

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Docket No. A0-214-A7; FV-93-981-1]

Almonds Grown in California; Secretary's Decision and Referendum Order on Proposed Further Amendment of Marketing Agreement and Order No. 981

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes amendments to the subject marketing agreement and order (order) and provides almond producers with the opportunity to vote in a referendum to determine if they favor the proposed amendments. The proposed amendments were submitted by the Almond Board of California (Board) and five additional persons. The proposed changes would: change five existing definitions in the order; revise Board representation, nomination procedures, terms of office, quorum and qualification procedures, voting and tenure requirements; modify creditable advertising provisions; revise volume control procedures; require handlers to maintain records in the State of California; authorize interest or late payment charges on assessments paid late; provide for periodic continuance referenda; authorize exemptions for organic almonds from certain program requirements; and make necessary conforming changes. These changes are being proposed to improve the administration, operation and functioning of the California almond marketing order program.

DATES: The referendum shall be conducted from January 8, 1996, through February 2, 1996. The representative period for the purpose of the referendum herein ordered is July 1, 1994, through June 30, 1995.

FOR FURTHER INFORMATION CONTACT:

Kathleen M. Finn, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523-S, P.O. Box 96456, Washington, DC 20090-6456, telephone: (202) 720-1509 or Fax (202) 720-5698; or Martin Engeler, Assistant Officer-in-Charge, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, suite 102-B, Fresno, California 93721; (209) 487-5901 or FAX (209) 487-5906.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on August 3, 1993, and published in the Federal Register on August 17, 1993 (58 FR 43565). Recommended Decision and Opportunity to File Written Exceptions issued on March 22, 1995, and published in the Federal Register on April 6, 1995 (60 FR 17466).

This administrative 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 Order 12866.

Preliminary Statement

The proposed amendments were formulated on the record of a public hearing held in Modesto, California, on November 3, 4 and 5, 1993, to consider the proposed amendment of the Marketing Agreement and Order No. 981, regulating the handling of almonds grown in California, hereinafter referred to collectively 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 *et seq.*), hereinafter referred to as the Act, and the applicable rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders (7 CFR part 900). The Notice of Hearing contained several amendment proposals submitted by the Almond Board of California (Board) established under the order to assist in local administration of the program and by five additional persons.

The Board's proposals would: (1) Increase its membership by two positions and change Board nomination, selection, and operation procedures; (2) change the term of office of its members from one to three years, and limit the

tenure of Board members; (3) change the definitions of "cooperative handler," "to handle," "settlement weight," "crop year" and "trade demand"; (4) require handlers of California almonds to maintain program records in the State of California; (5) change its advertising assessment credit program to allow credit for certain advertising costs incurred by handlers not previously authorized; (6) authorize requiring handlers to pay interest and/or late payment charges for past due assessments; (7) provide for continuance referenda every five years; (8) require handlers to submit grower lists to the Board; and (9) allow multi-year contracting.

Five persons submitted additional proposals related to continuance referenda, Board composition and nomination procedures, organic almonds, regulatory provisions, advertising and promotion, assessments, compliance audits, the definition of grower, and research and reserve operations.

The Fruit and Vegetable Division, Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA), proposals would make such changes as are necessary to the order, if any or all of the above amendments are adopted, so that all of its provisions conform with the proposed amendment. USDA also proposed that continuance referenda be conducted on a periodic basis consistent with USDA's policy guidelines.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (AMS) on March 22, 1995, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by May 8, 1995. Exceptions were received from Mr. Robert J. Crockett, Attorney, Office of the General Counsel, USDA, representing the Board; Mr. Steven W. Easter, Vice President, Blue Diamond Growers, Inc.; Mr. Brian C. Leighton, general counsel to almond handler Cal-Almond, Inc.; and Mr. Rick Veldstra, almond grower. The exceptions will be addressed in this document.

Small Business Considerations

In accordance with the provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Administrator of the AMS has determined that this action

would not have a significant economic impact on a substantial number of small entities. Small agricultural service firms, which include handlers regulated under this order, have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$5,000,000. Small agricultural producers are defined as those having annual receipts of less than \$500,000.

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 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 the RFA and the Act have small entity orientation and compatibility. Interested persons were invited to present evidence at the hearing on the probable impact that the proposed amendments to the order would have on small businesses.

During the 1993-94 crop year, approximately 115 handlers were regulated under Marketing Order No. 981. In addition, there are about 7,000 producers of almonds in the production area. The Act requires the application of uniform rules on regulated handlers. 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. Thus, both the RFA and the Act are compatible with respect to small entities.

