

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 982**

[Docket No. AO-205-A7; FV94-982-1]

**Filberts/Hazelnuts Grown in Oregon and Washington; Recommended Decision on Proposed Further Amendment of Marketing Agreement and Order No. 982**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

**SUMMARY:** This recommended decision invites written exceptions on proposed amendments to Marketing Agreement and Order No. 982 (order). The agreement and order regulate the handling of filberts/hazelnuts grown in Oregon and Washington. The proposed amendments would make changes in order provisions regarding: Volume control; nomination and membership of the Filbert/Hazelnut Marketing Board (Board); collecting assessments; and the administration and operation of the program. The proposed amendments were submitted by the Board to make the order more consistent with current industry conditions and needs. The Fruit and Vegetable Division, Agricultural Marketing Service (AMS), is proposing conforming and other necessary changes. The proposed amendments are designed to improve order operations.

**DATES:** Written exceptions must be filed by July 7, 1995.

**ADDRESSES:** Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081-S, Washington, D.C. 20050-9200, FAX (202) 720-9776. Four copies of all written exceptions should be submitted and should reference the docket number and the date and page number of this issue of the **Federal Register**. Exceptions will be made available for public inspection in the Office of the Hearing Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Teresa Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, 1220 SW Third Ave., room 369, Portland, OR 97204; telephone (503) 326-7274, FAX (503) 326-7440; or Tom Tichenor, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523-S, P.O. Box 96456, Washington,

D.C. 20090-6456; telephone: 202-720-6862; FAX 202-720-5698.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Public Hearing issued on February 24, 1994, and published in the February 28, 1994, issue of the **Federal Register** (59 FR 9425).

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**

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed further amendment of Marketing Agreement and Order No. 982 and of the opportunity to file written exceptions thereto. For the purposes of this document and this formal rulemaking proceeding, Marketing Agreement and Order No. 982 is referred to as the "order" and the term filberts and filberts/hazelnuts is hereinafter referred to as hazelnuts. Copies of this decision may be obtained from Teresa Hutchinson or Tom Tichenor, at the addresses listed above.

This notice is issued 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 the formulation of marketing agreements and orders (7 CFR part 900).

The proposed further amendment of the order is based on the record of a public hearing held in Newberg, Oregon, on March 8, 1994. Notice of this hearing was published in the **Federal Register** on February 28, 1994. The notice of public hearing listed 12 proposals submitted by the Board, the agency responsible for local administration of the order, and one proposal by the Fruit and Vegetable Division (Division), of the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (Department), concerning conforming changes.

The proposals would: (1) Change the name of the commodity covered under the order from "filberts" to "hazelnuts;" (2) for purposes of volume regulation, establish the trade demand area as the entire United States and allow the Board, with the Secretary's approval, to make changes in the inshell trade acquisition distribution area; (3) change the length of Board members' terms of office and the number of consecutive terms that may be held, make changes in the criteria used for nominating handler members and for weighting

handler votes when electing handler nominees, and change the voting procedures used for nominating members; (4) allow Board telephone votes to remain unconfirmed until the next public Board meeting; (5) remove the "verbatim" reporting requirement on Board marketing policy meetings; (6) provide the Board with some flexibility in recommending final free and restricted percentages; (7) authorize different identification standards for inspected and certified hazelnuts; (8) correct current language that specifies handler credit for ungraded hazelnuts; (9) change the procedures for establishing bonding requirements for deferred restricted obligations and allow the Board to purchase excess restricted credits from handlers; (10) clarify that mail order sales outside the production area are not exempt from order requirements; (11) allow the Board to accept advance assessment payments, provide discounts for such payments, and accept voluntary contributions; and (12) make such changes as are necessary to conform with any amendment that may result from the hearing.

The public hearing was held to: (1) Receive evidence about the economic and marketing conditions which relate to the proposed amendments of the order; (2) determine whether there is a need for the proposed amendments to the order; and (3) determine whether the proposed amendments, or appropriate modifications thereof, will tend to effectuate the declared policy of the Act.

No person testified in opposition to the proposals offered at the hearing and no alternative proposals were offered.

At the conclusion of the hearing, the administrative law judge fixed April 8, 1994, as the final date for interested persons to file corrections to the hearing transcript, proposed findings and conclusions, and written arguments or briefs based on the evidence received at the hearing. Corrections to the hearing transcript were filed by the Division with the Hearing Clerk on April 5, 1994. No other corrections, findings, conclusions, arguments or briefs were filed.

**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 for the last three years 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. Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that handlers would not be unduly burdened by any additional regulatory requirements, including those pertaining to reporting and recordkeeping, that might result from this proceeding. The record also indicates that a majority of handlers and producers would meet the SBA definitions of small agricultural service firms and small agricultural producers, respectively.

During the 1993-94 marketing year, approximately 25 handlers were regulated under the order. In addition, there were approximately 950 producers of hazelnuts in the production area. The Act requires the application of uniform rules on regulated handlers. Since handlers covered under the order are predominantly small businesses, the order itself is tailored to the size and nature of small businesses. 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.

For discussion of the anticipated impact on small businesses, the proposed amendments have been grouped into programmatic categories. Amendments concerning the order's marketing and volume control programs would: Change the name of the commodity to "hazelnuts" (§ 982.4); add the State of Hawaii to the trade demand area and allow the Board to make changes in the trade demand area, with the approval of the Secretary (§ 982.16); provide the Board the flexibility to release up to 15 percent of the average three year inshell trade acquisitions for desirable carryout (§ 982.40); correct the current language that determines handler credit for ungraded hazelnuts (§ 982.51); establish the bonding rate for deferred restricted obligations at the estimated value of restricted credits for the current marketing year and allow the Board to use defaulted bond payments to purchase excess restricted credits (§ 982.54); and clarify that mail order sales are not exempt from order requirements (new § 982.57). These

proposed amendments are designed to assist the Board in its domestic and export marketing efforts. The amendments would allow the Board to make program and management decisions that are more consistent with changing market conditions and better respond to changing marketing needs. Because the Board acts in the best interests of the industry, increased Board decision making flexibility should benefit the industry and, thus, small businesses in the industry.

Regarding nomination and Board membership, the proposed amendments would: Change from one to two years the length of Board member and alternate member terms of office (§ 982.33); limit the number of consecutive terms members and alternate members may hold to three two-year terms (§ 982.33); and make conforming changes and a correction in the qualifications for nominating members (§§ 982.30 and 982.32). The amendments are proposed to ease the burden of conducting nomination meetings every year and enhance the Board's efficiency. The amendments are administrative in nature and would not impose additional costs on small businesses.

Other recommended amendments to the order's administrative procedures and operations would: Allow Board telephone votes to remain unconfirmed in writing until the next public Board meeting (§ 982.37); remove the "verbatim" reporting requirement on Board marketing policy meetings (§ 982.39); allow the Board to accept advance assessment payments and provide discounts for such payments (§ 982.61); and allow the Board to accept voluntary contributions (new § 982.63). These proposed amendments are intended to improve the operations of the Board, lessen the administrative burden on Board members and staff, and improve management of the order's financial resources. As such, the proposed changes would have negligible, if any, economic impact on small entities.

Finally, one amendment would provide the Board with the authority to establish more up-to-date identification standards (§ 982.46), which would make order identification and certification provisions consistent with current industry practices and enable handlers more flexibility in meeting identification requirements.

