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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 982

[Docket No. FV98-982-1 FIR]

Hazelnuts Grown in Oregon and Washington; Establishment of Interim and Final Free and Restricted Percentages for the 1997-98 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, without change, the provisions of an interim final rule which established interim and final free and restricted percentages for domestic inshell hazelnuts for the 1997-98 marketing year under the Federal marketing order for hazelnuts grown in Oregon and Washington. The percentages allocate the quantity of domestically produced hazelnuts which may be marketed in the domestic inshell market. The percentages are intended to stabilize the supply of domestic inshell hazelnuts to meet the limited domestic demand for such hazelnuts and provide reasonable returns to producers. This rule was recommended unanimously by the Hazelnut Marketing Board (Board), which is the agency responsible for local administration of the order.

EFFECTIVE DATE: June 22, 1998.

FOR FURTHER INFORMATION CONTACT: Teresa L. Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, 1220 SW Third Avenue, Room 369, Portland, OR 97204; telephone: (503) 326-2724, Fax: (503) 326-7440 or George J. Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room

2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement No. 115 and Order No. 982 (7 CFR Part 982), both as amended, regulating the handling of hazelnuts grown in Oregon and Washington, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is intended that this action apply to all merchantable hazelnuts handled during the 1997-98 marketing year (July 1, 1997, through June 30, 1998). 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 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 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, 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 to review the Secretary'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 marketing percentages which allocate

the quantity of inshell hazelnuts that may be marketed in domestic markets. The Board is required to meet prior to September 20 of each marketing year to compute its marketing policy for that year and compute and announce an inshell trade demand if it determines that volume regulations would tend to effectuate the declared policy of the Act. The Board also computes and announces preliminary free and restricted percentages for that year.

The inshell trade demand is the amount of inshell hazelnuts that handlers may ship to the domestic market throughout the marketing season. The order specifies that the inshell trade demand be computed by averaging the preceding three "normal" years' trade acquisitions of inshell hazelnuts, rounded to the nearest whole number. The Board may increase the three-year average by up to 25 percent, if market conditions warrant an increase. The Board's authority to recommend volume regulations and the computations used to determine released percentages are specified in section 982.40 of the order.

The National Agricultural Statistics Service (NASS) estimated hazelnut production at 40,000 tons for the Oregon and Washington area.

The majority of domestic inshell hazelnuts are marketed in October, November, and December. By November, the marketing season is well under way.

The quantity marketed is broken down into free and restricted percentage portions to make available hazelnuts which may be marketed in domestic inshell markets (free) and hazelnuts which must be exported, shelled or otherwise disposed of (restricted). The preliminary free percentage releases 80 percent of the adjusted inshell trade demand. The preliminary free percentage is expressed as a percentage of the total supply subject to regulation (supply) and is based on the preliminary crop estimate.

At its August 28, 1997, meeting, the Board computed and announced preliminary free and restricted percentages of 8 percent and 92 percent, respectively. The Board used the NASS crop estimate of 40,000 tons. The purpose of releasing only 80 percent of the inshell trade demand under the preliminary percentage was to guard against an underestimate of crop size.

The preliminary free percentage released 3,003 tons of hazelnuts from the 1997 supply for domestic inshell use. The preliminary restricted percentage portion of the 1997 supply for export and kernel markets totaled 34,296 tons.

Under the order, the Board must meet a second time, on or before November 15, to recommend interim final and final percentages. The Board uses current crop estimates to calculate the interim final and final percentages. The interim final percentages are calculated in the same way as the preliminary percentages and release the remaining 20 percent (to total 100 percent of the inshell trade demand) previously computed by the Board. Final free and restricted percentages may release up to an additional 15 percent of the average of the preceding three years' trade acquisitions to provide an adequate carryover into the following season. The final free and restricted percentages must be effective by June 1, at least 30 days prior to the end of the marketing

year, June 30. The final free and restricted percentages can be made effective earlier, if recommended by the Board and approved by the Secretary. Revisions in the marketing policy can be made until February 15 of each marketing year, but the inshell trade demand can only be revised upward, consistent with section 982.40(e).

