



December 8, 2021

United States Department of Agriculture  
1400 Independence Ave SW  
Washington, DC 20250

**Re: Onions Grown in South Texas and Imported Onions; Termination of Marketing Order 959 and Change in Import Requirements, Docket No. AMS-SC-21-0003; SC21-959- 2 PR, 7 CFR Parts 959 and 980**

Ms. Campos and Mr. Nissen:

I appreciate the opportunity to comment on the United States Department of Agriculture's (USDA) proposed rule, "Onions Grown in South Texas and Imported Onions: Termination of Marketing Order 959 and Change in Import Requirements."

The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace. Cato's Herbert A. Stiefel Center for Trade Policy Studies is dedicated to promoting the principles of free trade by revealing the distortions created by trade barriers, and advocating alternatives that support a stable, flourishing, and free society.

### **Summary**

Terminating Marketing Order 959 on South Texas onions would be appropriate given that the referendum to support continuation failed. The Order does not provide useful information for consumers and gives domestic growers the opportunity to collude to create regulations that give preference to their varieties and growing conditions.

Many retailers have standards that exceed those set out in Marketing Orders, thus the additional inspection processes required to meet the standards of the Orders are redundant. Further, as retailers maintain such standards, a market for high-quality produce would remain with the termination of Marketing Order 959. Additionally, termination of the Order would increase market access for other varieties produced elsewhere, providing consumers with more choice.

### **Marketing Orders 959 and 958 and the Proposed Rule**

The passage of the Agricultural Marketing Agreement Act (AMA Act) in 1937 allowed fruit, nut, and vegetable farmers to control the quantity and quality of produce sold in the U.S.

fresh market.<sup>1</sup> These controls are authorized in formal agreements known as Marketing Orders. In 1961, a Marketing Order took effect that authorized regulations for onions grown in South Texas.<sup>2</sup> These regulations include standards for size, grade, maturity, and quality. Section 8(e) of the AMA Act also provides that whenever commodities are regulated under a Federal Marketing Order, as South Texas onions are, imports of the same commodity are prohibited unless they meet the same requirements for those commodities produced domestically.<sup>3</sup>

Every six years after the effective date of Marketing Order 959, a referendum has taken place to ascertain favor by producers to continue the Order. The Order can be terminated if less than two-thirds of growers voting in the referendum favor continuation.<sup>4</sup> In the case of the South Texas onions Marketing Order 959, the two-thirds majority needed to continue the Order failed on January 5, 2021, thus indicating that the industry no longer favors the Order. Given that support to continue the Order failed, the Secretary should move ahead with the Proposed Rule to terminate Marketing Order No. 959. The Proposed Rule would also terminate regulations that apply to both South Texas onions and imported onions during the period the Marketing Order covered: March 10 through June 4. However, Marketing Order 958 for onions in Idaho and Oregon remains in place. As a result, onions produced in those states and imported onions must comply with the regulations under Order 958 during the stated period: June 5 through March 9, and year-round for pearl and cipolline onions.<sup>5</sup>

### **Marketing Order Committees**

As outlined under Section 8(e) of the AMA Act, Marketing Orders are agreed upon by growers in specific United States regions.<sup>6</sup> In order to oversee these regulations, growers and handlers often establish committees. While the Orders do not expressly discriminate against imports as Orders apply to both domestic and imported commodities, representation on these committees is limited and does not give U.S. importers the opportunity to review or modify the regulations set forth in the Marketing Orders that may be facially neutral but discriminatory in practice.

For example, agricultural inputs such as weather and soil can affect the characteristics of a commodity that do not necessarily convey lower quality. Weather and soil conditions can vary greatly between countries, and even U.S. states.<sup>7</sup> Since only growers and handlers of

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<sup>1</sup> Agricultural Marketing Agreement Act of 1937, 7 U.S. Code §§ 601–674 (1937).

<sup>2</sup> Onions Grown in South Texas, 7 C.F.R. part 959 (1961).

<sup>3</sup> Agricultural Marketing Agreement Act of 1937, 7 U.S. Code § 608e–1 (1937).

<sup>4</sup> Onions Grown in South Texas, 7 C.F.R. § 959.84(d) (1961).

<sup>5</sup> Department of Agriculture’s Agricultural Marketing Service, “Onions Grown in South Texas and Imported Onions; Termination of Marketing Order 959 and Change in Import Requirements,” Docket No. AMS–SC–21–0003, 86 Fed. Reg. 42748 (Aug. 5, 2021).

<sup>6</sup> Agricultural Marketing Agreement Act of 1937, 7 U.S. Code § 608e–1 (1937).