All of these changes are designed to enhance the administration and functioning of the order and benefit the entire industry. Any added costs are not expected to be significant because the benefits of the proposed amendments

are expected to outweigh the costs. Finally, the proposed amendments would have no significant impact or burden on small businesses' recordkeeping and reporting requirements.

The amendments proposed herein have been reviewed under Executive Order 12778, Civil Justice Reform and 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. Chapter 35), any additional reporting and recordkeeping requirements that might result from the proposed amendments would be submitted to the Office of Management and Budget (OMB). The provisions would not be effective until after receiving OMB approval.

#### Material Issues

The material issues of record addressed in this decision are:

(1) Whether to change the name of the commodity from "filberts" to "hazelnuts;"

(2) whether the inshell trade acquisition (trade demand) distribution area should be expanded to include the entire United States; whether the Board, with the approval of the Secretary, should be allowed to make changes in the trade demand distribution area; and, whether inshell hazelnuts shipped to export markets should be restricted from importation into all trade demand distribution areas;

(3) whether to extend the length of Board members' and alternate members'

terms of office to two years, limit the number of consecutive terms which may be held to three two-year terms, make conforming changes to the qualifications for nominating members, make a correction in the weighting of handler votes, and clarify voting procedures;

(4) whether Board telephone votes should remain unconfirmed in writing until the next public Board meeting;

(5) whether to remove the "verbatim" reporting requirement on Board marketing policy meetings;

(6) whether the Board should have additional flexibility in recommending final free and restricted percentages;

(7) whether to provide the Board with the authority, subject to the approval of the Secretary, to establish different identification standards for inspected and certified hazelnuts;

(8) whether to correct the factor used to convert kernel weight to inshell equivalent weight when calculating the volume of hazelnuts withheld for restricted credit;

(9) whether the Board should use the estimated value of restricted credits when establishing bonding rates, and whether to allow the Board to purchase restricted credits;

(10) whether to clarify that mail order sales are not exempt from order requirements;

(11) whether the Board should have authority to accept advance assessment payments, provide discounts for such payments, borrow money, and accept voluntary contributions; and

(12) whether any conforming changes should be made to the order if any or all of these proposals were to become effective.

### Findings and Conclusions

The findings and conclusions on the material issues, all of which are based on evidence provided at the hearing and the record thereof, are:

(1) The terms "filberts" and "filberts/hazelnuts" should be revised to read "hazelnuts." Section 982.4 defines filberts to mean filberts or hazelnuts produced in the States of Oregon and Washington from trees of the genus *Corylus*.

Over the years, the use of the term "filberts" has lessened both within and outside the industry. "Hazelnuts" is widely used in the industry to describe the tree nut covered under the order and in international marketing efforts.

While some handlers continue to refer to the product as filberts, record evidence indicates that changing the name in the order will not have an adverse effect on those handlers who have traditionally referred to the product as "filberts" or use the term in

the company name or logo. Further, changing the term would be consistent with public practice because, in 1989, the hazelnut—not filbert—was declared the official state nut of Oregon. Record evidence indicates that, in the production area, the tree is generally referred to as a filbert tree while the nuts are referred to as hazelnuts.

In recognition of the more prominent use of the term "hazelnuts," the Board recommended that the tree nut defined as "filberts" in the order and the title of the Board, and the term "filbert/hazelnut" in the order's title be defined as "hazelnuts" throughout the order and the order's rules and regulations. Thus, the title of the order should be amended to read "Hazelnuts Grown in Oregon and Washington," the definition for filberts should be amended to read, "Hazelnuts means hazelnuts or filberts produced in the States of Oregon and Washington from trees of the genus *Corylus*," and the title "Filbert Control Board" should be changed to "Hazelnut Marketing Board." Wherever the term "filberts" appears in *Subpart—Order Regulating Handling* and *Subpart—Grade and Size Regulations*, it should be changed to "hazelnuts." Such changes should be made in the table of contents and the following sections: 982.4, 982.6, 982.7, 982.8, 982.11, 982.12, 982.13, 982.14, 982.15, 982.16, 982.18, 982.19, 982.20, 982.30, 982.32, 982.34, 982.39, 982.40, 982.41, 982.45, 982.46, 982.50, 982.51, 982.52, 982.53, 982.54, 982.55, 982.56, 982.57, 982.58, 982.61, 982.65, 982.66, 982.67, 982.69, 982.71, 982.86, and 982.101, including Exhibit A. Wherever the term "filberts/hazelnuts" appears in *Subpart—Administrative Rules and Regulations*, it should be changed to "hazelnuts." Such changes should be made in the following sections: 982.446, 982.450, 982.452, 982.453, 982.455, 982.456, 982.466, 982.468, and 982.471. Finally, references to "F/H Form \* \* \*", followed by a letter or number, or both, should be changed to read "H Form", followed by a letter or number, or both sections 982.450, 982.452, 982.453, 982.454, 982.455, 982.456, 982.460, 982.466, and 982.468.

(2) In § 982.16, Inshell trade acquisitions, the inshell trade demand area should include all 50 states of the United States, and not just the continental United States, and the Board, with the Secretary's approval, should be authorized to make changes in the distribution area. Therefore, this amendment would make two changes in the order: (1) Include all 50 states of the United States in the trade demand area, thus, adding Hawaii, and (2) provide authority to the Board to make changes

to the trade demand area through informal rulemaking procedures. For the purposes of these findings and conclusions, trade demand area is synonymous with inshell trade acquisition distribution area.

Under the order's volume regulations, shipments of inshell hazelnuts to the continental U.S. are limited to a prescribed percentage of the industry's supply, subject to regulation each marketing year. Currently, the continental U.S. comprises the "domestic market" under the order. All markets outside the continental U.S., including Hawaii, are currently export markets to which handlers may ship inshell hazelnuts without regard to volume regulations established under the order. This amendment would expand the trade demand area to include Hawaii, thus, making that state part of the "domestic market."

Inshell trade acquisitions are defined as the quantity of inshell hazelnuts acquired by the trade (commercial buyers) from all handlers during a marketing year for distribution in the continental United States. The trade demand for any given year is based on inshell trade acquisitions during the preceding three years. The domestic inshell market volume is restricted under volume regulations. Restricted hazelnuts are shelled or exported inshell to other countries, or are held in satisfaction of the handler's restricted obligation.

The effect of the first change would be to add Hawaii to the trade demand area. When the order was promulgated in 1949, "trade demand" was defined as the quantity of filberts/hazelnuts acquired for "distribution in the continental U.S., Alaska, Hawaii, Puerto Rico and the Canal Zone; except that there may also be considered in the making of such computations such acquisitions for distribution in Canada or Cuba, whenever the Board is of the opinion that such distribution may be made to the particular country at prices to handlers approximating such prices on distribution in the Continental United States." (14 FR 5657, September 15, 1949.) This definition was amended in 1959 (24 FR 5305, June 30, 1959) to include only the continental U.S. because it was determined that the other areas would better serve the industry as export outlets for restricted hazelnuts. The Board now recommends that all 50 states be included in the trade demand area.