The proposed amendments to the marketing agreement and order include changes to five definitions in the marketing order. These definitions are cooperative handler, to handle, settlement weight, crop year, and trade demand. The changes that are proposed to the definitions are intended to make them consistent with current industry practices. The proposed changes to the definitions are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

The proposed amendment to revise Board representation would increase the Board's size by allowing two additional grower members to serve on the Board. This would increase grower representation on the Board from five to seven and allow more grower input into Board decisions. The quorum size would also be increased to correspond with the increase in Board size. The change in voting requirements would require an increased number of votes needed to approve a Board action. The change to the nomination procedures

would require Board nominees to be nominated by January 20 rather than April 20 as currently provided. This would ensure that the new Board is seated prior to meetings where important decisions are made for the following crop year. These proposed amendments are designed to improve grower representation on the Board and allow the Board to function more efficiently.

The proposed amendment to change the Board members' term of office from one year to three year staggered terms would allow more continuity on the Board. This would allow the Board to focus more on long-term strategic goals and develop long-term approaches to problems in the industry.

The proposed amendment to require those persons nominated to the Board to qualify prior to their selection to the Board is an administrative change. This change would allow the selection process to take place in a more timely manner. The proposed amendment to add tenure requirements for Board members would allow more persons the opportunity to serve as members on the Board. It would provide opportunity for new ideas and approaches to issues that the Board addresses each year.

The proposed amendment to the creditable advertising provisions would provide for expansion of the promotional activities for which handlers may receive Credit-Back from their assessments. This would allow the Board to increase program flexibility for participating handlers.

The proposed amendment to allow the settlement weight for unshelled almonds to be determined on the basis of representative samples would be more consistent with current industry practices. There would be no increase in burden on handlers expected from this proposed amendment.

The proposed amendment to require handlers to maintain records in the State of California would improve the Board's administration of the program. It would also allow the Board to have the records available to them for compliance purposes. It is not expected that any additional costs would be incurred by handlers to comply with this amendment.

The proposed amendment to authorize interest and/or late payment charges on assessments paid late would encourage handlers to pay their assessments on time. Assessments not paid promptly add an undue burden on the Board because the Board has ongoing projects and programs funded by assessments that are functioning throughout the year. The addition of

such changes is consistent with standard business practices.

The proposed amendment to provide for periodic continuance referenda would allow growers the opportunity to vote on whether to continue the operation of the almond marketing order.

The proposed amendment to allow handlers to transfer their reserve obligation to other handlers would help facilitate the operation of the reserve program by providing handlers more flexibility.

The proposed amendment to exempt organic almonds from certain program requirements would provide the organic segment of the industry more flexibility in marketing and selling their product. The proposed amendment would authorize organic almond handlers to be exempt from reserve requirements and advertising assessments. Organic growers and handlers demonstrated at the hearing that certain current marketing order provisions do not take into account marketing differences between certified organic almonds and conventional almonds.

The proposal to make other miscellaneous changes that would be consistent with the proposed amendments is necessary so that all sections of the order would be consistent if any or all of the amendments are adopted. These changes include deleting and redesignating certain sections of the order.

All these changes are designed to enhance the administration and functioning of the marketing agreement and order to the benefit of the industry. Accordingly, it is determined that the proposed revisions of the order would not have a significant economic impact on handlers or producers.

The amendments proposed herein have been reviewed under Executive Order 12778, 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 the amendments.

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 the Secretary 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 requesting 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, the Secretary 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 in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 35), the reporting and recordkeeping provisions that are included in the proposed amendments will be submitted to the Office of Management and Budget (OMB). They would not become effective prior to OMB approval.

Findings and Conclusions and Rulings on Exceptions

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the April 6, 1995, issue of the Federal Register (60 FR 17466) are hereby approved and adopted subject to the following additions and modifications:

Based upon the exceptions filed by Mr. Crockett, Mr. Leighton and Mr. Veldstra, the findings and conclusions in material issue number six of the Recommended Decision concerning the acceptable methods for Board voting and Board voting requirements are amended by adding the following four paragraphs after the 16th paragraph of material issue number six to read as follows:

The exception filed by Mr. Crockett indicated that section 981.40 should be modified to include the term "other electronic means" as an acceptable method for voting. "Other electronic means" is envisioned to include the use of modems, video and teleconferencing. The term is flexible to allow for the advancement of new technologies that could be used by the Board for voting. Mr. Crockett stated that although "other electronic means" was not part of the original proposal, its incorporation at this time is reasonable since it is merely a technical adjustment. This request is also consistent with the record evidence. Therefore, in accordance with Mr. Crockett's exception, the amendatory language in § 981.40 is modified.

