

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 97**

[Document Number AMS-ST-19-0004]

RIN 0581-AD86

**Regulations and Procedures Under the Plant Variety Protection Act****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** Comments are invited on proposed revisions to the regulations, fees for services, and procedures established under the Plant Variety Protection Act. The proposed revisions are needed to conform with recent amendments to the Plant Variety Protection Act, which added authority for the Plant Variety Protection Office to issue certificates of protection for varieties of plants that are reproduced asexually. The proposed rule would add references to the term “asexual reproduction” to the regulations established under the Act. The proposed rule would also modernize the regulations by simplifying the fee schedule for PVPO services and updating the regulations relating to administrative procedures to reflect current business practices.

**DATES:** Comments on the proposed rule must be received by September 10, 2019.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. All comments must be submitted through the Federal e-rulemaking portal at <http://www.regulations.gov> and should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Haynes, Deputy Commissioner, Plant Variety Protection Office, AMS Science and Technology Program, USDA; 1400 Independence Avenue SW, Room 4512-S, Stop 0274, Washington, DC 20250-0002; telephone: (202) 260-8983; email: [Jeffery.Haynes@ams.usda.gov](mailto:Jeffery.Haynes@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** Section 10108 of the Agriculture Improvement Act of 2018 (Pub. L. 115-334) (2018

Farm Bill) amended the Plant Variety Protection Act of 1970, as amended (7 U.S.C. 2321-2582) (Act), by adding a definition for the term “asexually reproduced” as it pertains to plant propagation and adding authority to offer intellectual property protection to breeders of new varieties of plants developed through asexual reproduction. This rule proposes corresponding changes to the plant variety protection regulations established under the Act. The Plant Variety Protection regulations at 7 CFR part 97 (regulations) are administered by the Plant Variety Protection Office (PVPO), under the Agricultural Marketing Service’s (AMS) Science and Technology Program.

**Background Information**

The Act authorizes the PVPO to provide intellectual property protection to breeders of new plant varieties to facilitate the marketing of those new varieties. Currently, breeders can apply for and receive certificates that protect new varieties of seed and tuber propagated plants for 20 years, or 25 years for seed propagated vines and trees. A Certificate of Protection is awarded to an owner of a variety after examination by PVPO indicates that it is new, distinct from other varieties, genetically uniform, and stable through successive generations. PVPO-issued certificates are recognized worldwide and facilitate filing for plant variety protection in other countries. Certificate owners have the right to exclude others from marketing and selling protected varieties, manage the use of their varieties by other breeders, and enjoy legal protection of their work.

Asexually reproduced varieties are those derived using vegetative material, other than seed, from a single parent including cuttings, grafting, tissue culture, and propagation by root division. These varieties are a significant and growing portion of the industry. Developers of asexually reproduced varieties desire intellectual property rights recognized internationally that can only be obtained through PVPO-issued certificates.

**Proposed Provisions**

AMS proposes to revise the Plant Variety Protection regulations by adding references to asexual plant reproduction as appropriate to the current regulations that apply to the protection of seed and tubers. This proposed rule would revise § 97.1 to extend the protection breeders can obtain from PVPO to plants propagated through asexual means. As with other plants covered by the Act,

plant breeders would receive certificates that would protect asexually reproduced plant varieties for 20 years, or 25 years for trees and vines. Proposed revisions to the definition of the term *sale for other than seed purposes* in § 97.2 would add “propagating material” to that term as used in the regulations. Proposed revisions to § 97.6 would require that with an application for plant variety protection of an asexually propagated variety, a deposit of propagating material must be made to a public depository approved by the Commissioner and maintained for the duration of the certificate.

A proposed revision to § 97.7(d) would specify that original deposits of materials for tuber- or asexually reproduced plants must be made within three months of the notice of certificate issuance. Tuber-reproduced plants are currently eligible for plant variety protection under the Act and regulations. Addition of the reference to tuber-reproduced plants in § 97.7(d) is proposed at this time to correct inadvertent omission of that reference in previous revisions to the regulations. Revised § 97.7(d) would also address situations—as suggested by stakeholder feedback—in which it is technically infeasible to deposit or store propagating materials for certain asexually reproduced plants. In such situations, applicants would be allowed to request delay waivers, and would need to agree to provide a specimen, when one is needed, within three months of PVPO’s request. PVPO would consider a certificate abandoned if the applicant failed to provide the requested specimen within the three-month timeframe.