However, testimony presented at the hearing did not provide any economic analysis, data, or other persuasive reasons that would support adding Hawaii to the trade demand area. The

Department believes that the addition of Hawaii to the trade demand area should be evaluated on the same bases as other markets which might be added to the trade demand area. Should the second part of this material issue, as described below, be approved in this formal rulemaking procedure, the Board would be able to recommend adding Hawaii to the trade demand area through informal rulemaking procedures. Thus, this recommended decision denies that portion of the second material issue which recommends adding Hawaii to the trade demand area.

The second change would provide authority to the Board to make changes to the trade demand area, through informal rulemaking procedures. The Board now believes that it is in the best interest of the industry that the Board have the flexibility to respond to changing market conditions by adding a country or marketing region, when appropriate, to the trade demand area.

As currently provided, changes to the trade demand area require formal rulemaking procedures which include a public hearing, a recommended decision, an industry referendum and a final rulemaking decision. However, marketing policy decisions need to be made on a yearly basis, particularly those decisions that require computation to determine the amount of inshell hazelnuts available to be sold without restriction. The formal rulemaking procedure does not provide the Board with the flexibility or the timeliness it needs to respond to changing markets in other countries. Informal rulemaking authority, which requires a Board recommendation and Secretarial approval, would enable the Board to make more timely responses to changing market conditions in countries or regions outside the U.S.

The record indicates that a recommendation to add a country or region to the trade demand area would first be considered by the Board's Export Committee when it develops and recommends to the Board an annual export marketing policy. Changes in the trade demand area would then be considered by the Board and recommended to the Secretary. Notice of these meetings would be made to hazelnut growers and handlers in Oregon and Washington and the meetings would be open to all members of the industry.

According to the hearing record, a Board recommendation to add a country or region to the trade demand area would be based primarily on the potential market conditions and opportunities in the country or region. Market considerations could include:

Transportation modes and costs for getting product to the country or region; non-restrictive or at least neutral import and customs requirements; marketing infrastructure; consumption habits, holidays or cultural factors to which marketing efforts could be tied; economic outlook in the country; and other financial and economic factors.

The record evidence indicates that the characteristics of markets in some countries are very close to market characteristics in the United States. For instance, Canada, an export market country, is an example of a market that could be reviewed in a Board recommendation to expand the trade demand area. There is a considerable difference in price between hazelnuts sold in the U.S. and the same product sold in Canada. Inshell hazelnuts are marketed primarily during the end-of-the-year holiday season—which is also widely celebrated in Canada. The standard of living and disposable income levels in Canada are similar to those in the U.S. Thus, the record indicates that, for instance, the Board could recommend including Western Canada, or possibly all of Canada, in the trade demand area. Other examples of countries or areas which could be considered for inclusion in the trade demand area include Puerto Rico, and all or part of Mexico.

The Board would necessarily need to consider the effect adding a new country or region to the trade demand area would have on the U.S. inshell market. If the inshell supply designated for the trade demand area is not increased to meet the expected demand increase in new countries or regions, the inshell supply available to the U.S. market would be reduced. Thus, the addition of one or more new inshell markets, without an increase in inshell supply, could affect the amount of inshell hazelnuts available for shipment to domestic U.S. markets.

Any Board recommendation to shift a country or region from the export market to the trade demand area would likely result in a corresponding recommendation regarding the free and restricted volumes shipped. The Board should include the projected volume for the new country or region in inshell trade acquisitions when determining free and restricted percentages in its marketing policy recommendation to the Secretary. For instance, if Canada is added to the trade demand area, inshell shipments to Canada would be included in inshell trade acquisitions.

"Export" sales would be only hazelnut sales to those countries or regions that are not designated as being in the trade demand area.

Record evidence also indicates that the Board could recommend to the Secretary that a country or region be removed from the trade demand area if desired marketing results are not achieved. Indicators of failure could include: The volume of sales of hazelnuts in the new market were below expectations; the expected prices in the new market were not sustained; or the new market resulted in a negative or depressing affect on the marketing of hazelnuts in the remainder of the trade demand area.

The record does not suggest a minimum amount of time that a new country would be in the trade demand area before the Board could recommend its removal to the Secretary. The Board analyzes and recommends its marketing policy to the Secretary on an annual basis. Such analysis should include a complete and thorough review of any changes to the trade demand area that were made during the previous marketing season. Any recommendation to remove a country or region from the trade demand area would be reviewed by the Export Committee and recommended to the Board. Discussions for such a recommendation would be held at meetings open to industry members and the public prior to any recommendation to the Secretary. Thus, it is apparent that implementation of such a recommendation would preclude action to remove a country during the same marketing year it was added to the trade demand area.

A conforming change should be made in paragraph (b) of § 982.52 Disposition of restricted filberts. This amendment was listed as proposed material issue 9 in the Notice of Hearing but is discussed in this material issue as a conforming change.

Testimony submitted at the hearing indicates that free hazelnuts shipped to the trade demand area are marketed at prices higher than export prices. There is concern that exported inshell hazelnuts not be re-exported back to the U.S. at prices less than domestic market prices. The fourth sentence of § 982.52(b) currently provides that exporting handlers obtain certification from buyers that they will not re-export inshell hazelnuts back into the U.S. Record evidence indicates that, because foreign countries may be added to the trade demand area, inshell export sales to countries not in the trade demand area should not be exported or shipped onward to any country designated in the trade demand area. Thus, certifications signed by importers in export countries should include provisions that exported inshell hazelnuts not be exported again to any country or region that is part of

the trade demand area. Inshell hazelnut shipments may be shipped from one trade demand area country or market to other countries or markets that are also in the trade demand area. Based on hearing testimony, the United States is one region and should not be subdivided into two or more regions for the purpose of removing some states from the trade demand area.

The proposed amendments should provide the Board with the flexibility to take advantage of changing market conditions and do so on a timely basis. Thus, § 982.16 should be changed to: (1) Include all states in the U.S. in the inshell trade acquisition distribution area; and (2) allow the Board, with the approval of the Secretary, to add or remove countries or regions to or from the trade demand area. The proposed amendment would also make corresponding changes in the first sentence of paragraph (b) of § 982.52 to include all states of the United States in the trade demand area and add other countries or regions to the trade demand area, as recommended by the Board and approved by the Secretary. Likewise, a corresponding change should be made in the fourth sentence of paragraph (b) to prevent inshell export sales from being exported to countries or regions that are included in the trade demand area.

(3) In paragraph (b) of § 982.33, Selection and term of office, the length of Board member and alternate member terms of office should be changed from one to two years and the number of consecutive terms a member could serve should be limited to three terms. Conforming changes should be made in provisions covering the qualifications of handlers nominating handler members (§ 982.30(b)) and weighting handler votes in the nomination process (§ 982.32(b)), and a minor change should be made in § 982.32(a) to remove the reference to initial Board members. Finally, when nominating the fourth handler member and alternate member, as provided in § 982.32(c), a correction in the criteria used to calculate a handler's minimum weighted vote should be made and the voting procedure should be amended to provide that eligible handlers vote for both the fourth member and fourth alternate member.

The term of office for Board members and alternates has been amended twice since promulgation of the order. The record indicates the reason for this amendment to change the term of office from one to two years is to relieve the administrative burden that yearly nominations procedures place on industry members and the Board's

administrative staff. Nomination meetings, industry voting and ballot counting, and resultant certification paperwork have been required of the industry and the Board every year since 1959. When two-year terms were in effect from 1959 to 1986, the terms were staggered, so that half the members were nominated and selected each year. Staggered terms required that nomination referenda be held each year and, thus, did not relieve the burden on industry members or the Board's administrative staff.