The exception received from Mr. Leighton objects to the proposed voting requirements, indicating that one segment of the industry, Blue Diamond, would have the ability to effectively block any proposed action by the Board.

The exception received from Mr. Veldstra similarly objected to the voting

requirements proposed, indicating that it is fundamentally flawed to guarantee one segment of the industry a minimum of 5 votes, when those 5 votes could constitute a "Super Minority" able to direct the policy of the Board by their veto power.

Testimony at the hearing indicated strong industry support for this proposal. Proponents testified that the proposed voting requirements would help increase industry cohesion. No new evidence or arguments to the contrary were presented in the exceptions. Further, no one industry segment will perpetually be guaranteed a certain number of votes as a result of this proposal because of the ability to reapportion Board membership, which is discussed under material issue number 14. Therefore, these exceptions are denied.

Based upon the exception of Mr. Veldstra and the exception of Mr. Leighton, the findings and conclusions in material issue number 14 of the Recommended Decision concerning whether to authorize the Board, with the approval of the Secretary, to reapportion grower and/or handler member representation on the Board based on the proportionate amounts of almonds handled by different segments of the industry are amended by adding the following three paragraphs after the tenth paragraph of material issue number 14 to read as follows:

The exception filed by Mr. Veldstra indicated that reapportionment of Board membership should be required, based on percentages of crop produced by industry segments, rather than optional, at the recommendation of the Board and approval of the Secretary. Reapportionment should be required because otherwise, one segment of the industry would be able to prohibit passing a Board action recommending reapportionment, if the proposed voting requirements in material issue number 6 are approved. This could result in one segment of the industry having a disproportionate share of Board representation based on percentage of production.

The exception filed by Mr. Leighton stated that Board representation should be based on percentages of crop represented by each entity. The exception indicated that although the proposed amendment allows for changes in reapportionment and representation, any such changes will not occur if the voting requirements in material issue number 6 are implemented. The exception stated that Blue Diamond would not vote for any change which would reduce their representation, thus any Board

recommendation on this issue would be blocked.

Hearing testimony indicated that the number of growers represented by industry entities should also be given consideration in determining equitable Board representation as well as tonnage handled by these entities. The current proposal with respect to representation reflects this position and testimony presented indicates widespread industry support for the proposal. In addition, there was no specific alternative proposal presented. However, USDA recognizes the potential problems associated with the Board's ability to pass an action recommending reapportionment and changes in representation, if voting requirements as proposed in material issue number 6 are implemented. It should be clarified that the amendatory language as proposed in § 981.31(d) does not require a recommendation by the Board on this issue. Although USDA looks to the Board as the body representing the industry for recommendations on such issues, it is not precluded from taking action to reapportion membership based on other information available. Therefore, no change to the proposed order language is necessary based on Mr. Veldstra's and Mr. Leighton's exceptions. Their exceptions are denied.

Based upon the exception filed by Mr. Leighton, the findings and conclusions in material issue number 13 of the Recommended Decision concerning the deletion of the authority for the Credit-Back advertising program under the almond marketing order and to modify the generic program are amended by adding the following two paragraphs after the 11th paragraph of material issue number 13 to read as follows:

Mr. Leighton's exception stated that he opposed the generic advertising program, but a generic advertising program is preferable to a brand program, provided excessive funds are not expended promoting almonds as snacks off the store shelf. Mr. Leighton also reiterated that the new Credit-Back program violates the First Amendment to the U.S. Constitution. In addition, he states that there is not wide industry support for this proposal because a number of handlers representing 20 percent of the tonnage in the industry have filed administrative petitions pursuant to 7 U.S.C. section 608c(15)(A) contesting the constitutionality of this program.

The record evidence does not support the deletion of the authority for this program. The Credit-Back program provides flexibility in allowing the Board and handlers various options to

promote almonds. The program provides the opportunity for handlers to receive credit against their assessment obligation or pay assessments for a generic program. Although there are currently ongoing legal challenges to this program, the record evidence supports maintaining the authority for the program. With the authority in place, recommendations can be made by the Board and implemented by the Secretary to further modify and improve the program, if warranted. The program need not be active if it is determined that discontinuing all or part of the program would be in the best interest of the industry. Therefore, Mr. Leighton's exception is denied.

Based upon the exception filed by Mr. Leighton, the findings and conclusions in material issue number 17 of the Recommended Decision concerning the requirement that the Board provide handlers with 24 hours advance notice before audits are conducted of records and inspections of reserve almonds are amended by adding the following two paragraphs after the sixth paragraph of material issue number 17 to read as follows:

Mr. Leighton's exception states that USDA does not provide examples showing that "surprise" visits by the Board have uncovered widespread abuse of the reporting requirements relating to the reserve provisions. In addition, Mr. Leighton states that the Board should not require handlers to use their own equipment and personnel during the audit visits.

