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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 920**

**[Doc. No. AMS-FV-12-0008; FV12-920-1 PR]**

**Kiwifruit Grown in California; Proposed Amendments to Marketing Order 920 and Referendum Order**

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

**ACTION:** Proposed Rule and Referendum Order.

**SUMMARY:** This rule proposes five amendments to Marketing Order No. 920 (order), which regulates the handling of kiwifruit grown in California, and provides growers with the opportunity to vote in a referendum to determine if they favor the changes. The amendments are based on proposals by the Kiwifruit Administrative Committee (Committee or KAC), which is responsible for the local administration of the order. The five amendments would provide authority to recommend and conduct production and postharvest research, to recommend and conduct market research and development projects, to receive and expend voluntary contributions, to specify that recommendations for production research and market development be approved by eight members of the Committee, and to update provisions regarding alternate members' service on the Committee.

These amendments are intended to improve administration of and compliance with the order, as well as reflect current industry practices.

**DATES:** The referendum will be conducted from August 26, 2013, through September 6, 2013. The representative period for the purpose of the referendum is August 1, 2012, through July 31, 2013.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Bright, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 205-2830, Fax: (202) 720-8938, or E-mail: [Kathleen.Bright@ams.usda.gov](mailto:Kathleen.Bright@ams.usda.gov) or Michelle Sharrow, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-9921, Fax: (202) 720-8938 or E-mail: [Michelle.Sharrow@ams.usda.gov](mailto:Michelle.Sharrow@ams.usda.gov).

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

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit produced in California, hereinafter referred to as the "order." 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." Section 608c(17) of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendments of the order through this informal rulemaking action.

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

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule shall not be deemed to preclude, preempt, or supersede any research and market development provisions of any State program covering California kiwifruit.

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 no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 18c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR Part 900 (73 FR 49307; August, 21, 2008). The amendment of section 18c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendments, the potential regulatory and

economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendment proposals are not unduly complex and the nature of the proposed amendments is appropriate for utilizing the informal rulemaking process to amend the order. A discussion of the potential regulatory and economic impacts on affected entities is discussed later in the "Final Regulatory Flexibility Analysis" section of this rule.

The proposed amendments were unanimously recommended by the Committee following deliberations at public meetings on July 12 and December 13, 2011. A proposed rule soliciting comments on the proposed amendments was issued on February 4, 2013, and published in the **Federal Register** on February 8, 2013 (78 FR 9331). Three comments were received. Two comments were supportive of the proposed amendments. The third comment was supportive of some of the proposed amendments and not supportive of others. These comments will be addressed later in this document. AMS will conduct a producer referendum to determine support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments favored by

producers in the referendum.

The Committee's proposed amendments would amend the marketing order by: (1) adding authority to recommend and conduct production and postharvest research, (2) adding authority to recommend and conduct market research and development projects, (3) adding authority to receive and expend voluntary contributions, (4) amending procedures to specify that recommendations for production research and market development be approved by eight members of the Committee, and (5) clarifying provisions regarding alternate members' service on the Committee.

In addition to these proposed amendments, AMS proposes to make any additional changes to the order as may be necessary to conform to any amendment that may result from this rulemaking action.

#### Proposal Number 1 - Production and Postharvest Research

This proposal would add section 920.47 to authorize production and postharvest research to assist or improve the efficient production and postharvest handling of kiwifruit. Adding this authority would provide the Committee with the ability to conduct production research, food quality and handling research, and to distribute that information. These functions were previously conducted by

the California Kiwifruit Commission (CKC), a State of California program, which ceased to exist on September 30, 2011.

Kiwifruit is a relatively new crop to California with the first commercial crop produced in 1971. The CKC was established in 1979, five years prior to the kiwifruit marketing order. The CKC performed marketing research and development programs for the industry. When the kiwifruit marketing order was established in 1984, its main purpose was to implement quality and pack and container regulations. The two programs worked independently, and the industry chose not to add authority for production and postharvest research to the Federal order at inception to avoid duplication. According to the Committee, industry leaders believed at that time that having programs that performed separate and distinct functions would best serve the interests of the kiwifruit industry.