This amendment would establish two-year terms of office for Board members and alternate members with all terms beginning and ending at the same time. Thus, the nomination process would be conducted only once every two years, thereby reducing by half the administrative burden on industry members and the Board's administrative staff. Record evidence indicates that, because of the infrequent turnover of new members, the lack of staggered terms should not affect the continuity of Board membership.

Also, record evidence indicates that moving to two year terms of office would be beneficial to the Board's public member and alternate public member. The timing for annual nomination and selection of the Board's public member prevents that member from being an active and effective participant on the Board. Currently, the public member and alternate is nominated at the first meeting of the new Board, usually in late August. However, by the time the public member and alternate is subsequently selected by the Secretary, many important Board activities have been completed for the year. The proposed amendment to establish two-year terms of office would enable the public member and alternate public member to more actively participate in Board decisions because these members would be on the Board for a two-year period.

If the term of office is changed from one to two years, changes also should be made to three provisions regarding Board membership. Sections 982.30 and 982.32, regarding establishment of the Board and nomination of Board members, respectively, should be amended to provide that nominations of the three largest handler members be based on the handlers' tonnage during the previous two marketing years. Currently, nominations are based on the previous year's handled volume.

Paragraph (c) of § 982.32 contains an error in the wording which specifies the minimum weighted vote handlers may cast in nominating the fourth handler member and alternate to serve on the

Board. The current language says that if a handler eligible to vote for the fourth handler position handles less than one "percent," the handler's vote should be weighted as one ton. The term "percent" does not have any meaning without a reference as a percent of something. Testimony on this provision in the 1986 formal rulemaking proceeding shows that the intent of the industry was for the term to be ton and not percent. This error inadvertently occurred between publication of the proposed rule (50 FR 42545, October 21, 1985) and final rule (51 FR 29547, August 19, 1986) in the previous formal rulemaking proceeding in 1985/86. The Board has recognized the intent of the provision and has correctly recorded handlers' weighted votes when tabulating votes for the fourth handler member and alternate member. Thus, in the third sentence of paragraph (c) of § 982.32, the term "percent" should be replaced with the term "ton."

Paragraph (c) of § 982.32 should also be amended by changing the last sentence regarding the casting of votes for the fourth handler member and alternate member. Current paragraph (c) provides that handlers vote for one candidate and the candidate receiving the highest number of votes shall be the fourth handler member nominee and the candidate receiving the second highest number of votes shall be the fourth handler alternate member nominee. This proposal provides that each eligible handler shall cast two separate votes: one for the fourth handler member and one for the fourth handler alternate member. The candidates who receive the highest numbers of votes in each category would be the nominees.

Currently, paragraph (b) of § 982.33 limits the number of consecutive one year terms a member may serve to six terms. To maintain the order's intent that members and alternates should not serve more than six consecutive years, paragraph (b) should be amended to provide for a maximum of three consecutive two-year terms of office. If approved in referendum and by the Secretary, the three term limit would begin with the first nominations held after completion of this formal rulemaking process. Thus, any standing Board members and alternates nominated and selected for the first two year term would be eligible to serve two additional terms, regardless of past service. Also, this amendment would not restrict a member who has served three consecutive terms from then serving three consecutive terms as an alternate member or for an alternate member who has served three

consecutive terms from then serving three consecutive terms as a member.

The Board recommended a minor wording change in § 982.32(a) which would remove the reference to "initial" Board members as those members serving prior to the amendment of the order. This change would simplify the wording of the paragraph and make it consistent with the changing nature of Board membership. The proposed amended paragraph would provide that members and alternate members of the Board serving immediately prior to the effective date of this amended subpart shall continue to serve until their respective successors have been selected.

Thus, § 982.33 should be amended to provide two year terms of office for Board members and alternate members. Sections 982.30 and 982.32 covering nominating qualifications, weighting handler votes, voting procedures, and consecutive terms should also be changed for consistency and conformity with two-year office terms.

(4) In paragraph (b) of § 982.37, Procedure, the requirement that Board votes by telephone, telegraph or other means of long distance communication be confirmed in writing should be amended to provide that such votes remain unconfirmed until the next public Board meeting.

The Board generally meets twice a year. At least once each year over the last five years, the Board has found it necessary to vote on an issue by telephone. The issue has been the final budget which must be submitted to the Department at a time when there are no scheduled Board meetings.

Record evidence indicates that it is difficult to obtain written confirmation of all telephone votes cast by Board members. All telephone votes must be confirmed, and written confirmation must be unanimous. Even though a ballot is mailed to each member, and follow-up calls are made to those who have not submitted their written ballot, some members fail to respond.

Because of such confirmation delays, some telephone votes have been confirmed at the next public Board meeting. At these meetings, the members confirm their original vote and reaffirm their position. This procedure should be on the record and so recorded in the committee minutes. Reaffirmation must be unanimous. The record indicates that, under the proposed amendment, if any member were to change his or her original vote, the issue would be debated again and a new vote by all committee members would be taken. The second vote would require passage by a simple majority.

The record indicates that telephone votes should be taken only on issues that are known to be non-controversial. If an issue is known to have any one member or industry group against it, a telephone vote on the issue would not be taken and a public meeting would have to be called for consideration of the issue.

The record also indicates that a vote cast by facsimile transmission is considered a vote by "other means of communication." While a facsimile transmission produces a piece of paper which is received and held by the Board staff, the vote would still have to be confirmed at the next public Board meeting.

Thus, § 982.37(b) should be amended to provide that Board votes cast by telephone, telegraph or other means of communication shall be confirmed at the next regularly scheduled Board meeting and that such confirmation shall require ten concurring votes.

(5) In paragraph (i) of § 982.39, Duties, the requirement that the Board furnish verbatim reports of its marketing policy meetings to the Secretary should be amended to require that summary reports of such meetings be furnished to the Secretary.

The promulgation documentation provided that a "complete report of the proceedings" of the Board meeting establishing a marketing policy recommendation be reported to the Secretary (14 FR 5669, September 15, 1949). Because the Board in 1959 was providing verbatim reports of marketing policy deliberations, the verbatim requirement was added to the reporting requirement (24 FR 4173, May 23, 1959) and the requirement was moved to paragraph (5) of § 982.39 Duties (24 FR 5307, June 30, 1959). The amendment stated that only that portion of a meeting dealing directly with marketing policy discussions be reported verbatim.

However, the record indicates that verbatim reports are impractical because either a court reporter has to be contracted or a recording would have to be exactly transcribed by a Board employee. Either of these alternatives requires an extra expense for the Board and results in a delay in completing the report.

This amendment would establish that the Board tape record all meetings and then summarize the proceedings using the tape recording to ensure a complete and thorough report. The record testimony reports that this process should take considerably less time and be less costly than making a direct transcript of the recording. This revised procedure is expected to maintain the accuracy of the meeting report.

Thus, § 982.39(i) should be amended to provide that the Board furnish the Secretary a report of the proceedings of each meeting of the Board held for the purpose of marketing policy recommendations.

(6) In paragraph (c)(2) of § 982.40, Marketing policy and volume regulation, the Board should be provided some flexibility in recommending final free and restricted percentages. In the 1985-86 amendment of the order, development of the Board's annual marketing policy and volume regulation action were established to follow specific procedures and formula computations. This amendment would enable the Board to better respond to market conditions when recommending the final free and restricted percentages.