<sup>7</sup> “Soil Formation and Classification,” Natural Resources Conservation Service, United States Department of Agriculture, [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/edu/?cid=nrcs142p2\\_054278](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/edu/?cid=nrcs142p2_054278).

South Texas onions are represented on the committee, the regulations of the Marketing Order are dictated by the varieties and conditions of that region. Neither foreign producers or U.S. importers have any input on the committee, thus the regulations set forth in the Marketing Order do not account for differences in characteristics created by these conditions, putting domestic growers who write the rules at an advantage (whether intended or not).

### **Market Standards Versus Marketing Order Standards**

Retailers often have quality standards that exceed the requirements of the Marketing Order that are catered to consumer preferences, not the preferences of farmers and handlers. Thus, there should be minimal loss to farmers whose high-quality products would satisfy existing industry standards. However, terminating the rule would increase market access for other farmers. Marketing Orders that regulate quality as the South Texas onions Order does, can restrict quantity even if there are not explicit quantity restrictions because farmers cannot sell produce that does not meet the requirements of the Order. As a result, lower quantities than otherwise are sold than if the Marketing Order had not been in place, creating implicit quantity restrictions in the names of “quality,” “size,” or others. These implicit quantity restrictions can inflate prices as farmers need to charge more per unit to cover costs and make a profit. In fact, Marketing Orders can incentivize colluding by farmers in a region, creating cartels to realize higher prices.<sup>8</sup> These Marketing Orders may even go as far as preventing other entrants to the market that cannot meet the standards written by the growers on the committees. Thus, by terminating the Order, farmers could not use this legal avenue to engage in anticompetitive behavior and more onions could be sold at different prices.

Marketing Orders do not address food safety and create burdensome processes. Food safety is addressed under the Food Safety Modernization Act, which is enforced by the Food and Drug Administration (FDA).<sup>9</sup> When imported shipments of food arrive in the United States, they are inspected for safety by the FDA. These are separate from the inspections for Marketing Orders. Additional rounds of inspections that are irrelevant for food safety are wasteful and burdensome for importers. Holding produce at inspection points requires additional logistical planning to ensure minimal deterioration. Furthermore, retailers have their own inspection processes, further eliminating any possible need for a Marketing Order inspection system.

Marketing Orders can also be a roadblock to innovation. U.S. importers also work with foreign growers to create new varieties that are high quality but do not necessarily fit the parameters of the Marketing Order. For example, Mexican farmers are producing sweeter grapes favored by consumers. However, these sweeter varieties such as the “Cotton Candy”

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<sup>8</sup> Darren Filson et al., “Market Power and Cartel Formation: Theory and an Empirical Test,” *The Journal of Law & Economics* 44, no. 2 (October 2001): <https://doi.org/10.1086/322817>.

<sup>9</sup> Food Safety Modernization Act, 21 U.S. Code §§ 2201–2252 (2011).

variety have a higher sugar content, making them prone to shattering.<sup>10</sup> The level of acceptable shatter is dictated by California's Marketing Order.<sup>11</sup> Imported grapes that are "too shattered" during inspections are not accepted by the Federal or Federal-State Inspection Service,<sup>12</sup> which impedes market access for these varieties and reduces consumer choice.

## **Conclusion**

Terminating Marketing Order 959 would set a positive precedent for the U.S. fresh onion market. The rules set out in Marketing Orders do not control for food safety or provide additional information to consumers. They can even inflate prices by reducing the amount of the harvest that is marketable. Food safety is already regulated by the FDA, and retailers often have standards that exceed those established in Marketing Orders. The latter are, however, more flexible and can be altered with changes in demand.

Marketing Order committees are controlled by local growers who can collude to create rules that favor their varieties and growing conditions, preventing market access for onions from other countries and thereby reducing choice and raising prices for the American consumer.

Further, if the Secretary does not move to terminate Marketing Order 959, it would ignore due process and override the results of the January 5, 2021 referendum intended to discern the Order's necessity.

Thank you for the opportunity to comment on this important issue. I would be happy to answer any questions you may have at [gbeaumontsmith@cato.org](mailto:gbeaumontsmith@cato.org).

Sincerely,

/s/

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<sup>10</sup> Cynthia David, "Grape Expectations — Suppliers Talk Varieties, Packaging, Season," *The Packer* (blog), May 18, 2020.

<sup>11</sup> Grapes Grown In A Designated Area Of Southeastern California, 7 C.F.R. part 925 (1980).

<sup>12</sup> Fruits; Import Regulations, 7 C.F.R. § 944.503(b) (2005).