The Board met on November 13, 1997, and reviewed and approved an amended marketing policy. The Board recommended that the three-year average trade acquisition figure of 4,279 tons be increased by 214 tons for market expansion. The Board also recommended the establishment of interim final and final free and restricted percentages. Interim final percentages were recommended at 10 percent free and 90 percent restricted. The interim final percentage made an additional 965 tons of inshell hazelnuts available for the domestic inshell market, including product for market expansion. The interim final marketing percentages were based on the Board's

final production estimate (42,000 tons) and released 3,968 tons to the domestic inshell market from the 1997 supply subject to regulation. The interim final restricted percentage resulted in a restricted obligation of 35,173 tons.

The final free and restricted percentages were recommended at 12 percent and 88 percent, respectively. The Board also recommended that the final percentages be effective on April 30, 1997. The established final marketing percentages release for domestic inshell use an additional 642 tons from the supply subject to regulation. Thus, a total of 4,610 tons of inshell hazelnuts will be released from the 1997 supply for domestic inshell use. The final restricted percentage resulted in a restricted obligation of 34,531 tons.

The marketing percentages are based on the Board's production estimates and the following supply and demand information for the 1997-98 marketing year:

			Tons
Inshell Supply Tons			
(1)	Total production (Board's estimate)		42,000
(2)	Less substandard, farm use (disappearance)		2,860
(3)	Merchantable production (Board's adjusted crop estimate)		39,140
(4)	Plus undeclared carryin as of July 1, 1997, subject to regulation		1
(5)	Supply subject to regulation (Item 3 plus Item 4)		39,141
Inshell Trade Demand			
(6)	Average trade acquisitions of inshell hazelnuts for three prior years		4,279
(7)	Increase to encourage increased sales (5 percent of Item 6)		214
(8)	Less declared carryin as of July 1, 1996, not subject to regulation		525
(9)	Adjusted Inshell Trade Demand		3,968
(10)	15 percent of the average trade acquisitions of inshell hazelnuts for three prior years (Item 6)		642
(11)	Adjusted Inshell Trade Demand plus 15 percent for carryout (Item 9 plus Item 10)		4,610
Percentages			
		Free	Restricted
(12)	Interim final percentages (Item 9 divided by Item 5) × 100	10	90
(13)	Final percentages (Item 11 divided by Item 5) × 100	12	88

In addition to complying with the provisions of the order, the Board also considered the Department's 1982 "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" (Guidelines) when making its computations in the marketing policy. This volume control regulation provides a method to collectively limit the supply of inshell hazelnuts available for sale in domestic markets. The Guidelines provide that the domestic inshell market has available a quantity equal to 110 percent of prior years' shipments before secondary market allocations are approved. This provides for plentiful supplies for consumers and for market expansion, while retaining

the mechanism for dealing with oversupply situations. At its November 13, 1997, meeting, the Board recommended that an increase of 5 percent (214 tons) for market expansion be included in the inshell trade demand which was used to compute the interim percentages. The established final percentages are based on the final inshell trade demand, and will make available an additional 642 tons for desirable carryout. The total free supply for the 1997-98 marketing year is 5,135 tons of hazelnuts, which is the final trade demand of 4,610 tons plus the declared carryin of 525 tons. This amount is 120 percent of prior years'

sales and exceeds the goal of the Guidelines.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (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 in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially

small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 1,000 producers of hazelnuts in the production area and approximately 23 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. Using these criteria, virtually all of the producers are small agricultural producers and an estimated 20 of the 23 handlers are small agricultural service firms. Thus, the great majority of hazelnut producers and handlers may be classified as small entities.

Board meetings are widely publicized in advance of the meetings and are held in a location central to the production area. The meetings are open to all industry members and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations can be considered to represent the interests of small business entities in the industry.