On or before November 15, the Board meets to recommend to the Secretary, the establishment of interim final and final free and restricted percentages. The interim final percentage results in the release of 100 percent of the inshell trade demand previously computed by the Board. Paragraph (c)(2) of § 982.40 now requires that the final percentages release an additional 15 percent of the average of the preceding three years' trade acquisitions of inshell hazelnuts for desirable carryout.

This amendment focuses on the mandatory release of the final 15 percent. Record evidence indicates that the mandatory release of the entire tonnage resulting from the additional 15 percent can sometimes be harmful to the market and may not always be in the best interest of the industry. For instance, the mandatory release of the final 15 percent could place an excess supply of hazelnuts on the market and result in a weak market. Market conditions may be such that release of a smaller final percentage would be a wiser marketing policy. This amendment provides the Board with that flexibility when recommending the final free and restricted percentages.

In addition to complying with the provisions of the marketing order, the Board must also consider the Department's 1982 "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" (Guidelines) when recommending marketing policy computations. Volume control regulation provides the industry a means of collectively limiting the supply of inshell hazelnuts available for sale in the trade demand area. The Guidelines provide that the trade demand area have available a quantity equal to at least 110 percent of recent years' sales in the trade demand area before volume regulations can be implemented. This provides for

plentiful supplies for consumers and for market expansion while retaining a mechanism for dealing with oversupply situations.

The hazelnut industry in Oregon and Washington has satisfied the Guidelines' 110 percent requirement. Pursuant to § 982.40(b), each year the Board may, for market expansion purposes, increase inshell trade demand by an amount up to 25 percent of the previous 3 years' average inshell trade acquisitions. In addition, the Board must add to the adjusted inshell trade demand a total of 15 percent of the 3-year inshell trade acquisition average to meet the desirable carryout requirement of § 982.40(c)(2). This more than meets the 110 percent requirement.

Over the years, the authority for these increases has caused the Board to exceed the Guidelines' 110 percent requirement. It is possible that the Board could choose to recommend a market expansion increase and a final free and restricted percentage increase that totalled less than the Guidelines' 110 percent requirement. However, based on present Board practices, such a recommendation is not expected. Any Board recommendation that totalled less than the 110 percent requirement could be referred by the Secretary back to the Board.

Thus, § 982.40(c)(2) should be amended to provide that the final free and restricted percentages may release up to an additional 15 percent of the average of the preceding three years' trade acquisitions of inshell hazelnuts for desirable carryout.

(7) In paragraph (b) of § 982.46, Inspection and certification, specific identification practices for the handling and withholding of restricted obligation hazelnuts should be amended to provide that all inspected and certified hazelnuts shall be identified as prescribed by the Board.

Traditionally, hazelnuts were inspected and certified as either free or restricted before or during handling, or before being set aside as withheld for restricted obligation. Paragraph (b) provides that handlers use seals, stamps, tags or other identification fixed to the containers to identify lots set aside as either free or restricted hazelnuts. However, the record indicates that, since 1975, industry practices have changed significantly and now allow handlers to substitute fresh hazelnut lots for free and restricted lots that have been set aside. It is no longer necessary for handlers to meet their volume control obligations by maintaining restricted lots that are sealed, stamped, tagged, or otherwise so identified.

Under the proposed amendment, the Board may prescribe other methods of identification of restricted obligation hazelnuts. The record indicates that the Board currently allows handlers to carryover hazelnuts which are reported as either undeclared, declared restricted, or declared free. The hazelnuts are reported as one or the other, but do not have to be specifically so marked.

These relaxed identification procedures would enable handlers to continue to meet identification requirements for restricted obligation hazelnuts without setting aside specific, identifiable lots. The amended procedures would bring the marketing order provisions up-to-date with current industry practices. Thus, § 982.46(b) should be amended to provide that hazelnuts inspected and certified for free and restricted use shall be identified as prescribed by the Board.

(8) In paragraph (a) of § 982.51, Restricted credit for ungraded inshell hazelnuts and for shelled hazelnuts, the current language that authorizes handler credit for ungraded hazelnuts should be amended to delete an incorrect and misleading term.

This provision allows handlers to receive merchantable credit for ungraded inshell hazelnuts they hold to meet their restricted obligation. The hazelnuts must be inspected to determine kernel weight, which is converted back to an inshell equivalent. The industry uses a conversion factor of 60 percent shell or waste product and 40 percent kernel weight. Thus, it takes 2.5 pounds of inshell hazelnuts to make 1 pound of hazelnut kernels—a conversion factor of 2.5 to 1.

However, the first sentence of paragraph (a) of § 982.51 states that the conversion factor is 2.5 "percent." The term "percent" is not correct and, in fact, greatly reduces the conversion factor. If the conversion factor was to be represented as a percentage, it would be 250 percent. This error evidently occurred when § 982.51 was amended in 1986. The Board and industry handlers have been operating on the correct conversion factor of 2.5 to 1. Thus, the language that specifies handler credit for ungraded hazelnuts in § 982.51 should be amended to correct the conversion factor as stated herein.

(9) In § 982.54, Deferment of restricted obligation, several changes and conforming changes should be made to provisions regarding bonding values and rates, the use of defaulted bond funds, and the Board's flexibility when dispensing defaulted bond funds.

Prior to or upon shipping inshell hazelnuts to the trade demand area,

handlers are required to withhold from handling a quantity of hazelnuts equal to the restricted obligation resulting from that shipment. Hazelnuts so withheld may be exported inshell or shelled. The withholding obligation also may be deferred. Section 982.54 provides that a handler may post a bond as a guarantee that the handler will eventually fulfill the handler's restricted obligations. Hearing testimony indicates that the provision establishing the bonding rate currently specified in the order is too high and too burdensome on handlers under present marketing conditions.

Handlers may either shell or export inshell as many hazelnuts as they wish, but they are limited in the amount of inshell hazelnuts they can sell as free tonnage in the trade demand area when volume regulations are in effect. Volume regulations under the order require that, prior to or upon shipping inshell hazelnuts to the trade demand area, handlers shall withhold from handling a quantity of hazelnuts equal to the restricted obligation resulting from that shipment. Hazelnuts so withheld may be certified merchantable, inspected ungraded, or certified shelled. The domestic inshell market is extremely seasonal with most of the shipments occurring in October or early November, the same period when hazelnuts are harvested and delivered to handlers. During this period, handlers do not have enough hazelnuts certified, inspected, or shelled to meet their restricted obligations. Therefore, handlers use the bonding provisions in the order to defer a large part of their obligations.

As domestic use of inshell hazelnuts has declined and production has increased, the percent of the crop going to the primary inshell market has dropped. For example, in the 1993-94 marketing season, the free percentage was only 13 percent—resulting in a restricted obligation nearly 6.7 times the quantity handled for the free market. Such a high restricted obligation-to-handling ratio makes a bonding rate based on the price for inshell hazelnuts very burdensome. Such a high bonding rate is not necessary as long as the bonding rate reflects the difference between the domestic inshell price and the returns available in authorized markets for restricted hazelnuts such as inshell exports or shelling.

