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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AMS-FV-15-0056; FV15-920-1 FR]

Kiwifruit Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Kiwifruit Administrative Committee (Committee) for an increase of the assessment rate established for the 2015-16 and subsequent fiscal periods from \$0.025 to \$0.040 per 9-kilo volume-fill container or equivalent of kiwifruit handled under the marketing order (order). The Committee locally administers the order, and is comprised of growers of kiwifruit operating within the area of production. Assessments upon kiwifruit handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins on August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective February 4, 2016.

FOR FURTHER INFORMATION CONTACT: Kathie Notoro, Marketing Specialist, or Martin Engeler, 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 E-mail:

Kathie.Notoro@ams.usda.gov, or Martin.Engeler@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, 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 E-mail: 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 grown 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."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California kiwifruit handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein would be applicable to all assessable

kiwifruit beginning on August 1, 2015, and continue until amended, suspended, or terminated.

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. Such 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 rule increases the assessment rate for the 2015-16 and subsequent fiscal periods from \$0.025 to \$0.040 per 9-kilo volume-fill container or equivalent of kiwifruit.

The California kiwifruit marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The

members of the Committee are producers of California kiwifruit. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2013-14 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on July 17 and September 16, 2015, and unanimously recommended 2015-16 fiscal year expenditures of \$132,725 and an assessment rate of \$0.040 per 9-kilo volume-fill container or equivalent of kiwifruit handled to fund Committee expenses. In comparison, last year's budgeted expenditures were \$120,925. The assessment rate of \$0.040 is \$0.015 more than the rate currently in effect. The Committee's recommended 2015-16 expenditures are \$11,800 higher than last year's budgeted expenditures. The primary reason for the increase is to provide funding for research.

When applied to the Committee's crop estimate for the 2015-16 fiscal year of 2,297,000 9-kilo volume-fill containers or equivalent, the current assessment rate of \$0.025 would not generate sufficient assessment income to anticipated expenses. The assessment rate of \$0.040 per 9-kilo volume-fill container or its equivalent should generate assessment income of \$91,880. Anticipated assessment income combined with financial reserve and interest income, should provide sufficient funds for the Committee to meet its budgeted expenses while maintaining its financial reserve within the limit authorized under the order. (\$ 920.42)

The major expenditures recommended by the Committee for the 2015-16 fiscal period include \$80,000 for management expenses; \$14,000 for two financial audits, \$14,330 for research; \$7,500 for International Kiwifruit Organization (IKO) travel; \$2,500 for a membership fee to Buy California; and \$2,500 for a membership fee to the IKO. Major budgeted expenses for the 2014-15 fiscal period were \$80,000 for management expenses; \$7,500 for a financial audit, \$5,000 for handler audits; \$2,500 for a membership fee to Buy California; \$2,500 for IKO membership; and \$12,500 for IKO travel.

The assessment rate recommended by the Committee was derived by considering the amount of revenue needed to meet

anticipated expenses divided by expected shipments of California kiwifruit. As previously mentioned, kiwifruit shipments for the 2015-16 fiscal period are estimated at 2,297,000 9-kilo volume-fill containers, which should provide \$91,880 in assessment income. Anticipated assessment income derived from handler assessments, along with interest income and \$40,756 from the Committee's authorized financial reserve, should provide sufficient funds for the Committee to meet its budgeted expenses. It is anticipated that \$29,119 would remain in the financial reserve at the end of July 2016, which would be within the maximum amount permitted by the order of approximately one fiscal year's expenses (\$ 920.42).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested

persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2015-16 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

There are approximately 178 kiwifruit growers in the production area and approximately 28 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration

as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,000,000 (13 CFR 121.201).