A proposed revision to § 97.19(c) would replace the reference to “name of the kind of seed,” which appears on PVPO posts about pending applications, with the more generic reference to “name of the crop,” to accommodate all types of plant material that could be protected, including asexual reproduction material. The proposed rule would replace references to seed deposits in § 97.104 with references to seed and propagating material deposits made in the application and certification processes. Currently, § 97.141 of the regulations allows owners of plant varieties for which certificates have been issued to prohibit unauthorized multiplication of the seed of those varieties. Proposed revisions to § 97.141 would extend that protection to prohibit the unauthorized multiplication of propagating material of those varieties. Similarly, proposed revisions to § 97.142 would allow owners of protected plant varieties to

prohibit unauthorized increases of all propagating material released for testing or increase. Currently, § 97.142 only specifies such prohibition for seed and reproducible plant material released for testing or increase.

The proposed rule would also modernize the regulations to reflect current industry and government practices. The current regulations were most recently revised in 2005 and contain obsolete or incomplete references to processes that have changed over the years. For instance, when color is a distinguishing characteristic of a plant variety, the color can be described according to any recognized color charts used in the industry for that purpose. Section 97.9 currently provides one example of a named color chart—the Nickerson Color Fan, which has long been in use. The proposed rule would expand the list of examples in § 97.9 to identify two additional color charts that could be referenced, the Munsell Book of Color and the Royal Horticultural Society Colour Chart, as well as any other commonly recognized color charts.

Many of the proposed changes pertain to PVPO's application process, including the timing of different steps in the process. PVPO expects the proposed changes to simplify the requirements for applicants and to expedite the issuance of variety protection certificates, which would be a benefit to their customers. Currently, applicants pay fees associated with certain steps of the application process as they go through the process, but a proposed revision to § 97.6(c) would require the portions of the application fee for filing an application, for application examination by PVPO, and for certificate issuance to all be paid at the time of application. Corresponding revisions are proposed to §§ 97.103(a) and 97.104(a) and (c). A proposed revision to § 97.20(a) would specify that, subject to certain exceptions, filing and examination fees would not be refundable after an application is deemed by PVPO to be abandoned. A proposed revision to § 97.23(c) would require payment of new filing and examination fees for reconsideration of an original application that had been withdrawn by the applicant. Currently, § 97.101—Notice of Allowance specifies that an applicant must pay the certificate fee within one month of the notice of allowance. The proposed rule would revise § 97.101 by requiring the

applicant to verify the names of the plant variety and the owner and would give the applicant an opportunity to withdraw the application before the certificate is issued. After 30 days, a fee for delayed response would be charged to the applicant. Proposed revisions to § 97.178 would remove references to searches and search fees and would specify that the examination fee could be refunded if an application is either voluntarily withdrawn or abandoned before the examination has begun. Section 97.178 would be further revised to provide that the certificate issuance fee would be refunded if an application is voluntarily withdrawn or abandoned after an examination, but before a certificate is issued.

This proposed rule would reorganize and simplify the schedule of fees and charges for PVPO services in § 97.175. The proposed revisions would consolidate and simplify the fee schedule to reflect the proposed revisions described above. Fee amounts for filing an application, examination, certificate issuance, application reconsideration, revival of abandoned applications, and filing appeals with the Commissioner or the Secretary would not change from the current fee schedule. However, fees for PVPO services like reproducing records, authentication, and correction or reissuance of a certificate would no longer be specified separately in the fee schedule in the regulations and would be charged at rates prescribed by the Commissioner, not to exceed \$97 per employee hour. Currently those services are estimated to average \$107 per employee hour. Office automation and other process improvements make the proposed decreases feasible. One such improvement is the ability to process fee payments through electronic payment methods. The proposed revision to § 97.177 would specify that payments could be made through the Plant Variety Protection system or through *pay.gov*, although payments by check or money order would still be allowed.