Many years of marketing experience led to the development of the current volume control procedures. These procedures have helped the industry solve its marketing problems by keeping inshell supplies in balance with domestic needs. The current volume control procedures fully supply the domestic inshell market, provide for market expansion, and help prevent oversupplies in that market.

Inshell hazelnuts sold to the domestic market provide higher returns to the industry than are obtained from shelling. The inshell market is inelastic and is characterized as having limited demand and being prone to oversupply.

Industry statistics show that total hazelnut production has varied widely over the last 10 years, from a low of 13,000 tons in 1989 to a high of 41,000 tons in 1993, with another record crop of 42,000 tons in 1997. Average production has been around 24,000 tons. While crop size has fluctuated, the volume regulations contribute toward orderly marketing and market stability, and help moderate the variation in returns for all growers and handlers, both large and small. For instance, production in the shortest crop year (1989) was 53 percent of the 10-year average (1987–1996). Production in the biggest crop year (1996) was 170 percent of the 10-year average. The percentage

releases provide all handlers with the opportunity to benefit from the most profitable domestic inshell market. That market is available to all handlers, regardless of handler size.

NASS statistics show that the grower price per pound has increased steadily over the last 4 years, from \$.28 in 1992 to \$.43 in 1996.

The Board discussed the only alternative to this rule which was not to regulate. Without any regulations in effect, the Board believed that the industry would oversupply the inshell domestic market. With the 1997 hazelnut crop the largest in history, the release of 42,000 tons on the domestic inshell market would cause grower returns to decrease drastically, and completely disrupt the market.

While the level of benefits of this rulemaking are difficult to quantify, the stabilizing effects of the volume regulations impact both small and large handlers positively by helping them maintain and expand markets even though hazelnut supplies fluctuate widely from season to season.

Hazelnuts produced under the order comprise virtually all of the hazelnuts produced in the U.S. This production represents, on average, approximately 3 percent of total U.S. tree nut production and approximately 3 percent of the world's hazelnut production.

This volume control regulation provides a method for the U.S. hazelnut industry to limit the supply of domestic inshell hazelnuts available for sale in the U.S. Section 982.40 of the order establishes a procedure and computations for the Board to follow in recommending to the Secretary release of preliminary, interim final, and final quantities of hazelnuts to be released to the free and restricted markets each marketing year. The program results in plentiful supplies for consumers and for market expansion while retaining the mechanism for dealing with oversupply situations.

Currently, U.S. hazelnut production can be successfully allocated between the inshell domestic and secondary markets. One of the best secondary markets for hazelnuts is the export market. Inshell hazelnuts produced under the marketing order compete well in export markets because of quality. Europe, and Germany in particular, is historically the primary world market for U.S. produced inshell hazelnuts, although China was the largest importer in 1996–97. A third market is for shelled hazelnuts sold domestically. Domestically produced kernels generally command a higher price in the domestic market than imported kernels. The industry is continuing its efforts to

develop and expand secondary markets, especially the domestic kernel market. Small business entities, both producers and handlers, benefit from the expansion efforts resulting from this program.

There are some reporting, recordkeeping, and other compliance requirements under the order. The reporting and recordkeeping burdens have been accepted by the handlers as necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This final rule does not change those requirements.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this regulation.

The interim final rule was published in the **Federal Register** on January 22, 1998 (63 FR 3251). The Board manager mailed information concerning that action to all known industry members, and it was also made available through the Internet by the Office of the Federal Register. That rule provided a 60-day comment period which ended March 23, 1998. No comments were received.

After consideration of all relevant material presented, including the Board's recommendation and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (63 FR 3251, January 22, 1998), will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 982

Filberts, Hazelnuts, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

PART 982—HAZELNUTS GROWN IN OREGON AND WASHINGTON

Accordingly, the interim final rule amending 7 CFR part 982 which was published at 63 FR 3251 on January 22, 1998, is adopted as a final rule without change.

Dated: May 14, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

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