The National Agricultural Statistical Service (NASS) reported total California kiwifruit production for the 2014 season at 27,400 tons, with an average price of \$1,190 per ton. Based on the average price and shipment information provided by NASS and the Committee, it could be concluded that the majority of kiwifruit handlers would be considered small businesses under the SBA definition. Based on kiwifruit production and price information, as well as the total number of California kiwifruit growers, average annual grower revenue is less than \$750,000. Thus, the majority of California kiwifruit growers may also be classified as small entities.

This rule increases the assessment rate collected from handlers for the 2015-16 and subsequent fiscal periods from \$0.025 to \$0.040 per 9-kilo volume-fill container or equivalent of kiwifruit. The Committee unanimously recommended 2015-16 expenditures of \$132,725 and an assessment rate of \$0.040 per 9-kilo volume-fill container.

The assessment rate of \$0.040 is \$0.015 higher than the 2014-15 rate. The quantity of assessable kiwifruit for the 2015-16 fiscal period is estimated at 2,297,000 9-kilo

volume-fill containers. Thus, the \$0.040 rate should provide \$91,880 in assessment income. Anticipated assessment income derived from handler assessments, along with financial reserve funds and interest income, should provide sufficient revenue for the Committee to meet its budgeted expenses, while maintaining its financial reserve within the maximum amount permitted by the order of approximately one fiscal year's expenses (\$ 920.42).

The major expenditures recommended by the Committee for the 2015-16 fiscal period include: \$80,000 for management expenses; \$14,000 for two financial audits; \$14,330 for research; \$7,500 for IKO travel; \$2,500 for a membership fee to Buy California; and \$2,500 for IKO membership. Major budgeted expenses for the 2014-15 fiscal period were: \$80,000 for management expenses; \$7,500 for a financial audit; \$5,000 for handler audits; \$2,500 for a membership fee to Buy California; \$2,500 for IKO membership; and \$12,500 for IKO travel.

Prior to arriving at this budget and assessment rate, the Committee considered alternative expenditure levels, to include maintaining the current assessment rate, but ultimately determined that the current assessment rate would generate insufficient revenue to meet its expenses.

According to data from NASS, the seasonal average producer price was \$11.09 per 9-kilo volume-fill container in 2013 and \$11.78 per 9-kilo volume-fill container in 2014.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for 2015-16 could range between \$11.09 and \$11.78 per 9-kilo volume-fill container of assessable kiwifruit. Therefore, estimated assessment revenue for the 2015-16 fiscal year as a percentage of total producer revenue could be between 0.34 percent and 0.36 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meetings were widely publicized throughout the California kiwifruit industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. The July 17 and September 16, 2015, meetings were public meetings. All entities, both large and small, were able to express views on this issue.

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. No changes in those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large California kiwifruit handlers. 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. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final 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.

A proposed rule concerning this action was published in the **Federal Register** on November 5, 2015 (80 FR 68473). Copies of the proposed rule were also mailed or sent via

facsimile to all California kiwifruit handlers. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A 15-day comment period ending November 20, 2015, was provided for interested persons to respond to the proposal. One comment in support of the rule was received, with the commenter requesting more information on the type of research the committee was conducting. The research the Committee recommended involves two field trials during the first year of a research proposal to study the beneficial effects of Nimitz nematicide on the Root-knot nematode. This type of production research is authorized under § 920.47 of the marketing order and will benefit growers. Accordingly, no changes will be made to the rule as proposed, based on the comment received.

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

After consideration of all relevant material presented, including the information and recommendation submitted by

the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2015-16 fiscal year began on August 1, 2015. Handlers began shipping kiwifruit in September and the marketing order requires that the rate of assessment apply to all assessable kiwifruit handled during the fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years. Also, a 15-day comment period was provided for in the proposed rule, and one supportive comment was received.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

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. Section 920.213 is revised to read as follows:
§ 920.213 Assessment rate.

On and after August 1, 2015, an assessment rate of \$0.040 per 9-kilo volume-fill container or equivalent of kiwifruit is established for kiwifruit grown in California.

Dated: January 29, 2016

Erin Morris
Associate Administrator
Agricultural Marketing Service

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