The proposed rule would replace obsolete references in the regulations to the Official Journal of the Plant Variety Protection Office with references to the PVPO website, which is the current business portal used by PVPO to provide service to its customers. Another revision would add a reference to the PVPO website to the section. Such changes are proposed for §§ 97.5(c), 97.7(c)(5), 97.14(d), 97.19,

97.403(d), and 97.800. Such changes would also be made to what are currently paragraphs (b) and (d) of § 97.104, but which would be redesignated paragraphs (a) and (c) through other revisions to the section. A further proposed revision to § 97.5(c) would provide that applicants could request forms and information at a PVPO email address. A proposed revision for § 97.12 would clarify that PVPO could use mail or email to notify applicants of the filing number and effective filing date of applications received by PVPO. Section 97.23(c) would be revised to specify that refiling a voluntarily withdrawn original application must be accompanied by payment of a new filing and examination fee, while § 97.23(d) would be removed altogether, as it contains obsolete references to applications pending on April 4, 1995. An additional revision to § 97.104 (a) would remove reference to the return of seed samples deposited with applications since that is no longer the practice of PVPO and would provide that samples of seed and propagating material associated with abandoned applications and certificates would be retained or destroyed by the depository. Finally, the proposed rule would correct the reference in § 97.500 to the U.S. Court of Appeals for the Federal Circuit, to whom applicants may appeal if they are dissatisfied with decisions of the Secretary related to plant variety protection issues.

### Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small business entities. The affected industry falls under the North American Industry Classification System (NAICS) as code 54171—Research and development in the physical, engineering, and life sciences. This classification includes firms that are not plant breeders/plant research; however no detailed industry data was available for the analysis.

Table 1 shows the most recent descriptive data for the industry, obtained from the County Business Pattern 2016 survey. This data set provides information on the number of establishments, number of employees and total annual payroll.

TABLE 1—NUMBER OF ESTABLISHMENTS, REVENUE AND PAYROLL BY EMPLOYEE COUNT, NAICS CODE 54171, 2016 COUNTY BUSINESS PATTERNS <sup>1</sup>

|                          | Number of establishments | Number of paid employees | Annual payroll (\$1,000) |
|--------------------------|--------------------------|--------------------------|--------------------------|
| All establishments ..... | 17,292                   | 695,810                  | \$82,865,611             |

The Small Business Administration (SBA) determines firm size for this industry by number of employees, but on a per firm basis, with small firms defined as having fewer than 1,000 employees and 1,000 or more employees per firm classified as large. Because firms may own more than one

establishment, and the County Business Patterns data are compiled on an establishment rather than a firm basis, we must use the Economic Census data to determine the number of small and large firms for the industry.

Table 2 shows the most recent data available on the breakdown between

small (<1,000 employees) and large (1,000 or more employees) firms in this industry, according to the SBA's guidance.<sup>2</sup> The data are from the 2002 Economic Census, with monetary values converted to 2016 dollars. More recent Economic Census data is not available at this level of detail for this industry.

TABLE 2—NUMBER OF FIRMS AND ESTABLISHMENTS, REVENUE AND PAYROLL BY EMPLOYEE COUNT, NAICS CODE 54171, 2002 ECONOMIC CENSUS <sup>3</sup>

| Size of firm by number of employees              | Number of firms | Number of establishments | Number of paid employees | Revenue * (\$1,000) | Annual payroll * (\$1,000) |
|--|-----------------|--------------------------|--------------------------|---------------------|----------------------------|
| Small—Firms with less than 1,000 employees ..... | 10,200          | 11,753                   | 273,601                  | \$49,702,793        | \$24,780,487               |
| Large—Firms with 1,000 employees or more .....   | 79              | 1,380                    | 283,816                  | 30,095,258          | 27,776,903                 |
| All firms .....                                  | 10,279          | 13,133                   | 557,417                  | 79,798,051          | 52,557,389                 |

\* Adjusted to 2016 values.

The 2002 Economic Census reported that fewer than one percent of firms were considered large (79 of 10,279 firms, or 0.54 percent). The 10,279 firms at that time owned a total of 13,133 establishments, with 1,380 (nearly 11 percent) of these facilities owned by the 79 large firms.

