is less than 10 percent of the cost associated with a rejection. Proponents testified that if a requirement that all almonds destined for the EU be tested prior to shipment was established under authority provided by the order amendment, handlers would incur the cost of testing, but those costs would be expected to be more than offset by the reduced risk of rejections.

It's likely that most handlers are already complying with their customers' specific market requirements on a voluntary basis as a part of doing business, but witnesses explained that mandatory requirements lend credibility to the entire industry. In addition, such requirements could reduce the risk that one shipment of substandard product would jeopardize the entire industry's reputation.

Currently, outgoing quality requirements established under the order apply to all handler entities regardless of size. If regulations are established pursuant to this amendment, distribution of any increased costs between small and large entities would depend on the requirements established for the markets to which individual handlers shipped their almonds as well as the volume of almonds shipped to those markets. But increases in cost would be equitable to all entities because requirements for each market would be imposed uniformly on all handlers shipping to that market.

Witnesses explained that almonds are used in many different ways by the various markets. In Europe, almonds are widely used as marzipan and ingredients for baked goods, candy, and other dishes. In India and the Middle East, almonds are presented as gifts at holidays and weddings, and play a part in other cultural traditions. India imports large quantities of inshell almonds that are then processed by hand. The wide range of uses leads to a similarly wide array of customer requirements.

According to record testimony, handlers adapt their export methods to

satisfy customer requirements. One witness explained that it is often difficult for smaller handlers to stay informed of rapidly changing import regulations. The witness stated that small handlers in particular would benefit from the authority to establish different requirements for different markets by avoiding costly mistakes that could be associated with not understanding various market and import requirements. If regulations are established under this amendment, the Board will provide information about updated requirements to the industry.

Finally, one witness explained that having the ability under the order to establish different outgoing quality requirements for different markets will not restrict handlers' choices regarding which markets to supply. Rather, the provision will ensure that the important standards that differentiate markets will be consistently met by all handlers shipping to those markets.

#### **Proposal 2—Adding the Authority To Establish Container Labeling and Marking Requirements**

The second amendment adds § 981.43 to the order to provide general authority to establish container marking and labeling requirements. This amendment will allow the Board, through the informal rulemaking process, to recommend and establish uniform container marking and labeling regulations in response to evolving market requirements. Under previous order provisions, there is only very limited authority for container marking and labeling requirements.

Witnesses testified that the lack of this authority has hindered them from adapting quickly and appropriately to recent market situations. In one case described at the hearing, the industry was unable to implement container marking or labeling following recalls for possible *Salmonella* contamination. Witnesses stated that customer confidence in almond quality could have been reinforced if the necessary authority to establish marking and labeling requirements had been available. Such authority would have allowed the industry to prescribe labeling to clearly indicate which almonds had been treated to reduce risk of contamination.

The amendment will allow the industry to respond to evolving market needs as they develop by establishing uniform and consistent marking and labeling requirements. According to proponents, the ability to communicate important product information to customers in a uniform and consistent manner will be essential as the industry

strives to maintain its position in the expanding global marketplace.

If regulations are implemented pursuant to this amendment, costs of complying with any regulations established thereunder will not be disproportionate to small businesses. Witnesses testified that applying labels and marks to almond containers is currently a common practice, and industry handlers already have container marking processes and equipment in place. Therefore, the costs associated with the addition of uniform marking or labeling requirements will be minimal for both small and large entities. The record shows that any costs will likely be offset by the benefits derived from being more responsive to market demands.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence indicates that the amendments are intended to benefit all producers and handlers under the order, regardless of size. Further, the record shows that the costs associated with implementing regulations would be outweighed by the benefits expected to accrue to the California almond industry.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. These amendments are designed to enhance the administration and functioning of the order to the benefit the California almond industry.

#### **Paperwork Reduction Act**

Information collection requirements for part 981 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581-0178, Vegetable and Specialty Crops. Implementation of these amendments will not trigger any changes to those requirements. Should any such changes become necessary in the future, they will 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 Marketing Order 981 stated herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. The amendments will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with an amendment.

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 the entry of the ruling.