Inshell exports have been a large and growing market for restricted hazelnuts. In some years, the average reported value for inshell exports has exceeded domestic quotations for domestic sales of U.S. No. 1 large hazelnuts. This apparently results from a willingness of some foreign buyers to pay a significant

premium for the largest sizes of hazelnuts. Thus, restricted disposition credits earned by exporting inshell hazelnuts may reflect little or no loss compared to the domestic inshell market.

The order authorizes the transfer of restricted disposition credits between handlers, and some handlers use this authority.

The record shows that members of the Board, particularly its handler members, have knowledge of the marketing opportunities in various restricted outlets and knowledge of the transfer of restricted disposition credits. Thus, the Board should be capable of using these factors to calculate an appropriate bonding rate that is financially acceptable but not so low as to encourage handlers to default on their bonds.

The proposed amendments would change the method by which the Board determines the rate of the bond. Paragraphs (b), (c), (d), (e) and (f) of § 982.54 would be amended to replace terminology that ties bonding rates to the value of quantities handled or certified for handling. Instead, bonding rates would be tied to the estimated value of restricted credits as established by the Board. A bonding rate based on the value of restricted disposition credits should provide adequate protection against default and would be much less burdensome.

Paragraph (b) provides that the bonding value for each handler be established by multiplying the deferred restricted obligation poundage bearing the lowest bonding rate by the applicable bonding rate. Under the proposed amended paragraph (b), the bonding value would be determined by multiplying the deferred restricted obligation poundage by the applicable bonding rate.

Paragraph (c) provides for a bonding rate for each pack withheld which is the amount per pound as established by the Board. Under the proposed amended paragraph (c), the Board would establish the bonding rate based on the Board's estimated value of restricted credits. Record evidence indicates that the value of credits should be based on the value of hazelnuts in all markets—restricted as well as free. Because restricted market hazelnuts usually have less market value than free hazelnuts, the credit value usually is less than the actual market value of free hazelnuts. Thus, a bond based on credit value would lower the value of the bond, making it a more acceptable burden for handlers. The record also indicates that a bond value based on credits would be high enough to discourage handlers

from voluntarily defaulting on their bond.

Paragraph (d) requires the Board to use the funds collected from defaulted bond payments to purchase quantities of certified merchantable hazelnuts on which the restricted obligations have been met. To make paragraph (d) consistent with amended paragraph (c), the Board would use defaulted bond funds to purchase restricted credits from handlers.

Paragraph (e) provides that unexpended funds resulting from defaulted bond payments remaining at the end of the marketing year would be used by the Board to pay its expenses and in the purchase of hazelnuts as provided in paragraph (d). Consistent with amended paragraph (d), a conforming change would be made in amended paragraph (e) to provide that unexpended funds resulting from defaulted bond payments remaining at the end of the marketing year could be used by the Board to purchase restricted credits, rather than merchantable hazelnuts, on which the restricted obligation has been met.

The last sentence in paragraph (e) provides that any balance of funds collected from defaulted bond obligations remaining at the end of the marketing year after payment of Board expenses, including administrative costs and the purchase of hazelnuts, would be returned pro-rata to all handlers. However, experience indicates that no such unused funds have remained at the end of recent marketing years to be refunded to handlers. Bond payments based on restricted credit values are expected to result in fewer defaults and less default funds collected. Thus, a marketing year that would produce an excess of defaulted bond funds is not likely to occur. In addition, paragraph (b) of § 982.62 provides Board authority to return excess funds at the end of each marketing year.

Paragraph (f) currently provides that merchantable hazelnuts purchased by the Board as provided in paragraph (d) shall be turned over to handlers who have defaulted on their bonds for disposal by the handlers as restricted hazelnuts. A conforming change would be made in amended paragraph (f) to provide that the restricted credits purchased by the Board under amended paragraph (d) would be turned over to those handlers who have defaulted on their bonds for liquidation of their restricted obligation.

The record indicates that some small handlers only shell hazelnuts and have no need to use the bonding authority. This proposed amendment would have no effect on these handlers. All handlers

who use the bonding authority would benefit from the reduced cost of the lower bonding rates.

Therefore, paragraphs (b), (c) and (d) of § 982.54 should be amended to provide, respectively, that: the bonding value be determined by multiplying the deferred restricted obligation poundage by the applicable bonding rate; the bonding rate be based on the estimated value of restricted credits; and the Board use handlers' defaulted bond funds to purchase restricted credits. Conforming changes should also be made to paragraphs (e) unexpended sums and (f) transfer of purchases.

(10) Section 982.57, Exemptions, should be amended to clarify that mail order sales are not exempt from order requirements.

This provision was amended in 1986 to clarify that hazelnuts sold directly to end users (consumers) at a grower's ranch or orchard, or at roadside stands and farmers markets are exempt from regulatory and assessment provisions of the order. No testimony was provided at the amendment hearing in 1985 to suggest that mail order sales should be exempt from order regulations. However, some growers and handlers in the industry believe that the exemption provision applies also to mail order sales.

To help correct this misinterpretation, the Board proposed that § 982.57 be amended by adding a sentence at the end of paragraph (b) to clarify that mail order sales are not considered exempt from order requirements.

The added sentence that appeared in the Notice of hearing for this rulemaking (59 FR 9428; February 28, 1994) included a phrase that could cause further confusion among industry members. The proposed sentence in the Notice of hearing reads, "Mail order sales to destinations outside the area of production are not considered to be exempt sales under this part." The phrase "to destinations outside the area of production" could be interpreted to mean that mail order sales to destinations inside the States of Oregon and Washington would be exempt from order requirements. However, this is not consistent with Board policy.

It is current Board policy that no exemptions are authorized for mail order sales, regardless of destination. Hearing testimony indicated that the Board has always considered that no mail order sales are exempt from order regulations. Testimony further indicates that this amendment is not a change in policy. Thus, the proposed clarifying sentence should read: "Mail order sales are not exempt sales under this part."

Therefore, paragraph (b) of 982.57 should be amended by adding the clarification that mail order sales are not exempt sales under the order.

(11) A new paragraph (b) of § 982.61, Assessments, should be established to allow the Board to accept advance assessment payments, provide discounts for such advanced payments, and borrow funds. Also, a new § 982.63 Contributions, should be established to allow the Board to accept voluntary contributions for payment of research, promotion, and market development activities.

The marketing order's fiscal period begins July 1, which is three months before the hazelnut harvest and four months before receipt of assessment payments for the new marketing year. During the initial four months, the Board's access to funds is limited. The first proposed amendment is intended to increase the Board's ability to obtain funds on a temporary basis early in the marketing year. While marketing order reserve funds may be used to pay for planned research and promotion programs and other administrative obligations, record evidence indicates that the Board would prefer to accept advance assessment payments or borrow funds rather than draw from the order's reserve funds to pay for financial obligations that might occur prior to the accumulation of assessment funds.

The second amendment would allow the Board to increase funds—through contributions—to pay expenses incurred under § 982.58, Research, promotion and market development. A minor change would be added to § 982.52 to make that provision consistent with the proposed new paragraph. The record indicates that these amendments are not proposed in response to any specific program or current need.

Testimony indicates that with access to additional funds the Board would have the opportunity to enter into significant marketing or promotional programs in conjunction with other commodity groups. Likewise, the Board would have the ability to meet unforeseen increases in administrative obligations that may occur at the start of a marketing year. While such promotional opportunities or emergency needs have not occurred in the past, the Board believes it is important that the Board have the ability to accrue additional funds, if needed.