The tables show the extent of growth in the industry over time. The number of establishments has grown from 13,133 in 2002 to 17,292 in 2016 (32 percent, or 2.3 percent per year). Total employment increased from 557,417 workers to 695,810 (25 percent, or 1.8 percent per year), and total annual payroll from \$52,557,389 to \$82,865,611 (58 percent, or 4 percent per year). These figures indicate that the industry has seen small to moderate growth, with a more highly paid work force over time. There do not appear significant changes in the structure of the industry between 2002 and 2016.

In reviewing PVPO's list of customers, AMS found evidence that the size distribution of the firms affected by this rule was consistent with data reported in the 2002 Economic Census. AMS estimates that most PVPO customers would be considered small business

entities under the criteria established by SBA (13 CFR 121.201), while fewer than 5% of the plant breeders and plant research and development firms using PVPO services would be considered large businesses with 1,000 or more employees.

The PVP Office administers the PVP Act of 1970, as amended (7 U.S.C. 2321 *et seq.*), and issues Certificates of Protection that provide intellectual property rights to developers of new varieties of plants. A Certificate of Protection is awarded to an owner of a variety after examination indicates that it is new, distinct from other varieties, genetically uniform, and stable through successive generations. PVP is a voluntary service.

This proposed rule would amend the regulations to add application and certification procedures for asexually reproduced plants that mirror procedures currently in use for sexually reproduced and tuber propagated varieties. The proposed rule is intended to give breeders of new plant varieties additional tools for protecting new and emerging crops that were not previously available. This benefit would accrue to breeders of all sizes. As well, the

proposed rule would simplify the fee schedule for services provided by the PVPO and would reduce fees for some services from \$107.00 per hour to \$97.00 per hour. The new fee schedule and rates would streamline the certification process and reduce the cost of maintaining a PVP Certificate of Protection and would apply to applicants of all sizes. Finally, proposed modernization of business processes under the regulations is intended to improve service delivery to PVPO customers of all sizes.

There are currently more than 800 users of the plant variety protection service, of whom about 95 file applications in a given year. Some of these users are small business entities under the criteria established by SBA (13 CFR 121.201). With this action, the number of users is expected to increase by roughly 40 firms. The new applicants are expected to submit an additional 50 new applications on a yearly basis.

PVP applicants are subject to an application fee of \$5,150 per certificate. This proposed rule would allow firms that withdraw their applications to be reimbursed \$768. Additional services are available from the PVPO at the

<sup>1</sup> Geography Area Series: County Business Patterns by Employment Size Class, 2016 Business Patterns, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=BP\\_2016\\_00A3&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=BP_2016_00A3&prodType=table).

<sup>2</sup> Table of Small Business Size Standards Matched to North American Industry Classification

System Codes", Small Business Administration, effective January 1, 2017, [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>3</sup> Professional, Scientific, and Technical Services: Subject Series—Establishment and Firm Size: Employment Size of Firms for the United States: 2002 Economic Census of the United States, [https://](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2002_US_54SSSZ5&prodType=table)

[factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2002\\_US\\_54SSSZ5&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2002_US_54SSSZ5&prodType=table).

request of the applicant. Applicants using these services are subject to fees as listed in the rule schedule (7 CFR 97.175), with the inclusion of the reduction in fees for specified services. It is expected that new applicants will also participate in the Germ Plasm Deposit, at a cost of \$3,000 per applicant.

The burden on the new entrants is calculated by multiplying the cost of application, \$5,150, by the number of expected new applicants (50), for an additional cost of  $\$5,150 \times 50 = \$257,500$ . The cost to new applicants for the Germ Plasm Deposit is  $\$3,000 \times 50 = \$150,000$ . In total this represents an additional cost to industry for this proposed rule of \$407,500. The estimate is an upper boundary made without including the cost savings that result from the reduced hourly fee for additional services or the reimbursement for withdrawn applications, as these cost reductions are expected to be needed infrequently.

Due to the limited cost of the proposed rule expanding a voluntary program, AMS has determined that this action would not have a significant economic impact on a substantial number of these small business entities.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection requirements for this program will be submitted as a new collection to OMB for approval and will be reported in the final rule.

