

# Rules and Regulations

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## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Parts 1201 and 1210

#### MSPB Practices and Procedures; Department of Homeland Security Human Resources Management System

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Final rule.

**SUMMARY:** The Merit Systems Protection Board (“MSPB”) has decided to remove its DHS-specific regulations that concern the processing and adjudication of appeals filed under the DHS Human Resources Management System to conform with Department of Homeland Security regulations.

**DATES:** This rule is effective on March 4, 2009.

**FOR FURTHER INFORMATION CONTACT:** William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200, fax: (202) 653-7130 or e-mail: [mspb@mspb.gov](mailto:mspb@mspb.gov).

**SUPPLEMENTARY INFORMATION:** On February 1, 2005, the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) jointly issued final regulations at 5 CFR Part 9701 establishing the DHS Human Resources Management System. 70 FR 5272. Thereafter, pursuant to 5 CFR 9701.102(b)(2), DHS phased in coverage to certain employees under Subpart F (Adverse Actions) and G (Appeals).

On October 5, 2007, MSPB published an interim rule revising its regulations to clarify the procedures applicable to MSPB processing and adjudication of cases arising under Subparts F and G of the DHS Human Resources Management System. 72 FR 56883. Thereafter, on April 18, 2008, the MSPB published a final rule further revising its regulations

applicable to the processing and adjudication of such cases. 73 FR 21019.

Effective October 1, 2008, the DHS rescinded application of 5 CFR 9701, Subparts A–G, of the DHS Human Resources Management System. 73 FR 58435. DHS took this action pursuant to the Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009, Public Law 110–329 (2008) (the “FY 09 DHS Appropriations Act”), which barred DHS from using funds appropriated in this act or any other appropriations act for the development, testing, deployment, or operation of any portion of the DHS personnel system.

As a result of DHS’s rescission of the application of Subparts F and G, the MSPB has decided to amend its regulations by removing all regulations that are specific to Subparts F and G of the DHS Human Resources Management System. The Board considered staying these regulations, but determined that removing the regulations is appropriate in order to ensure that DHS employees are not confused concerning which regulations apply. In addition, staying the DHS-specific regulations was problematic because DHS-specific rules are contained in numerous places within 5 CFR 1201, the Board’s generally applicable practices and procedures. As a result, the Board is removing all DHS-specific rules from its regulations pending future developments with regard to the DHS Human Resources Management System.

#### List of Subjects in 5 CFR Parts 1201 and 1210

Administrative practice and procedure, Government employees.

■ Accordingly, under the authority at 5 U.S.C. 1204(h), the Board amends 5 CFR Chapter II as follows:

#### PART 1201—[AMENDED]

■ 1. The authority citation for part 1201 continues to read as follows:

**Authority:** 5 U.S.C. 1204 and 7701, unless otherwise noted.

■ 2. Section 1201.3 is amended by removing paragraphs (a)(21) and (b)(3) and revising paragraphs (a)(19) and (a)(20) as follows:

#### § 1201.3 Appellate jurisdiction.

\* \* \* \* \*

(a) \* \* \*

(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104); and

(20) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011).

\* \* \* \* \*

■ 3. Section 1201.11 is revised to read as follows:

#### § 1201.11 Scope and policy.

The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in § 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. It is the Board’s policy that these rules will be applied in a manner that expedites the processing of each case. It is the Board’s policy that these rules will be applied in a manner that ensures the fair and efficient processing of each case.

■ 4. Section 1201.21 is revised to read as follows:

#### § 1201.21 Notice of appeal rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(b) A copy, or access to a copy, of the Board’s regulations;

(c) A copy of the MSPB appeal form available at the Board’s Web site (<http://www.mspb.gov>), and

(d) Notice of any right the employee has to file a grievance, including:

(1) Whether the election of any applicable grievance procedure will result in waiver of the employee’s right to file an appeal with the Board;

(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with

the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).

■ 5. Section 1201.22 is amended by revising paragraph (b)(2) to read as follows:

**§ 1201.22 Filing an appeal and responses to appeals.**

(b) \* \* \*

(2) The time limit prescribed by paragraph (b)(1) of this section for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103-353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests.

\* \* \* \* \*

**PART 1210—[REMOVED AND RESERVED]**

■ 6. Part 1210 is removed and reserved.

**William D. Spencer,**

*Clerk of the Board.*

[FR Doc. E9-4290 Filed 3-3-09; 8:45 am]

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 984**

[Doc. No. AMS-FV-08-0093; FV09-984-2 FIR]

**Walnuts Grown in California;  
Decreased Assessment Rate**

**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 which decreased the assessment rate established for the California Walnut Board (Board) for the 2008-09 and subsequent marketing years from \$0.0158 to \$0.0131 per kernelweight pound of assessable

walnuts. The Board locally administers the marketing order which regulates the handling of walnuts grown in California. Assessments upon walnut handlers are used by the Board to fund reasonable and necessary expenses of the program. The marketing year began September 1 and ends August 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** *Effective Date:* April 3, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Debbie Wray, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or e-mail: *Debbie.Wray@ams.usda.gov*, or *Kurt.Kimmel@ams.usda.gov*.

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@ams.usda.gov*.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California, 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."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California walnut handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable walnuts beginning September 1, 2008, and continue until amended, suspended, or terminated. 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. 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 rule continues in effect the action that decreased the assessment rate established for the Board for the 2008-09 and subsequent marketing years from \$0.0158 to \$0.0131 per kernelweight pound of assessable walnuts.

The California walnut marketing order provides authority for the Board, 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 Board are producers and handlers of California walnuts. They are familiar with the Board's needs and the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2008-09 and subsequent marketing years, the Board recommended, and USDA approved, an assessment rate of \$0.0158 per kernelweight pound of assessable walnuts that would continue in effect from year to year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to the USDA. The Board recommended this rate in May 2008 along with expenditures of \$4,594,300 for 2008-09.

The Board met on September 12, 2008, and unanimously recommended reducing its 2008-09 expenditures to \$3,809,000 and reducing the assessment rate to \$0.0131 per kernelweight pound of assessable walnuts. The assessment rate of \$0.0131 per kernelweight pound of assessable walnuts is \$0.0027 per kernelweight pound lower than the rate previously in effect. The decreased assessment rate is primarily due to an \$800,000 decrease in domestic market development expenditures previously recommended for the 2008-09 marketing year.