As previously stated, the almond industry is subject to Federal regulation and therefore, audit visits are a part of participating in this Federal program. USDA requires that adequate compliance programs are in place for marketing order programs. The record evidence supported the continuation of such a tool for compliance purposes. In addition, the record evidence supported handlers assisting the Board by using their equipment and personnel during an audit visit. Therefore, Mr. Leighton's exception is denied.

Based upon the exceptions filed by Mr. Leighton, Mr. Veldstra and Mr. Easter, the findings and conclusions in material issue number 18 of the Recommended Decision concerning the requirement for handlers to submit to the Board a list of growers who have delivered almonds to such handler during the crop year are amended by adding the following four paragraphs after the 17th paragraph of material issue number 18 to read as follows:

The exception filed by Mr. Leighton stated that Blue Diamond should also be required to submit a grower list to the

Board. He stated that since the independent grower list would be available under the Freedom of Information Act, Blue Diamond is given an unfair advantage by having accessibility to all almond growers. Mr. Leighton contends that the independent growers should be allowed the same opportunity.

Mr. Veldstra's exception similarly objected to the material issue stating that if Blue Diamond's list is proprietary and protected under California State law, then the independent list should also be protected. In addition, Mr. Veldstra stated that Blue Diamond growers should elect Blue Diamond growers to the Board rather than have them appointed by the cooperative. Finally, Mr. Veldstra stated that growers who deliver their almonds to both the cooperative and independent handlers may theoretically vote twice in elections—once through the cooperative process and once as independent growers. If the Board had a complete list, it could identify these situations and ensure that growers participate in the voting process only once.

As previously stated, the record evidence supports that the primary reason an independent grower list would be submitted to the Board would be for the purposes of Board elections. Record evidence showed that there are other sources of obtaining a grower list. The Blue Diamond cooperative testified that they do inform their members of all important matters concerning the marketing order. Blue Diamond's list is its grower/supplier list and therefore, it is considered their customer list. This would not be the case for a list of independent growers in part, because this list is not handler-specific. In addition, there was no record evidence to support that Board members elected from the cooperative should be elected in another manner as suggested by Mr. Veldstra. Also, growers participating in independent elections must certify on the ballot that they do not deliver almonds to a cooperative. Therefore, Mr. Leighton's and Mr. Veldstra's exceptions are denied.

The exception filed by Mr. Easter fully supported the proposal. Mr. Easter stated that Blue Diamond believes that its grower list is protected by California law and that no case has been made for a requirement that it be submitted to the Board.

Based upon the exception filed by Mr. Leighton, the findings and conclusions in material issue number 19 of the Recommended Decision concerning the addition of the authority to require handlers to pay interest and/or late payment charges are amended by

adding the following two paragraphs after the seventh paragraph of material issue number 19 to read as follows:

The exception filed by Mr. Leighton stated that unless prevailing handlers can receive a refund of assessments wrongfully imposed plus interest, the proposed revisions to section 981.81 to allow the collection of interest and late penalties on past due assessments is confiscatory and violates Due Process. Mr. Leighton further stated that this provision violates the First Amendment, because handlers will be penalized for filing administrative challenges to any assessment provision by being forced to pay late charges if their challenges are unsuccessful. Mr. Leighton contends that the proposal authorizing the Board to assess late payments and/or interest on unpaid assessments should not be adopted unless the proposal authorizing interest to handlers for successfully challenging the payment of assessments is adopted.

As previously discussed, the evidence at the hearing fully supported this proposal. Many marketing orders provide for the collection of interest and/or late payment charges to encourage prompt payment of assessments. Again, the Act authorizes that each handler shall pay to a marketing order committee such handler's pro rata share for the operation of the marketing order. Therefore, Mr. Leighton's exception is denied.

Based upon the exception filed by Mr. Leighton, the findings and conclusions in material issue number 20 of the Recommended Decision concerning the requirement of refunds plus payment of interest to a handler in the event a suit or administrative petition filed by a handler challenging the payment of assessments is successful are amended by adding the following two paragraphs after the fifth paragraph of material issue number 20 to read as follows:

Mr. Leighton's exception stated that unless this proposal is adopted, Material Issue number 19, which proposes authority for interest and late payment charges should not be adopted. Mr. Leighton indicated that USDA rejected this proposal because "the Board may not have funds available to make a refund" and Due Process requires a clear and certain remedy if one must pay now and file a complaint later. Mr. Leighton further stated that USDA clearly does not address where court ordered refunds will be derived, nor does it provide for such remedy.