This proposed rule would revise the list of plant varieties eligible for PVPO certification and protection to include asexually reproduced plants. This proposed rule would also simplify the fee schedule for applicants and would lower the fees for some services. Finally, this rule would modernize the PVPO regulations to reflect current industry and government business operations. Reports and forms used in PVPO operations are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

#### E-Gov

AMS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### Executive Orders 12866 and 13771

This proposed rule does not meet the definition of a significant regulatory

action contained in section 3(f) of Executive Order 12866 and is not subject to review by the Office of Management and Budget (OMB). Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Costs'" (February 2, 2017).

#### Executive Order 13175

This proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on: (1) Policies that have tribal implication, including regulation, legislative comments, or proposed legislation; and (2) other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

AMS has assessed the impact of this proposed rule on Indian tribes and determined that this rule would not have tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about the proposed changes to the regulations will be shared during an upcoming quarterly call, and tribal leaders will be informed about the proposed revisions to the regulation and the opportunity to submit comments. AMS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided as needed with regards to the PVPO regulations.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988—Civil Justice Reform. This proposed action is not intended to have retroactive effect, nor would it preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the proposed rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 63 of the Act, when an application for plant variety protection

has been refused by the PVPO, the applicant may appeal to the Secretary. The Secretary must seek the advice of the Plant Variety Protection Board on all appeals before deciding an appeal. The Act provides that an applicant can appeal the Secretary's decision in the U.S. Court of Appeals for the Federal Circuit, or institute a civil action in the U.S. District Court, provided that such action is taken within 60 days of the Secretary's decision, or such further time as the Secretary allows.

#### List of Subjects in 7 CFR Part 97

Plants, Seeds.

For the reasons set forth in the preamble, USDA proposes to amend 7 CFR part 97 as follows:

#### PART 97—PLANT VARIETY AND PROTECTION

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** Plant Variety Protection Act, as amended, 7 U.S.C. 2321 *et seq.*

■ 2. Revise § 97.1 to read as follows:

##### § 97.1 General.

Certificates of protection are issued by the Plant Variety Protection office for new, distinct, uniform, and stable varieties of sexually reproduced, tuber propagated, or asexually reproduced plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

■ 3. Amend § 97.2 by removing the definition for *Official Journal* and revising the definition for *Sale for other than seed purposes* to read as follows:

##### § 97.2 Meaning of words.

\* \* \* \* \*

*Sale for other than seed or propagating purposes.* The transfer of title to and possession of the seed or propagating material by the owner to a grower or other person, for reproduction for the owner, for testing, or for experimental use, and not for commercial sale of the seed, reproduced seed, propagating material, or reproduced propagating material for planting purposes.

■ 4. Amend § 97.5 by revising paragraph (c) to read as follows:

##### § 97.5 General requirements.

\* \* \* \* \*

(c) Application and exhibit forms shall be issued by the Commissioner.

(Copies of the forms may be obtained from the Plant Variety Protection Office by sending an email request to *PVPOmail@ams.usda.gov* or downloading forms from the PVPO website (<https://www.ams.usda.gov/PVPO>).

\* \* \* \* \*

■ 5. Amend § 97.6 by revising paragraphs (c) and (d)(3) and adding paragraph (d)(4) to read as follows:

**§ 97.6 Application for certificate.**

\* \* \* \* \*

(c) The fees for filing an application, examination, and certificate issuance shall be submitted with the application in accordance with §§ 97.175 through 97.178.

(d) \* \* \*

(3) With the application for a hybrid from self-incompatible parents, a declaration that a plot of vegetative material for each parent will be established in a public depository approved by the Commissioner and will be maintained for the duration of the certificate, or

(4) With the application for an asexually propagated variety, a declaration that a deposit of propagating material in a public depository approved by the Commissioner will be made and maintained for the duration of the certificate.

■ 6. Amend § 97.7 by revising paragraphs (c)(5) and (d) to read as follows:

**§ 97.7 Deposit of Voucher Specimen.**

\* \* \* \* \*

(c) \* \* \*

(5) Once a depository is recognized to be suitable by the Commissioner or has defaulted or discontinued its performance under this section, notice thereof will be published on the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>).