Over the past two decades, California kiwifruit acreage and the number of growers have decreased, from a peak in 1992 of 7,300 producing acres and 690 producers to 4,200 producing acres and 175 growers today, according to data from the National Agricultural Statistics Service and the Committee. As a result, the industry has reduced

programs supported by industry assessments. In the early 2000s, industry leaders began to evaluate industry programs in an effort to determine which ones were the most beneficial and actively sought ways to make the administration of these programs more cost efficient and effective. The need for production and postharvest research is repeatedly identified as one of the most important programs to the industry, along with market development programs. According to the Committee, there is a general consensus throughout the industry that the future administration of these activities should be done through one program, and because there is widespread support to maintain the quality and pack and container requirements, that program should be the Federal marketing order.

The Committee believes that for the California kiwifruit industry to remain productive and competitive, management practices must continue to evolve. It further believes that production and postharvest research was one of the most beneficial activities performed by the CKC. Over the years, these activities helped growers become knowledgeable on how to establish vineyards, prune, thin, irrigate, pollinate, fertilize, manage diseases, harvest, store and transport kiwifruit. According to the Committee,

the industry wants the KAC to conduct these activities since the CKC no longer exists.

The Committee believes production and postharvest research would have a direct and positive impact on producers, handlers, and consumers. Diseases such as the infectious vine-killing bacterial disease known as PSA, confirmed in New Zealand in 2010, decimated 28% of New Zealand's orchards. With no current organization equipped to facilitate research activities, the same could happen to California kiwifruit. Production research projects sponsored by the Committee could help develop cultural practices to reduce the likelihood of a similar incident in the United States. In addition, improving food quality and handling practices is important to producers, handlers, and consumers. The industry desires to take a proactive stance to be prepared to address any challenges in this area.

Also, without a research organization, the Committee is unable to participate in the joint global research effort with the International Kiwifruit Organization (IKO). The IKO jointly funds research activities with other organizations that benefit kiwifruit producers and consumers on a global basis. Approval of this proposal

would ensure the industry's ability to participate in these activities.

Adding production research to the order is expected to improve returns for producers because it will enable the industry to develop new technologies to increase yields, improve fruit quality and production, and facilitate postharvest research.

There is a potential cost to handlers of increased assessments to fund projects. However, the KAC would weigh the costs against the potential benefits. The USDA would review and approve activities prior to their undertaking. In addition, the KAC would evaluate activities after they are completed to ensure that the goals and objectives are met.

For the reasons stated above, it is proposed that section 920.47 be added to authorize production and postharvest research to assist or improve the efficient production and postharvest handling of kiwifruit.

#### Proposal Number 2 - Market Research and Development

This proposal would add section 920.48 to authorize marketing research and development programs to promote, assist, or improve the marketing, distribution, and consumption of kiwifruit. Adding this authority would

enable the industry to continue to conduct these activities that were previously conducted by the CKC.

The California kiwifruit industry, as a whole, has undergone many changes since the inception of the marketing order in 1984. The industry experienced significant growth in the 1980s, but acreage and production levels have since declined. According to the Committee, this has caused industry leaders to evaluate which programs are most beneficial to the industry and the most efficient way to conduct such programs. Through an industry vote, the CKC was discontinued in 2011, as previously discussed. The Committee believes that marketing research and development activities previously conducted by the CKC are beneficial to the industry, but can be conducted under the Federal marketing order. This also creates overall efficiencies by using a single industry organization to carry out the various functions previously conducted by two organizations. Therefore, the Committee supports adding marketing research and development authority to the order.

Providing authority for the Committee to conduct marketing research and development programs would assist the industry with the marketing, distribution, and consumption of kiwifruit. The Committee could undertake

marketing research and development activities such as conducting market and consumer surveys, which could identify consumer and market preferences. Further, adding this authority to the marketing order would enable the Committee to apply for Market Access Program (MAP) funding from the USDA and engage in jointly funded export marketing research and development activities. Participation in jointly funded programs including MAP was identified as a priority by the Committee in its strategic planning in the early 2000s. These types of activities would be designed to increase the demand and sales of California kiwifruit, with the intent of increasing returns to producers.