The record does not support this proposal. Section 608c(15)(A) of the Act provides a method for challenging marketing order provisions. In addition,

USDA did not reject this proposal on the basis of the ability to pay refunds. USDA relied on the record and the evidence presented by both sides. Therefore, Mr. Leighton's exception is denied.

Based upon the exception filed by Mr. Crockett, the findings and conclusions in material issue number 24 of the Recommended Decision concerning the exemption of organic almonds from all reserve requirements are amended by adding the following three paragraphs after the ninth paragraph of material issue number 24 to read as follows:

The exception from Mr. Crockett requested that USDA reconsider this proposal. Mr. Crockett stated that this proposal would create a separate class of producers from the mainstream of almond production and would eliminate the flexibility of the Board to address this issue. Further, Mr. Crockett indicated that past experience shows that the Board determined that certified organic almonds would be an eligible outlet for disposition of reserve almonds when special circumstances warranted exempting them from these requirements. The exception also indicated that the circumstances today may be that organically grown almonds are non-competitive in nature, but the situation could change in the future. For this reason, Mr. Crockett stated that the Board should be allowed to respond to those changes as they arise and not be bound by a regulation that no longer reflects the realities of almond production. Mr. Crockett further stated that the cost to administer such an exemption is prohibitive and would cause compliance problems because there is no practical means of identifying an organically grown almond from a conventional almond.

The proponents of this proposal presented a compelling case that certified organic almonds are unique and are sold into different markets. In addition, growers and handlers of organic almonds must follow strict regulations to ensure their almonds are certified organic and these almonds can be traced by a paper trail to the retail level.

Mr. Crockett's concern regarding compliance problems that could be encountered in documenting sales of certified organic almonds does have merit. Although stringent requirements exist for certifying almonds as organic, it is important that the order require that handlers provide documentation substantiating that their almonds meet these requirements if they are to be exempt from reserve requirements. The proposed amendment to section 981.47(b) is being slightly modified to

require that documentation be submitted to the Board by handlers in order to substantiate that almonds were, in fact, sold as certified organic and met the requirements of the Organic Foods Production Act of 1990 and the California Organic Foods Act of 1990 in order to be exempt from reserve requirements. Therefore, Mr. Crockett's exception is accepted, in part.

Based upon the exception filed by Mr. Crockett, the findings and conclusions in material issue number 25 of the Recommended Decision concerning the authority to allow the Board to enter into contracts for periods of five years for services, goods or other reasonable expenses are amended by adding the following two paragraphs after the eighth paragraph of material issue number 25 to read as follows:

The exception filed by Mr. Crockett requested that USDA reconsider this proposal. The exception indicated that the inability to enter into long term arrangements for goods and services from vendors hinders the efficiency of the order. Mr. Crockett stated the Board should be able to avail itself of such simple common business sense to stretch grower monies to their maximum effectiveness. Mr. Crockett further stated that although USDA states that other marketing orders have been approved for long term contracts, it ignores that potential opportunities may be lost seeking advance approval of each contract.

As previously stated, USDA has provided approval for marketing order committees to enter into multi-year contracts on a case-by-case basis. Record evidence indicates that this proposal could limit annual reviews and restrict activities of future Boards. USDA will work with the Board to ensure such approvals are completed in a timely manner to promote efficient Board operation. Therefore, Mr. Crockett's exception is denied.

Based upon the exception filed by Mr. Leighton, the findings and conclusions in material issue number 27 of the Recommended Decision concerning certain reserve provisions are amended by adding the following two paragraphs after the 11th paragraph of material issue number 27 to read as follows:

Mr. Leighton's exception contended that USDA claimed that removing the authority for allocated reserve would remove a valuable tool of the Board. However, Mr. Leighton contended that there should be no tool available to require the dumping of valuable and nutritious product given the storage capability of almonds. In addition, Mr. Leighton stated that USDA has a conflict of interest in retaining this tool because

USDA uses these almonds for school lunch programs. Mr. Leighton states that the cost of school lunch programs should be borne by taxpayers, not the almond industry.

The marketing order contains authority to require reserve almonds to be disposed of in certain approved outlets that are non-competitive with normal markets. There is no requirement for dumping the product. Under certain conditions, it may be desirable for the industry to divert product to these non-competitive outlets rather than carrying product over into the next crop year. Record evidence supports retaining this tool. USDA does not consider the provision a conflict of interest. USDA does purchase almonds as a surplus removal program and those almonds are used in the school lunch program. The purpose of USDA surplus removal purchases is to remove excess supplies from normal market channels. In addition, USDA does not specify that the almonds it buys must be reserve almonds. The record evidence supported adopting this proposal, in part. Therefore, Mr. Leighton's exception is denied.