(d) *Time of making an original deposit.* An original deposit of materials for seed-reproduced plants shall be made within three months of the filing date of the application or prior to issuance of the certificate, whichever occurs first. An original deposit of materials for tuber-propagated plants or asexually reproduced plants shall be made within three months from the notice of certificate issuance date. A waiver from these time requirements may be granted for good cause, such as delays in obtaining a phytosanitary certificate for the importation of voucher sample materials. A delay waiver may also be granted to address the technical infeasibility of depositing propagating materials for certain asexually reproduced plants.

(1) When the original deposit is made, the applicant must promptly submit a statement from a person in a position to corroborate the fact, stating that the voucher specimen material which is deposited is the variety specifically identified in the application as filed. Such statement must be filed in the application and must contain the identifying information listed in paragraph (b) of this section and:

- (i) The name and address of the depository;
- (ii) The date of deposit;
- (iii) The accession number given by the depository; and
- (iv) A statement that the deposit is capable of reproduction.

(2) When a delay waiver is granted due to technical difficulties with depositing propagating materials for asexually reproduced plants, the applicant is required to make a declaration that a voucher specimen will be provided within three months of a request by the Plant Variety Protection Office. Failure to provide a specimen as requested shall result in the certificate being regarded as abandoned.

\* \* \* \* \*

■ 7. Amend § 97.9 by revising paragraphs (b) and (c) to read as follows:

**§ 97.9 Drawings and photographs.**

\* \* \* \* \*

(b) Drawings or photographs shall be in color when color is a distinguishing characteristic of the variety, and the color shall be described by use of Nickerson's color fan, the Munsell Book of Color, the Royal Horticultural Society Colour Chart, or other recognized color chart.

(c) Drawings shall be sent flat, or may be sent in a suitable mailing tube, in accordance with instructions furnished by the Commissioner.

\* \* \* \* \*

■ 8. Amend § 97.12 by revising paragraph (a) to read as follows:

**§ 97.12 Number and filing date of an application.**

(a) Applications shall be numbered and dated in sequence in the order received by the Office. Applicants will be informed in writing, by mail or email, as soon as practicable of the number and effective filing date of the application.

\* \* \* \* \*

■ 9. Amend § 97.14 by revising paragraph (d) to read as follows:

**§ 97.14 Joint applicants.**

\* \* \* \* \*

(d) If a joint owner refuses to join in an application or cannot be found after diligent effort, the remaining owner may

file an application on behalf of him or herself and the missing owner. Such application shall be accompanied by a written explanation and shall state the last known address of the missing owner. Notice of the filing of the application shall be forwarded by the Office to the missing owner at the last known address. If such notice is returned to the Office undelivered, or if the address of the missing owner is unknown, notice of the filing of the application shall be published once on the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>). Prior to the issuance of the certificate, a missing owner may join in an application by filing a written explanation. A certificate obtained by fewer than all of the joint owners under this paragraph conveys the same rights and privileges to said owners as though all of the original owners had joined in an application.

■ 10. Amend § 97.19 by revising the introductory text and paragraph (c) to read as follows:

**§ 97.19 Publication of pending applications.**

Information relating to pending applications shall be published periodically as determined by the Commissioner to be necessary in the public interest. With respect to each application, the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>) shall show:

\* \* \* \* \*

(c) The name of the crop; and

\* \* \* \* \*

■ 11. Amend § 97. 20 by revising paragraph (a) to read as follows:

**§ 97.20 Abandonment for failure to respond within the time limit.**

(a) Except as otherwise provided in § 97.104, if an applicant fails to advance actively his or her application within 30 days after the date when the last request for action was mailed to the applicant by the Office, or within such longer time as may be fixed by the Commissioner, the application shall be deemed abandoned. The filing and examination fees in such cases will not be refunded.

\* \* \* \* \*

■ 12. Amend § 97.23 by revising paragraph (c) to read as follows, and by removing paragraph (d).

**§ 97.23 Voluntary withdrawal and abandonment of an application.**

\* \* \* \* \*

(c) An original application which has been voluntarily withdrawn shall be returned to the applicant and may be reconsidered only by refiling and

payment of new filing and examination fees.