There is a potential cost to handlers of increased assessments to fund projects. However, the KAC would weigh the costs against the potential benefits. The USDA would review and approve activities prior to their undertaking. The KAC would evaluate activities after they are completed to ensure that the goals and objectives are met. In addition, the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill) (Pub.L. 104-127) requires Federal marketing order promotion activities to be evaluated by an independent party on a regular basis to ensure they are effective. Any such programs conducted

under the order would be evaluated to help ensure that the benefits exceed the costs.

For the reasons stated above, it is proposed that section 920.48 be added to authorize marketing research and development programs to promote, assist, or improve the marketing, distribution and consumption of kiwifruit.

### Proposal Number 3 - Voluntary Contributions

This proposal would add section 920.45 to authorize the Committee to receive and expend voluntary contributions for market development projects, market research, and production and postharvest research. The proposal also contains a provision that any voluntary contributions would be free from any encumbrances by the donor and the Committee would retain complete control of their use. Currently, the Committee only has authority to collect and spend assessment dollars. In the event that proposal number one and/or proposal number two are adopted, for example, the ability to accept voluntary contributions would provide the Committee with additional funding sources for production and postharvest research, and marketing research and development activities.

This proposal compliments and supports proposals number one and two. If adopted, this proposal could help

provide financial support for marketing research and development activities. Producers and handlers could benefit from these activities as discussed under proposals number one and two. Also, funding from an additional source could help to mitigate potential assessment rate increases to fund research and development projects.

The Committee would clearly communicate that voluntary contributions accepted would be free from any encumbrances by the donor and the Committee would retain control over the use of the funds.

For the reasons stated above, it is proposed that section 920.45 be added to authorize the Committee to receive and expend voluntary contributions for market development projects, market research, and production and postharvest research.

#### Proposal Number 4 - Committee Quorum (Voting)

This proposal would modify section 920.32 so that approval by eight members of the Committee is required for market research and development as well as production and postharvest research activities. The proposed change to require an eight-vote majority for marketing research and development issues is consistent with industry practices and voting requirements for Committee actions on other

issues. The Committee is comprised of twelve members and alternates. This proposal would help to ensure industry support exists before undertaking these activities.

Section 920.32 of the order provides that actions of the Committee require a majority vote, except that eight concurring votes are required by the Committee with respect to actions concerning expenses, assessments, or recommendations for regulations. The addition of approval by eight members for marketing research and development activities would be consistent with current Committee procedures regarding issues of major importance to the industry. Requiring eight concurring votes would ensure that major actions of the Committee would have a super majority, indicating that a broad level of industry support exists prior to undertaking marketing research and development activities.

For the reasons stated above, it is proposed that section 920.32 be modified so that approval by eight members of the Committee is required for market research and development as well as production and postharvest research activities.

Proposal Number 5 - Alternate Member Procedures

This proposal would modify section 920.27 to update and clarify procedures for substitute alternates from within the same district to represent absent members at Committee meetings in districts with more than two members. Further, this proposal would clarify existing language in the order by providing the authority for substitute alternates within the same district to represent absent members. This is a necessary change designed to update existing language.

Prior to 2010, the production area covered by the order was comprised of eight districts, represented by one or two members, and an alternate member for each district, for a total of twenty-two grower positions. In 2010, the order was amended and the number of districts decreased to three. Each district is now represented on the Committee by two, four, or five members and alternate members, for a total of twenty-two grower positions. However, section 920.27 only addresses alternate members' service on the Committee in districts with one and two grower positions. This proposal addresses alternate members' service on the Committee in districts with more than two members, as well as alternates if both a member and his or her respective alternate are unable to attend a Committee meeting. In

such situations, the Committee would be authorized to designate any other alternate present, from the same district, to serve in place of the absent member.

Updating the order to clarify procedures for substitute alternates' service on the Committee would help to ensure that quorum requirements are met. It would also contribute to more efficient conduct of Committee business.

For the reasons stated above, it is proposed that section 920.27 be modified to update and clarify procedures for substitute alternates from within the same district to represent absent members at Committee meetings in districts with more than two members.

#### **Final Regulatory Flexibility Analysis**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued

pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Based on committee data, there are approximately 175 producers and 27 handlers of kiwifruit in the California production area. The Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$7,000,000. (13 CFR 121.201).