Marketing Agreement and Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Almonds Grown in California." 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 *et seq.*) to determine whether the issuance of the annexed order amending the order regulating the handling of almonds grown in California is approved or favored by producers, as defined under the terms of the order, who during the representative period were engaged in the production of almonds grown in California.

The representative period for the conduct of such referendum is hereby determined to be July 1, 1994, through June 30, 1995.

The agents of the Secretary to conduct such referendum are hereby designated to be Martin Engeler, Assistant Officer-in-Charge, and Maureen Pello, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202

Monterey Street, suite 102-B, Fresno, California 93721, telephone (209) 487-5901.

List of Subjects in 7 CFR Part 981

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

Dated: October 23, 1995

Shirley R. Watkins,

Acting Assistant Secretary, Marketing and Regulatory Programs.

Order Amending the Order Regulating the Handling of Almonds Grown in California¹

Findings and Determinations

The findings and determinations hereinafter set forth 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 et seq.), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and 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 order, as amended, as hereby proposed to be further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The order, as amended, as hereby proposed to be 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 order, as amended, as hereby proposed to be 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 subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The order, as amended, 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 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.

Order Relative to Handling

It is therefore ordered, That on and after the effective date 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 proposed to be amended as follows:

The provisions of the proposed marketing agreement and the order amending the order contained in the Recommended Decision issued by the Administrator on March 22, 1995, and published in the Federal Register on April 6, 1995, shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

PART 981—ALMONDS GROWN IN CALIFORNIA

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

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

2. Section 981.14 is revised to read as follows:

§ 981.14 Cooperative handler.

Cooperative handler means any handler as defined in § 981.13 of this subpart which qualifies for treatment as a nonprofit cooperative association as defined in Section 54001, *et seq.* of the California Food and Agricultural Code. The Board, with the approval of the Secretary, may modify this definition, if necessary.

3. Section 981.16 is revised to read as follows:

§ 981.16 To handle.

To handle means to use almonds commercially of own production or to sell, consign, transport, ship (except as a common carrier of almonds owned by another) or in any other way to put almonds grown in the area of production into any channel of trade for human consumption worldwide, either

within the area of production or by transfer from the area of production to points outside or by receipt as first receiver at any point of entry in the United States or Puerto Rico of almonds grown in the area of production, exported therefrom and submitted for reentry or which are reentered free of duty. However, sales or deliveries by a grower to handlers, hullers or other processors within the area of production shall not, in itself, be considered as handling by a grower.

4. Section 981.18 is amended by removing the word "and" at the end of paragraph (b); removing the period and adding ", and" at the end of paragraph (c); and adding a new paragraph (d) to read as follows:

§ 981.18 Settlement weight.

* * * * *

(d) For inedible kernels as defined in § 981.8.

5. Section 981.19 is revised to read as follows:

§ 981.19 Crop year.

Crop year means the twelve month period from August 1 to the following July 31, inclusive. Any new crop almonds harvested or received prior to August 1 will be applied to the next crop year for marketing order purposes. The first crop year after the implementation of this amendment shall be a 13-month period.

6. Section 981.21 is revised to read as follows:

§ 981.21 Trade demand.

Trade demand means the quantity of almonds (kernelweight basis) which commercial distributors and users such as the wholesale, chain store, confectionery, bakery, ice cream, and nut salting trades will acquire from all handlers during a crop year for distribution worldwide.

7. Sections 981.30 and 981.31 are revised to read as follows:

§ 981.30 Establishment.

The Almond Board shall consist of twelve members, each with an alternate member.

§ 981.31 Membership representation.

Membership of the Board will be determined in the following manner:

(a) Three members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (a) (1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) Those growers who market their almonds through cooperative handlers; and

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.

(2) Those growers who market their almonds through other than cooperative handlers.

(b) Two members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (b) (1) and (2) of this section, or from among other qualified persons belonging to such groups:

- (1) Cooperative handlers; and
- (2) All handlers, other than cooperative handlers.

(c) One member and an alternate shall be selected from nominees submitted by each of the following groups designated in paragraphs (c)(1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) The group of cooperative handlers or the group of handlers other than cooperative handlers, whichever received for their account more than 50 percent of the almonds delivered by all growers as determined by December 31 of the then current crop year; and

(2) Those growers whose almonds were marketed through the handler group identified in paragraph (c)(1) of this section.

(d) The Secretary, upon recommendation of the Board, or other information, may reapportion within the 12-member Board, the number of grower members or handler members, or both, of any group listed in § 981.31 (a) through (c), to be nominated pursuant to § 981.32. Any such change shall be based, insofar as practicable, upon the proportionate amounts of almonds handled within any group.