Record evidence does not provide guidelines or procedures as to how the Board would announce and collect advanced assessment payments or borrow funds. The record does indicate, however, that after approval of the proposed amendment, guidelines and

procedures to implement the amendment would be discussed by the Board in a public meeting and recommended to the Secretary for approval through informal rulemaking procedures.

To encourage advance payment, the Board recommended that advance assessment payments be discounted. Record evidence indicates that the amount of discount could be closely tied to prevailing commercial bank interest rates. A discount assessment rate based on commercial bank interest rates would encourage handlers who pay advanced assessments because they would not lose more money than they would accrue if their advanced assessment payment was held in a commercial bank interest bearing account. Discounted assessment payment opportunities should be available to all handlers throughout the production area.

The record confirms that a decision to accept advance assessment payments and offer discounts for such payments would be made at public meetings open to all industry members. Any additional administrative and operating procedures needed for the collection of advance assessment payments and the calculation of appropriate advance payment discounts should be recommended by the Board to the Secretary for approval. The record evidence indicates that the Board's administrative staff has the capability to assure that advance assessment payments and borrowed funds would be properly budgeted and expended for the authorized purposes for which they would be collected.

This recommendation would be established by designating the current assessment provision as paragraph (a) and adding a new paragraph (b) to provide that the Board should have the authority to offer handlers the opportunity to pay assessments in advance and receive a discount on such assessments paid. New paragraph (b) would provide the Board with authority, with Secretarial approval, to borrow funds early in the marketing year. Such borrowed funds would be used to meet program or fiscal needs as described above.

The record indicates that funds should be borrowed from lending institutions rather than from industry handlers. The Board would make the decision to borrow funds based on recommendations of the appropriate committee that establishes the need for the borrowed funds. For example, the Executive Promotion Committee and the Promotion Committee could recommend that the Board should

borrow funds for a specified promotion project or program. The record also suggests that borrowed funds should be paid back within the same marketing year, so as not to encumber future Boards with the financial obligations of its predecessors.

The Board proposes that a new § 982.63, Contributions, be established to provide the Board with the authority to accept contributions. Such contributions would be used only to pay for production research, market research and development, and market promotion programs, including paid advertising. Such research and development programs would be designed to improve or promote the marketing, distribution, consumption or efficient production of hazelnuts. The Board would not be able to accept contributions that might have stipulations or other provisos on the expenditure of contributed funds. Thus, the Board would have complete control over the expenditure of contributed funds. The record indicates that the Board has not received contribution offers but would like the authority to accept contributions in the future should they be offered.

The record also indicates that the proviso specifying contributions be free from any encumbrances by the donor is not intended to prevent the Board from entering into joint promotional programs with other agencies. However, funding for such joint programs may not come from donations which specify the intended use of the donated funds.

Therefore, § 982.61 should be amended by adding a new paragraph (b) that provides the Board with the authority to collect advance assessment payments, offer discounts for such payments, and borrow money to provide funds for administration of the order during the early months of the marketing period. Also, a new § 982.63, Contributions, should be established to provide the Board with the authority to accept contributions, provided that such contributions are used to pay expenses incurred pursuant to § 982.58 and are free of any encumbrances by the donor. A conforming change should be made to § 982.58, adding contributions as a source of funds that may only be used to pay research, promotion and market development expenses.

(12) The Department proposed in the public hearing to make such changes as are necessary to conform with any amendment that may result from the hearing. This proposal was supported at the hearing without opposition. Record evidence supports these changes.

**Rulings on Briefs of Interested Persons**

The presiding officer of the hearing set April 8, 1994, as the final date for filing briefs with respect to the evidence presented at the hearing and the conclusions which should be drawn therefrom. No briefs were received.

**General Findings**

Upon the basis of the record, it is found that:

(1) The findings hereinafter set forth are supplementary to the previous findings and determinations which were made in connection with the issuance of the marketing agreement and order and each previously issued amendment thereto. Except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein, all of the said prior findings and determinations are hereby ratified and affirmed;

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

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of hazelnuts grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their 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; and

(5) All handling of hazelnuts grown in the production area as defined in the marketing agreement and order, as amended, and as hereby proposed to be further amended, is in the current of interstate or foreign commerce or directly burdens, obstructs or affects such commerce.

**List of Subjects in 7 CFR Part 982**

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

For the reasons set forth in the preamble, 7 CFR part 982 is proposed to be amended as follows:

**PART 982—FILBERTS/HAZELNUTS GROWN IN OREGON AND WASHINGTON**

1. The authority citation for 7 CFR part 982 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. In part 982 all references to “filbert”, “filberts”, “filbert/hazelnut”, “filberts/hazelnuts” are revised to read as “hazelnut”, “hazelnuts”, “hazelnut”, and “hazelnuts”, respectively.

3. Section 982.4 is revised to read as follows:

**§ 982.4 Hazelnuts.**

Hazelnuts means hazelnuts or filberts produced in the States of Oregon and Washington from trees of the genus *Corylus*.

4. Section 982.16 is revised to read as follows:

**§ 982.16 Inshell trade acquisitions.**

*Inshell trade acquisitions* means the quantity of inshell hazelnuts acquired by the trade from all handlers during a marketing year for distribution in the continental United States and such other distribution areas as may be recommended by the Board and established by the Secretary.

5. Section 982.30 is amended by revising paragraphs (a), (b)(1), (b)(2), and (b)(3) to read as follows:

**§ 982.30 Establishment and membership.**

(a) There is hereby established a Hazelnut Marketing Board consisting of 10 members, each of whom shall have an alternate member, to administer the terms and provisions of this part. Each member and alternate shall meet the same eligibility qualifications. The 10 member positions shall be allocated as follows:

(b) \* \* \*

(1) One member shall be nominated by the handler who handled the largest volume of hazelnuts during the two marketing years preceding the marketing year in which nominations are made;

(2) One member shall be nominated by the handler who handled the second largest volume of hazelnuts during the two marketing years preceding the marketing year in which nominations are made;

(3) One member shall be nominated by the handler who handled the third largest volume of hazelnuts during the two marketing years preceding the marketing year in which nominations are made;

\* \* \* \* \*

6. In § 982.32, paragraphs (a), (b), (c) and (f) are revised to read as follows:

**§ 982.32 Initial members and nomination of successor members.**

(a) Members and alternate members of the Board serving immediately prior to the effective date of this amended subpart shall continue to serve on the Board until their respective successors have been selected.

(b) Nominations for successor handler members and alternate members specified in § 982.30(b) (1) through (3) shall be made by the largest, second largest, and third largest handler determined according to the tonnage of certified merchantable hazelnuts and, when shelled hazelnut grade and size regulations are in effect, the inshell equivalent of certified shelled hazelnuts (computed to the nearest whole ton) recorded by the Board as handled by each such handler during the two marketing years preceding the marketing year in which nominations are made.

(c) Nominations for successor handler member and alternate handler member positions specified in § 982.30(b)(4) shall be made by the handlers in that category by mail ballot. All votes cast shall be weighted according to the tonnage of certified merchantable hazelnuts and, when shelled hazelnut grade and size regulations are in effect, the inshell equivalent of certified shelled hazelnuts (computed to the nearest whole ton) recorded by the Board as handled by each handler during the two marketing years preceding the marketing year in which nominations are made. If less than one ton is recorded for any such handler, the vote shall be weighted as one ton. Voting will be by position, and each eligible handler can vote for a member and an alternate member. The person receiving the highest number of weighted votes for each position shall be the nominee for that respective position.