The California Agricultural Statistical Service (CASS) reported total California kiwifruit production for the 2011-12 season at 37,700 tons, with an average price of \$775 per ton. Based on the average price, shipment, and grower information provided by the CASS and the Committee, the majority of kiwifruit handlers would be considered small businesses under the SBA definition. In addition, based on kiwifruit production and price information, as well as the total number of California kiwifruit growers, the average annual grower revenue is less than \$750,000. Thus, the majority of California kiwifruit producers may also be classified as small entities.

The amendments proposed by the Committee would provide

authority to recommend and conduct production and postharvest research; add authority to recommend and conduct marketing research and development projects; add authority to receive and expend voluntary contributions; amend procedures to specify that recommendations for production research and market development be approved by eight members of the Committee; and update provisions regarding alternate members' service on the Committee.

These proposed amendments were unanimously recommended at public meetings of the Committee held on July 12 and December 13, 2011.

If proposal number one regarding adding research authority to the order is approved in referendum, there would be no immediate cost to growers or handlers. This proposal would only provide authority to recommend production and postharvest research activities. In the event the Committee decided to undertake these activities in the future, there would be a cost associated with funding any projects recommended. However, research activities were previously funded by the industry through the CKC, which no longer exists. Therefore, there would be no net overall increase in costs to the industry if the Committee chose to take over projects previously funded

through the CKC.

Section 920.41(b) of the order establishes a maximum limit on the assessment rate that may be implemented. The limit was established at \$.035 per tray equivalent (6.8 pounds) when the order was promulgated in 1984, and may be adjusted for inflation. The assessment rate currently in effect is \$.035 per 19.8-pound (9 kilo) container, or approximately \$.012 per tray equivalent (§ 920.213). The current rate is well below the maximum authorized under the order and any potential increase in the assessment rate to cover the costs of research activities is anticipated to be well within the maximum assessment rate authorized under the order. Therefore, the Committee did not recommend an increase in the assessment rate limitation. In addition, if proposal number three, regarding authority for the Committee to accept voluntary contributions is approved, it could provide additional sources of revenue and reduce the amount of assessment monies otherwise needed to fund research activities.

Although there would be a cost associated with any research activities undertaken by the industry, the benefits of such activities would be expected to outweigh the costs. Past benefits of production research to the

California kiwifruit industry include improved techniques for establishing vineyards, pruning, thinning, irrigating, pollination, fertilizer application, disease and pest management, and harvesting. Benefits of postharvest research include improved methods of fruit storage, packaging, and transportation. These research results have been disseminated to growers and handlers in the past and have been instrumental in maintaining a viable kiwifruit industry in California. The Committee believes a continuation of these types of activities is important to the long term success of the industry.

Prior to undertaking any research activities, the Committee would evaluate potential projects and weigh their costs against the potential benefits to the industry. Any projects recommended by the Committee would be reviewed and approved by USDA before being implemented. The Committee and USDA would provide oversight to help ensure that the goals and objectives were being met. The results would be disseminated to industry members and would also be available to the public.

If proposal number two regarding adding authority to the order for marketing research and development projects is approved, there would be no immediate costs to the

industry, as with proposal number one. This proposal would similarly only provide authority to recommend production and postharvest research activities. In the event the Committee decided to undertake these activities in the future, there would be a cost associated with funding any marketing research and development projects recommended.

Like the production and postharvest research activities discussed above, marketing research and development projects could also receive supplemental funding through receipt of voluntary contributions if proposal number three is approved. This could help to mitigate any possible assessment rate increases to pay for the costs of these activities. To the extent that the assessment rate may need to be increased, any increase would be limited so it remains within the maximum level authorized under section 920.41 of the order.

Any increased costs associated with marketing research and development activities are expected to be outweighed by the benefits. Marketing research could be conducted regarding consumer tastes and preferences. This type of information is valuable in developing marketing strategies. Collection of market data can also be useful to determine the success of prior programs and to develop future

programs. Market development programs could be used to conduct programs designed to increase awareness and demand for California kiwifruit. These demand building activities would be expected to increase sales with the intent of ultimately increasing returns to producers.

Prior to undertaking any marketing research and/or market development activities, the Committee would evaluate potential projects and their costs against the potential benefits to the industry. Any projects recommended by the Committee would be reviewed and approved by USDA before implementation. The Committee would provide oversight to ensure that the goals and objectives were being met. In addition, as required by the Federal Agricultural Improvement and Reform Act of 1996, any marketing research and development programs engaged in under a Federal marketing order require periodic evaluation by an independent third party to ensure that they are effective. Thus, any such programs conducted under the kiwifruit order would be evaluated to help ensure that the benefits exceed the costs.