8. Section 981.32 is amended by revising paragraph (a) and amending paragraph (b)(2) by removing the date "March 31" and adding in its place the date "December 31" to read as follows:

§ 981.32 Nominations.

(a) *Method.* (1) Each year the terms of office of three of the members elected pursuant to § 981.31(a) and (b) shall expire, except every third year when the term of office for four of those members shall expire. Nominees for each respective member and alternate member shall be chosen by ballot delivered to the Board. Nominees chosen by the Board in this manner shall be submitted by the Board to the Secretary on or before February 20 of each year together with such information as the Secretary may require. If a nomination for any Board member or alternate is not received by the Secretary on or before February 20, the Secretary may select such member or alternate from persons belonging to the group to be represented without nomination. The Board shall mail to all

handlers and growers, other than the cooperative(s) of record, the required ballots with all necessary voting information including the names of incumbents willing to accept renomination, and, to such growers, the name of any person proposed for nomination in a petition signed by at least 15 such growers and filed with the Board on or before January 20. Distribution of ballots shall be announced by press release, furnishing pertinent information on balloting, issued by the Board through newspapers and other publications having general circulation in the almond producing areas.

(2) Nominees for the positions described in § 981.31(c) shall be handled in the same manner as described in paragraph (a)(1) of this section except that those terms of office shall expire annually.

* * * * *

9. Section 981.33 is revised to read as follows:

§ 981.33 Selection and term of office.

(a) Members and their respective alternates for positions open on the Board shall be selected by the Secretary from persons nominated pursuant to § 981.32, or, at the discretion of the Secretary, from other qualified persons, for a term of office beginning March 1. Members and alternates shall continue to serve until their respective successors are selected and qualified.

(b) The term of office of members of the Board shall be for a period of three years beginning on March 1 of the years selected except where otherwise provided. However, for the initial ten members of the Board selected pursuant to this section and to paragraphs (a) and (b) of § 981.31, three members shall serve for a term of one year; three members shall serve for a term of two years; and four members shall serve for a term of three years. For the initial terms of office, at the time of nomination under § 981.32, the Board shall make this designation by lot. The term of office for the two members selected under paragraph (c) of § 981.31 shall always be for a period of one year.

(c) Board members may serve for a total of six consecutive years. Members who have served for six consecutive years must leave the Board for at least one year before becoming eligible to serve again. A person who has served less than six consecutive years on the Board may not be nominated to a new three year term if his or her total consecutive years on the Board at the end of that new term would exceed six years. This limitation on tenure shall not include service on the Board prior

to implementation of this amendment and shall not apply to alternate members.

10. Section 981.34 is revised to read as follows:

§ 981.34 Qualification and acceptance.

(a) Any person to be selected as a member or alternate of the Board shall, prior to such selection, qualify by providing such background information as necessary and by advising the Secretary that he/she agrees to serve in the position for which nominated. Grower members and alternates shall be growers or employees of growers, and handler members and alternates shall be handlers or employees of handlers. In the event any member or alternate ceases to be qualified for the position for which selected, that position shall be deemed vacant.

(b) The Board, with approval of the Secretary, may establish additional eligibility requirements for grower members on the Board.

11. Section 981.40 is amended by revising paragraphs (b) and (c) and amending paragraph (e) by removing the word "seven" and adding in its place the word "eight" to read as follows:

§ 981.40 Procedure.

* * * * *

(b) *Quorum.* The presence of eight members shall be required to constitute a quorum. All decisions of the Board shall be as follows except where otherwise specifically provided: 8 or 9 members present, 6 votes; 10 members present, 7 votes; 11 or 12 members present, 8 votes.

(c) *Voting by mail, telegram, fax or other electronic means.* The Board may vote by mail, telegram, fax or other electronic means upon written notice to all members, or alternates acting in their place, including in the notice a statement of a reasonable time, not to exceed 10 days, in which a vote by mail, telegram, fax or other electronic means must be received by the Board for counting. Voting by mail, telegram, fax or other electronic means shall not be permitted at any assembled meeting of the Board. When a proposition is submitted for vote by mail, telegram, fax or other electronic means, at least ten members of the Board must vote in favor of its passage or the proposition shall be defeated.

* * * * *

12. In § 981.41, paragraph (c) is amended by removing the colon and all text following the words "15 percent" in the last sentence and adding in its place a period and by amending paragraph (a) by adding a sentence at the end of the paragraph to read as follows:

§ 981.41 Research and development.

(a) * * * Notwithstanding the foregoing, certified organic almonds may be exempt from assessments for marketing promotion, including paid advertising, upon recommendation of the Board and approval of the Secretary.