■ 13. Revise § 97.101 to read as follows:

**§ 97.101 Notice of allowance.**

If, on examination, PVPO determines that the applicant is entitled to a certificate, a notice of allowance shall be sent to the applicant or his or her attorney or agent of record, if any, requesting verification of the variety name and of the name of the owner. The notice will also provide an opportunity for withdrawal of the application before certificate issuance. The applicant must respond within 30 days from the date of the notice of allowance. Thereafter, a fee for delayed response shall be charged as specified in § 97.175(f).

■ 14. Amend § 97.103 by revising paragraph (a) to read as follows:

**§ 97.103 Issuance of a certificate.**

(a) After the notice of allowance has been issued and the applicant has clearly specified whether or not the variety shall be sold by variety name only as a class of certified seed, the certificate shall be promptly issued. Once an election is made and a certificate issued specifying that seed of the variety shall be sold by variety name only as a class of certified seed, no waiver of such rights shall be permitted by amendment of the certificate.

\* \* \* \* \*

■ 15. Amend § 97.104 by removing paragraph (a), redesignating paragraphs (b) through (d) as paragraphs (a) through (c), and revising redesignated paragraphs (a) through (c) to read as follows:

**§ 97.104 Application or certificate abandoned.**

(a) Upon request by the Office, the owner shall replenish the seed or propagating material of the variety and shall pay the handling fee for replenishment. Samples of seed or propagating material related to abandoned applications or certificates will be retained or destroyed by the depository. Failure to replenish seed or propagating material within 3 months from the date of request shall result in the certificate being regarded as abandoned. No sooner than 1 year after the date of such request, notices of abandoned certificates shall be published on the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>), indicating that the variety has become open for use by the public and, if previously specified to be sold by variety name as “certified seed only,” that such restriction no longer applies.

(b) If the seed or propagating material is submitted within 9 months of the final due date, it may be accepted by the Commissioner as though no abandonment had occurred. For good cause, the Commissioner may extend for a reasonable time the period for submitting seed or propagating material before declaring the certificate abandoned.

(c) A certificate may be voluntarily abandoned by the applicant or his or her attorney or agent of record or the assignee of record by notifying the Commissioner in writing. Upon receipt of such notice, the Commissioner shall publish a notice on the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>) that the variety has become open for use by the public, and if previously specified to be sold by variety name as “certified seed only,” that such restriction no longer applies.

■ 16. Revise § 97.141 to read as follows:

**§ 97.141 After issuance.**

Upon issuance of a certificate, the owner of the variety, or his or her designee, may label the variety, propagating material of the variety, or containers of the seed of the variety or plants produced from such seed or propagating material substantially as follows: “Unauthorized Propagation Prohibited—(Unauthorized Seed or Propagating Material Multiplication Prohibited)—U.S. Protected Variety.” Where applicable, “PVPA 1994” or “PVPA 1994—Unauthorized Sales for Reproductive Purposes Prohibited” may be added to the notice.

■ 17. Revise § 97.142 to read as follows:

**§ 97.142 For testing or increase.**

An owner who contemplates filing an application and releases for testing or increase seed of the variety or propagating material or reproducible plant material of the variety may label such plant material or containers of the seed or plant material substantially as follows: “Unauthorized Propagation Prohibited—For Testing (or Increase) Only.”

■ 18. Revise § 97.175 to read as follows:

**§ 97.175 Fees and charges.**

The following fees and charges apply to the services and actions specified below:

- (a) Application
  - (1) Initial fee for filing, examination, and certificate issuance—\$5,150
  - (2) Submission of new application data prior to issuance of certificate—\$432
  - (3) Granting extensions for responding to data requests—\$89

(4) Refunds pursuant to § 97.178 may be issued for portions of the initial application fee as follows: Examination—\$3,864, and certificate issuance—\$768.

(b) Reconsideration of application—\$589

(c) Revival of an abandoned application—\$518

(d) Appeals

(1) Filing a petition for protest to Commissioner—\$4,118

(2) Appeal to Secretary (refundable if appeal overturns protest to Commissioner)—\$4,942

(e) Field inspections or other services requiring travel by a representative of the Plant Variety Protection Office, made at the request of the applicant, shall be reimbursable in full (including travel, per diem or subsistence, salary, and administrative costs), in accordance with standardized government travel regulations.