Proposal number three would provide authority for the Committee to receive voluntary contributions to help fund marketing research and development activities. If approved

and utilized, this could provide an additional source of revenue to help supplement the funding of research and development programs. These types of programs are intended to benefit the entire industry. This proposal would not increase or decrease any reporting, recordkeeping, or compliance costs. Acceptance of voluntary financial contributions by the Committee would not result in increased costs. Rather, it might reduce the amount of assessment revenue needed to fund a given program or programs.

Proposal numbers four and five relate to voting procedures and alternate member service on the Committee. Both are procedural in nature and would have no economic impact on producers or handlers if they are approved because they would not establish any regulatory requirements on handlers, nor do they contain any assessment or funding implications. There would be no change in financial costs, reporting, or recordkeeping requirements if either of these proposals is approved.

Alternatives to these proposals, including making no changes at this time, were considered. However, the Committee believes that it would be beneficial to have the ability to conduct production research and market

development activities, collect voluntary contributions, and clarify procedural language for Committee meetings.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic OMB Fruit Crops. No changes in those requirements as a result of this proceeding are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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.

The Committee's meetings, at which these proposals were discussed, were widely publicized throughout the California kiwifruit industry. All interested persons were invited to attend the meeting and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the meeting was public, and all entities, both large and small, were encouraged to express their views on these proposals.

A proposed rule concerning this action was published in the **Federal Register** on February 8, 2013 (78 FR 9331). Copies of the rule were mailed or sent via facsimile to all Committee members and kiwifruit handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending April 9, 2013, was provided to allow interested persons to respond to the proposal.

Three comments were received. Two comments were supportive of the proposed amendments.

The third commenter supported the amendments to §§ 920.32 and 920.45 concerning Committee quorum (voting) and accepting voluntary contributions, respectively. However, the commenter was opposed to the proposed amendment to § 920.27 regarding alternate member procedures that would

allow substitute alternates, from within the same district, to represent absent members at Committee meetings in districts with two or more members because he was concerned that it gave the Committee the opportunity to choose an alternate who shared their views. The proposed change would improve the likelihood that quorum requirements are met. This should ensure a timely and orderly flow of business so that important matters would not have to be postponed. The substitute alternate would only be called upon if the member and their designated alternate were both absent. Because the substitute would be from the same district as the absent member and alternate, it is more likely that the substitute would represent the views of other growers in that district.

In 2010, the order was amended and the number of districts decreased to three. Each district is now represented on the Committee by two, four, or five members and alternate members, for a total of twenty-two grower positions. However, section 920.27 only addresses alternate members' service on the Committee in districts with one and two grower positions. This proposal addresses alternate members' service on the Committee in districts with more than two members, as well as substitute

alternates if both a member and his or her respective alternate are unable to attend a Committee meeting. In such situations, the Committee would be authorized to designate any other alternate present, in the same district, to serve in place of the absent member. Accordingly, no change to the proposed amendment is being adopted.

The commenter was also opposed to the proposed amendment to § 920.48 regarding marketing research and development because he believes each marketer should conduct their own market promotion. The Act authorizes the establishment of marketing research and development projects including paid advertising for certain commodities; however, paid advertising is not authorized for kiwifruit. (7 U.S.C. 608(c)(6)(I)) The Committee developed this amendment taking into account that the CKC is no longer conducting such activities. One purpose of such generic programs is to benefit all members of the kiwifruit industry, including those that could not fund their own programs. As such, adding authority in the order for market research and development projects would benefit the entire kiwifruit industry. Therefore, no change to the proposed amendment is being adopted.

The commenter only supported the amendment to add authority to § 920.47 to conduct production and postharvest research if the quorum requirement of eight votes passes in § 920.32. The commenter wanted to either eliminate or link the two proposed amendments. Such a change would not allow the voters to consider each proposal on its own merits. Currently, the order requires an eight vote plurality for any changes for expenses, assessments, or recommended regulations in § 920.32. The Committee unanimously supported requiring eight votes for approval of marketing research and development as well as production and postharvest research activities. Requiring at least eight votes would insure that a broad base of support existed for any major actions that would affect the budget. Further, the Committee believes this requirement will ensure that industry support exists before undertaking these activities. The commenter was supportive of adding the quorum voting requirement for production and postharvest research and the commenter was in favor of production and postharvest research.