13. Section 981.47 is amended by designating the existing paragraph as (a), removing the words "either domestic or" in the third sentence of paragraph (a), and adding a new paragraph (b) to read as follows:

§ 981.47 Method of establishing salable and reserve percentages.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Secretary shall exempt from any reserve that is established that part of the crop which is sold as "certified organic" under standards established by the Organic Foods Production Act of 1990, (7 U.S.C. 2101 *et seq.*) and the California Organic Foods Act of 1990, as amended: Provided, That handlers provide adequate documentation demonstrating the almonds were sold as certified organic and met the requirements of the aforementioned Acts. The Board may propose regulations to assure procedures to implement this section.

14. In § 981.49, the introductory paragraph is amended by removing the word "six" and adding in its place the word "eight", by removing ";" and in paragraph (e) and adding a period in its place, by adding "and" at the end of paragraph (d); by removing paragraph (f) and by revising paragraph (b) to read as follows:

§ 981.49 Board estimates and recommendations.

(b) The estimated handler carryover and the estimated reserve inventory as of July 31;

§ 981.50 [Amended]

15. Amend § 981.50 by adding after the words "into oil", the words "or sold as certified organic."

16. Amend § 981.55 by designating the existing paragraph as (a) and adding a new paragraph (b) to read as follows:

§ 981.55 Interhandler transfers.

(b) When saleable and reserve percentages are in effect, any handler may transfer reserve withholding obligation to other handlers. Terms and conditions implementing this provision must be recommended by the Board and approved by the Secretary.

17. Section 981.60 is amended by revising paragraph (b) to read as follows:

§ 981.60 Determination of kernel weight.

(b) *Almonds for which settlement is made on unshelled weight.* The settlement weight for unshelled almonds shall be determined on the basis of representative samples of unshelled almonds reduced to shelled weight.

18. Section 981.61 is amended by revising the last sentence to read as follows:

§ 981.61 Redetermination of kernel weight.

* * * Weights used in such computations for various classifications of almonds shall be:

(a) For unshelled almonds, the kernel weight based on representative samples reduced to shelled weight;

(b) For shelled almonds, the net weight; and

(c) For shelled almonds used in production of almond products, the net weight of such almonds.

§ 981.62 [Removed]

19. Section 981.62 is removed.

§ 981.66 [Removed]

20. Section 981.66 is amended by removing paragraphs (b) and (d), redesignating paragraph (c) as paragraph (b), redesignating paragraph (e) as paragraph (c), redesignating paragraphs (f) and (g) as paragraphs (d) and (e), and by amending newly designated paragraph (c) by removing all references to the date "September 1" and adding in each place "December 31".

§ 981.67 [Amended]

21. Section 981.67 is amended by removing all references to the date "September 1" and adding in each place "December 31".

22. Section 981.70 is amended by revising the first sentence to read as follows:

§ 981.70 Records and verification.

Each handler shall keep records which will clearly show the details of his or her receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, as well as other pertinent information regarding his or her operation pursuant to the provisions of this part: *Provided*, that, such records shall be kept in the State of California. * * *

23. A new § 981.76 is added before the undesignated center heading "Expenses and Assessments" to read as follows:

§ 981.76 Handler list of growers.

No later than December 31 of each crop year, each handler other than a cooperative handler (hereinafter, referred to as independent handler) governed by this subpart shall, upon request, submit to the Board a complete list of growers who have delivered almonds to such independent handler during that crop year.

24. Section 981.81 is amended by adding a new paragraph (e) to read as follows:

§ 981.81 Assessment.

(e) Any assessment not paid by a handler within a period of time prescribed by the Board may be subject to an interest or late payment charge or both. The period of time, rate of interest and late payment charge shall be as recommended by the Board and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

25. Section 981.90 is amended redesignating paragraph (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4) and by amending newly designated paragraph (b)(3) by removing the date "June 1" and adding in its place "July 1" and adding a new (b)(2), to read as follows:

§ 981.90 Effective time, suspension, or termination.

(2) The Secretary shall conduct a referendum as soon as practical after the end of the fiscal year ending two years after [effective date of the final rule], and at such time every fifth year thereafter, to ascertain whether continuation of the order is favored by growers who have been engaged in the production of almonds for market within the State of California during the current crop year.

§ 981.467 [Amended]

26. In § 981.467, paragraph (a) is amended by removing the date "July 1" and adding in its place "August 1" and by removing the words "export or" and "or both," from the second sentence in paragraph (a).

§ 981.472 [Amended]

27. In § 981.472, paragraph (a) is amended by removing the dates "July 1 to August 31" and adding in its place "August 1 to August 31."