(f) Any other service not covered in this section, including, but not limited to, reproduction of records, authentication, correction, or reissuance of a certificate, recordation or revision of assignment, and late fees will be charged for at rates prescribed by the Commissioner, but in no event shall they exceed \$97 per employee hour. Charges will also be made for materials, space, and administrative costs.

■ 19. Revise § 97.177 to read as follows:

**§ 97.177 Method of payment.**

Payments can be submitted through the electronic Plant Variety Protection system or *pay.gov*. Checks or money orders shall be made payable to the Treasurer of the United States. Remittances from foreign countries must be payable and immediately negotiable in the United States for the full amount of the prescribed fee. Money sent by mail to the Office shall be sent at the sender's risk.

■ 20. Revise § 97.178 to read as follows:

**§ 97.178 Refunds.**

Money paid by mistake or excess payments shall be refunded, but a mere change of plans after the payment of money, as when a party decides to withdraw an application or to withdraw an appeal, shall not entitle a party to a refund. However, the examination fee shall be refunded if an application is voluntarily withdrawn or abandoned pursuant to § 97.23(a) before the examination has begun. The certificate issuance fee shall be refunded if an application is voluntarily withdrawn or abandoned after an examination has been completed and before a certificate has been issued. Amounts of \$1 or less shall not be refunded unless specifically demanded.

■ 21. Amend § 97.403 by revising paragraph (d) to read as follows:

**§ 97.403 Manner of service.**

\* \* \* \* \*

(d) Whenever it shall be found by the Commissioner or Secretary that none of the above modes of serving the paper is practicable, service may be by notice, published once on the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>).

■ 22. Revise § 97.500 to read as follows:

**§ 97.500 Appeal to U.S. Courts.**

Any applicant dissatisfied with the decision of the Secretary on appeal may appeal to the U.S. Courts of Appeals for the Federal Circuit, or institute a civil action in the U.S. District Court as set forth in the Act. In such cases, the appellant or plaintiff shall give notice to the Secretary, state the reasons for appeal or civil action, and obtain a certified copy of the record. The certified copy of the record shall be forwarded to the Court by the Plant Variety Protection Office on order of, and at the expense of the appellant or plaintiff.

■ 23. Revise § 97.800 to read as follows:

**§ 97.800 Publication of public variety descriptions.**

Voluntary submissions of varietal descriptions of “public varieties” on forms obtainable from the Office will be accepted for publication on the Plant Variety Protection Office website (<https://www.ams.usda.gov/PVPO>). Such publication shall not constitute recognition that the variety is, in fact, distinct, uniform, and stable.

Dated: July 8, 2019.

**Bruce Sommers,**

*Administrator, Agricultural Marketing Service.*

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 981**

[Doc. No. AMS-SC-18-0099; SC18-981-1 PR]

**Almonds Grown in California; Revisions to the Accepted User Program Requirements and New Information Collection**

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement a recommendation from the

Almond Board of California (Board) to revise the almond accepted user program requirements currently prescribed under the Marketing Order for Almonds Grown in California (Order). In addition, this action would prohibit the transfer of inedible material between accepted users. This proposal also announces the Agricultural Marketing Service’s (AMS) intention to request approval from the Office of Management and Budget (OMB) of a new information collection and to make a conforming change to an existing form.

**DATES:** Comments must be received by August 12, 2019. Comments on the forms and information collection must be received by September 10, 2019.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or internet: <http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this proposal will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Peter Sommers, Marketing Specialist, or Terry Vawter, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or Email: [Peter.Sommers@usda.gov](mailto:Peter.Sommers@usda.gov) or [Terry.Vawter@usda.gov](mailto:Terry.Vawter@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, proposes an amendment to regulations issued to carry out a marketing order as

defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the “Act.” The Board locally administers the Order and is comprised of growers and handlers operating within California.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that OMB exempted from Executive Order 12866 review. Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB’s Memorandum titled “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled ‘Reducing Regulation and Controlling Regulatory Costs’” (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule invites comments on revisions to the almond accepted user program requirements currently prescribed under the Order. This proposal would require accepted users to dispose of inedible material within six months of receipt, submit public weighmaster weight certificates within 10 business days of receipt of inedible material, and submit an accepted user plan annually. In addition, this action would prohibit the transfer of inedible material between accepted users, establish a new information collection,