The purpose of not bundling the proposed amendments is to give the industry the opportunity to consider each proposal on its own merits. If the proposed addition of

new § 920.47 and/or § 920.48 is approved by voters, the language in § 920.32 will be amended accordingly, if that amendment also receives the required approval. Likewise, if § 920.32 does not pass, § 920.47 and/or § 920.48 could still benefit the industry. Accordingly, no changes have been made to the proposed amendments.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:  
[www.ams.usda.gov/MarketingOrdersSmallBusinessGuide](http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide). Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

#### **Findings and Conclusions**

The findings and conclusions and general findings and determinations included in the proposed rule set forth in the February 8, 2013, issue of the **Federal Register** are hereby approved and adopted.

#### **Marketing Order**

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Kiwifruit Grown in California." This document has been decided upon as the detailed and appropriate means of

effectuating the foregoing findings and conclusions. It is hereby ordered, that this entire rule be published in the **Federal Register**.

#### **Referendum Order**

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400-407) to determine whether the annexed order amending the order regulating the handling of kiwifruit grown in California is approved by growers, as defined under the terms of the order, who during the representative period were engaged in the production of kiwifruit in the production area.

The representative period for the conduct of such referendum is hereby determined to be August 1, 2012, through July 31, 2013.

The agents of the Secretary to conduct such referendum are designated to be Rose Aguayo and Kathie Notoro, California Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (559) 487-5901, or E-mail: Rose.Aguayo@ams.usda.gov or Kathie.Notoro@ams.usda.gov, respectively.

**List of Subjects in 7 CFR Part 920**

Marketing agreements, Kiwifruit, Reporting and  
recordkeeping requirements.

Dated: July 29, 2013

Rex A. Barnes  
Associate Administrator  
Agricultural Marketing Service

**Order Amending the Order Regulating the Handling of  
Kiwifruit Grown in California<sup>1</sup>**

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of kiwifruit grown in California in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order;

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<sup>1</sup>This order shall not become effective unless and until the requirements of §900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

3. The marketing order, as amended, and as hereby proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of kiwifruit produced in the production area; and

5. All handling of kiwifruit produced in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

**Order Relative to Handling**

It is therefore ordered, That on and after the effective date hereof, all handling of kiwifruit grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the order contained in the proposed rule issued by the Administrator on February 4, 2013, and published in the **Federal Register** (78 FR 9331) on February 8, 2013, will be and are the terms and provisions of this order amending the order and are set forth in full herein.

**PART 920 - KIWIFRUIT GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 920 continues to read as follows:

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

2. Revise § 920.27 to read as follows:

**§ 920.27 Alternate members.**

An alternate member of the committee, during the absence of the member for whom that individual is an alternate, shall act in the place and stead of such member and perform such other duties as assigned. In the event both a member and his or her alternate are unable to attend a committee meeting, the committee may designate any other alternate member from the same district to serve in such member's place and stead. In the event of the death, removal, resignation, or disqualification of a member, the alternate of such member shall act for him or her until a

successor for such member is selected and has qualified.

3. Revise § 920.32(a) to read as follows:

**§ 920.32 Procedure.**

(a) Eight members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: Provided, That actions of the committee with respect to expenses and assessments, production and postharvest research, market research and development, or recommendations for regulations pursuant to §§920.50 through 920.55, of this part shall require at least eight concurring votes.

\* \* \* \* \*

4. Add § 920.45 to read as follows:

**§ 920.45 Contributions.**

The committee may accept voluntary contributions, but these shall only be used to pay expenses incurred pursuant to § 920.47 and § 920.48. Furthermore, such contributions shall be free from any encumbrances by the donor, and the committee shall retain complete control of their use.

5. Add § 920.47 to read as follows:

**§ 920.47 Production and postharvest research.**

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of kiwifruit.

6. Add § 920.48 to read as follows:

**§ 920.48 Market research and development.**

The committee, with the approval of the Secretary, may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of kiwifruit.

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