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

##### *Findings and Determinations*

The findings and determinations set forth hereinafter are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the order; and all of 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 the proposed amendments to Marketing Order No. 981 (7 CFR part 981), regulating the handling of almonds grown in California.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing order, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby further amended, regulates the handling of almonds 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 marketing order upon which hearings have been held;

(3) The marketing order, 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 orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing 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 almonds grown in the production area; and

(5) All handling of almonds grown in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Additional Findings.*

It is necessary and in the public interest to make these amendments effective not later than one day after publication in the **Federal Register**. A later effective date would unnecessarily delay implementation of the new amendments. These amendments should be in place as soon as possible as the new crop year begins August 1. Making the effective date one day after publication in the **Federal Register** will allow the industry to consider regulations implementing the new order authorities at the beginning of the new crop year, which would be beneficial to the industry.

(c) *Determinations.* It is hereby determined that:

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping almonds covered by the order as hereby amended) who, during the period August 1, 2006, through July 31, 2007, handled 50 percent or more of the volume of such almonds covered by said order, as hereby amended, have not signed an amended marketing agreement; and,

(2) The issuance of this amendatory order, further amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of August 1, 2006, through July 31, 2007 (which has been deemed to be a representative period), have been engaged within the production area in the production of such almonds, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum; and

(3) In the absence of a signed marketing agreement, the issuance of this amendatory order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers of almonds in the production area.

### Order Relative to Handling of Almonds Grown in California

*It is therefore ordered*, that on and after the effective dates 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 amended as follows:

The provisions of the proposed order further amending the order contained in the Secretary's Decision issued by the Administrator on February 27, 2008, and published in the **Federal Register** on March 3, 2008 (73 FR 11360), shall be and are the terms and provisions of this order amending the order and set forth in full herein.

#### List of Subjects in 7 CFR Part 981

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

#### PART 981—ALMONDS GROWN IN CALIFORNIA

■ For the reasons set forth in the preamble, Title 7 of Chapter XI of the Code of Federal Regulations is amended by amending part 981 to read as follows:

■ 1. The authority citation for 7 CFR part 981 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Amend paragraph (b) of § 981.42 by adding the following sentence before the last sentence to read as follows:

**§ 981.42 Quality control.**

\* \* \* \* \*

(b) \* \* \* The Board may, with the approval of the Secretary, establish different outgoing quality requirements for different markets. \* \* \*

■ 3. Add a new § 981.43 to read as follows:

**§ 981.43 Marking or labeling of containers.**

The Board may, with the approval of the Secretary, establish regulations to require handlers to mark or label their containers that are used in packaging or handling of bulk almonds. For purposes of this section, *container* means a box, bin, bag, carton, or any other type of receptacle used in the packaging or handling of bulk almonds.

Dated: July 30, 2008.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–17827 Filed 8–1–08; 8:45 am]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 25

[Docket No. NM390; Special Conditions No. 25–372–SC]

#### Special Conditions: Embraer S.A., Model ERJ 190–100 ECJ Airplane; Fire Protection

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions.

**SUMMARY:** These special conditions are issued for the Embraer S.A., Model ERJ 190–100 ECJ airplane. This airplane has a novel or unusual design feature, in that it features multiple electrical/electronic equipment bays that are located throughout the airplane. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** *Effective Date:* September 3, 2008.

**FOR FURTHER INFORMATION CONTACT:** Stephen Happenny, FAA, Propulsion/Mechanical Branch, ANM–112, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone 425–227–2147; facsimile 425–227–1232.

#### SUPPLEMENTARY INFORMATION:

##### Background

Embraer S.A., made the original application for certification of the Model ERJ 190 on May 20, 1999. The Embraer application includes six different models, the initial variant being designated as the Model ERJ 190–100. The application was submitted concurrently with that for the Model ERJ 170–100, which received an FAA type certificate (TC) on February 20, 2004. Although the applications were submitted as two distinct TCs, the airplanes share the same conceptual design and general configuration. On July 2, 2003, Embraer S.A., submitted a request for an extension of its original application for the Model ERJ 190 series, with a new application date of May 30, 2001, for establishing the type certification basis. The FAA certification basis was adjusted to reflect this new application date. In addition, Embraer has elected to voluntarily