\* \* \* \* \*

(f) Nominations received in the foregoing manner by the Board for all handler and grower member and alternate member positions shall be certified and sent to the Secretary at least 60 days prior to the beginning of each two-year term of office, together with all necessary data and other information deemed by the Board to be pertinent or requested by the Secretary. If nominations are not made within the time and manner specified in this subpart, the Secretary may, without regard to nominations, select the Board members and alternates on the basis of the representation provided for in this subpart.

\* \* \* \* \*

7. In § 982.33, paragraph (b) is revised to read as follows:

§ 982.33 Selection and term of office.

\* \* \* \* \*

(b) Term of office. The term of office of Board members and their alternates shall be for two years beginning on July 1 and ending on June 30, but they shall serve until their respective successors are selected and have qualified:

Provided, That beginning with the 199\_\_-9\_\_ marketing year, no member shall serve more than three consecutive two-year terms as member and no alternate member shall serve more than three consecutive two-year terms as alternate unless specifically exempted by the Secretary. Nomination elections for all Board grower and handler member and alternate positions shall be held every two years.

\* \* \* \* \*

8. In § 982.37, paragraph (b) is revised to read as follows:

§ 982.37 Procedure.

\* \* \* \* \*

(b) The Board may vote by mail, telephone, telegraph, or other means of communication: Provided, That any votes (except mail votes) so cast shall be confirmed at the next regularly scheduled meeting. When any proposition is submitted for voting by any such method, its adoption shall require 10 concurring votes.

\* \* \* \* \*

9. In § 982.39, paragraph (i) is revised to read as follows:

§ 982.39 Duties.

\* \* \* \* \*

(i) To furnish to the Secretary a report of the proceedings of each meeting of the Board held for the purpose of making marketing policy recommendations.

10. In § 982.40, paragraph (c)(2) introductory text is amended by removing the word "shall" in the third sentence and adding in its place the word "may".

11. In § 982.46, paragraph (b) is revised to read as follows:

§ 982.46 Inspection and certification.

\* \* \* \* \*

(b) All hazelnuts so inspected and certified shall be identified as prescribed by the Board. Such identification shall be affixed to the hazelnut containers by the handler under direction and supervision of the Board or the Federal-State Inspection Service, and shall not be removed or altered by any person except as directed by the Board.

\* \* \* \* \*

§ 982.51 [Amended]

12. In § 982.51, paragraph (a) is amended by removing the word "percent" at the end of the first sentence.

13. In § 982.52, paragraph (b) is revised to read as follows:

§ 982.52 Disposition of restricted hazelnuts.

\* \* \* \* \*

(b) Export. Sales of certified merchantable restricted hazelnuts for shipment to destinations outside the United States and such other distribution areas as may be recommended by the Board and established by the Secretary shall be made only by the Board. Any handler desiring to export any part or all of that handler's certified merchantable restricted hazelnuts shall deliver to the Board the certified merchantable restricted hazelnuts to be exported, but the Board shall be obligated to sell in export only such quantities for which it may be able to find satisfactory export outlets. Any hazelnuts so delivered for export which the Board is unable to export shall be returned to the handler delivering them. Sales for export shall be made by the Board only on execution of an agreement to prevent exportation into the area designated in § 982.16. A handler may be permitted to act as an agent of the Board, upon such terms and conditions as the Board may specify, in negotiating export sales, and when so acting shall be entitled to receive a selling commission as authorized by the Board. The proceeds of all export sales, after deducting all expenses actually and necessarily incurred, shall be paid to the handler whose certified merchantable restricted hazelnuts are so sold by the Board.

\* \* \* \* \*

14. In § 982.54, paragraphs (b), (c), (d), (e) and (f) are revised to read as follows:

§ 982.54 Deferral of restricted obligation.

\* \* \* \* \*

(b) Bonding requirement. Such bond or bonds shall, at all times during their effective period, be in such amounts that the aggregate thereof shall be no less than the total bonding value of the handler's deferred restricted obligation. The bonding value shall be the deferred restricted obligation poundage multiplied by the applicable bonding rate. The cost of such bond or bonds shall be borne by the handler filing same.

(c) Bonding rate. Said bonding rate shall be an amount per pound as established by the Board. Such bonding rate shall be based on the estimated

value of restricted credits for the current marketing year. Until bonding rates for a marketing year are fixed, the rates in effect for the preceding marketing year shall continue in effect. The Board should make any necessary adjustments once such new rates are fixed.

(d) Restricted credit purchases. Any sums collected through default of a handler on the handler's bond shall be used by the Board to purchase restricted credits from handlers, who have such restricted credits in excess of their needs, and are willing to part with them. The Board shall at all times purchase the lowest priced restricted credits offered, and the purchases shall be made from the various handlers as nearly as practicable in proportion to the quantity of their respective offerings of the restricted credits to be purchased.

(e) Unexpended sums. Any unexpended sums which have been collected by the Board through default of a handler on the handler's bond, remaining in the possession of the Board at the end of a marketing year, shall be used to reimburse the Board for its expenses, including administrative and other costs incurred in the collection of such sums, and in the purchase of restricted credits as provided in paragraph (d) of this section.

(f) Transfer of restricted credit purchases. Restricted credits purchased as provided for in this section shall be turned over to those handlers who have defaulted on their bonds for liquidation of their restricted obligation. The quantity delivered to each handler shall be that quantity represented by sums collected through default.

\* \* \* \* \*

15. In § 982.57, paragraph (b) is revised to read as follows:

§ 982.57 Exemptions.

\* \* \* \* \*

(b) Sales by growers direct to consumers. Any hazelnut grower may sell hazelnuts of such grower's own production free of the regulatory and assessment provisions of this part if such grower sells such hazelnuts in the area of production directly to end users at such grower's ranch or orchard or at roadside stands and farmers' markets. The Board, with the approval of the Secretary, may establish such rules, regulations, and safeguards and require such reports, certifications, and other conditions, as are necessary to ensure that such hazelnuts are disposed of only as authorized. Mail order sales are not exempt sales under this part.

16. In § 982.58, the last sentence of paragraph (a) is revised to read as follows:

**§ 982.58 Research, promotion, and market development.**

(a) \* \* \* The expenses of such projects shall be paid from funds collected pursuant to § 982.61, § 982.63, or credited pursuant to paragraph (b) of this section.

\* \* \* \* \*

17. Section 982.61 is amended by designating the existing undesignated paragraph as paragraph (a) and adding a new paragraph (b) to read as follows:

**§ 982.61 Assessments.**

(a) \* \* \*

(b) In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments, the Board may accept the payment of assessments in advance, and may also borrow money for such purpose. Further, payment discounts may be authorized by the Board upon the approval of the Secretary to handlers making such advance assessment payments.

18. A new § 982.63 is added to read as follows:

**§ 982.63 Contributions.**

The Board may accept voluntary contributions but these shall only be used to pay expenses incurred pursuant to § 982.58. Furthermore, such contributions shall be free from any encumbrances by the donor and the Board shall retain complete control of their use.

Dated: May 24, 1995.

**Lon Hatamiya,**  
*Administrator.*

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