



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AMS-SC-18-0060; SC18-920-1 FR]

Kiwifruit Grown California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Kiwifruit Administrative Committee (Committee) to decrease the assessment rate established for the 2018-2019 and subsequent fiscal periods. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Maria Stobbe, Marketing Specialist, or Terry Vawter, Senior Marketing Specialist, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or Email: Maria.Stobbe@ams.usda.gov or Terry.Vawter@ams.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)
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Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement and Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California. Part 920 (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 Committee locally administers the Order and is comprised of producers of kiwifruit operating within the area of production, and one member of the public.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, kiwifruit handlers in California are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable kiwifruit for the 2018-2019 fiscal period 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 (7 U.S.C. 608c(15)(A)), 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.

The 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, and one member of the public. 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.

This rule decreases the assessment rate for the 2018-2019 and subsequent fiscal periods from \$0.040 to

\$0.025 per 9-kilo volume-fill container or equivalent of kiwifruit handled.

The Committee met on July 19, 2018, and unanimously recommended 2018-2019 expenditures of \$119,000 and an assessment rate of \$0.025 per 9-kilo volume-fill of kiwifruit. In comparison, last year's budgeted expenditures were \$114,383. The assessment rate of \$.025 is \$0.015 lower than the rate currently in effect. The Committee currently has a cash reserve of approximately \$52,056. The decreased assessment rate plus the cash reserve are sufficient to fund the 2018-2019 budgeted expenses.

The major expenditures recommended by the Committee for 2018-2019 include \$80,000 for management services, \$29,000 in office expenditures, and \$10,000 for research.

Budgeted expenses for these items in 2017-2018 were \$80,000 for management services, \$24,383 in office expenditures, and \$10,000 for research.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, expected shipments of kiwifruit in the production area, and the level of funds in the authorized reserve. Kiwifruit shipments for the 2018-2019 season are estimated at

4,207,071 9-kilo volume-fill containers, which should provide \$105,177 in assessment income (4,207,071 9-kilo volume-fill containers times \$0.025 per container equals \$105,177). Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, should be adequate to cover budgeted expenses. Funds in the reserve (currently \$52,056) will be kept within the maximum permitted by the Order (approximately one fiscal period's expenses).

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 and 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 will 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 budget 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 140 producers of kiwifruit in the production area and approximately 20 handlers subject to regulation under the Order. Small

agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to Committee, USDA Market News, and National Agricultural Statistics Service (NASS) data, the average price of kiwifruit for the 2016-2017 season was approximately \$0.92 per pound, and the total crop was approximately 9.0 million tray equivalents, or 63 million pounds. Based on the average price and handler-specific annual kiwifruit sales data provided by the Committee, 19 of the 20 handlers have average annual receipts less than \$7,500,000. Thus, the majority of kiwifruit handlers may be classified as small business entities.

In addition, based on information from the NASS, the average grower price for kiwifruit during the 2016-2017 season was approximately \$0.525 cents per pound. The Committee analyzed grower-specific production data and determined that growers with production over 204,081 9-kilo volume-fill containers would be classified as large entities (204,081 9-kilo volume-fill containers times 7 pounds per container times \$0.525 per pound equals

\$749,998). Using the NASS average grower price and the Committee's specific grower production information, at least 130 of 140 producers have annual receipts of less than \$750,000. Thus, the majority of the kiwifruit producers may be classified as small entities.

This rule decreases the assessment rate collected from handlers for the 2018-2019 and subsequent fiscal periods from \$0.040 to \$0.025 per 9-kilo volume-fill container of kiwifruit. The Committee unanimously recommended 2018-2019 expenditures of \$119,000 and an assessment rate of \$0.025 per 9-kilo volume-fill container. The assessment rate of \$0.025 is \$0.015 lower than the 2017-2018 rate. The quantity of assessable commodity for the 2018-2019 fiscal year is estimated at 4,207,071 9-kilo volume-fill container. Thus, the \$0.025 rate should provide \$105,177 in assessment income ($4,207,071 \times \$0.025$). Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve (currently \$52,056), should be adequate to cover budgeted expenses.

The major expenditures recommended by the Committee for the 2018-2019 fiscal year include \$80,000 for management services, \$29,000 in office expenditures, and

\$10,000 for research. Budgeted expenses for these items in 2017-2018 were \$80,000 for management services, \$24,383 in office expenditures, and \$10,000 for research.

The Committee estimates that the funds in the reserve (currently \$52,056) would be reduced by \$13,303 to ensure the reserve remains within the maximum permitted by the Order (approximately one fiscal period's expenses).

Prior to arriving at this budget and assessment rate, the Committee considered various options, such as maintaining the current assessment rate and expenditure levels. Alternative expenditure levels were discussed by the Committee, based upon the relative value of various activities to the kiwifruit industry. The Committee ultimately determined that 2018-2019 expenditures of \$119,000 were appropriate, and the recommended \$0.025 assessment rate, and the use of \$13,303 from the financial reserve, would be sufficient to meet its expenses.

A review of historical crop and price information, as well as preliminary information pertaining to the upcoming fiscal period, indicates that the shipping point price for the 2017-2018 season averaged about \$17.32 per 9-kilo volume-fill container of California kiwifruit

handled. If the 2018-2019 price is similar to the 2017-2018 price, estimated assessment revenue as a percentage of total estimated handler revenue would be 0.14 percent for the 2018-2019 season (\$0.025 divided by \$17.32 per 9-kilo volume-fill container).

This rule decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers and may reduce the burden on producers. This rule will not have a significant economic impact on a substantial number of small entities.

The Committee's meeting was widely publicized throughout the production area. All interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 19, 2018, meeting was a public meeting, and 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

OMB and assigned OMB No. 0581-0189, Fruit Crops. No changes in those requirements are necessary as a result of this rule. 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 October 1, 2018 (83 FR 49312).

Copies of the proposed rule were provided to all kiwifruit handlers. The proposal was also made available through the internet by USDA and the Office of Federal

Register. A 30-day comment period ending October 31, 2018, was provided for interested persons to respond to the proposal.

One comment was received regarding the proposed rate change. The commenter questioned the Committee's authority to recommend a reduction in the rate and the potential impact of the rate change on the quality of kiwifruit.

As stated in the Act (7 U.S.C. 610(b)(2)(ii)), assessments collected by the Committee are used to cover the costs of administering the program. When the collection of assessments surpasses budget needs and reserve funds are at their maximum, the Committee and USDA are obligated by the Order (§920.41 Assessments and §920.42 Accounting) to adjust the amount of assessment funds collected. This adjustment can be made either by refunding assessments or by reducing the assessment rate. Reducing the assessment rate is less costly and more efficient for both the Committee and handlers. Therefore, to prevent the collection of surplus revenue if the assessment rate were not changed, the authority to reduce the assessment rate is both implied in, and necessary under the Order.

Regarding the commenters question about the quality of kiwifruit, the amount of assessments collected are tied to volume of kiwifruit handled, not the quality of the kiwifruit. Therefore, the assessment rate and kiwifruit quality are not directly correlated.

The remainder of the comment was related to general information about the kiwifruit marketing order and was outside the scope of this action. 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 Richard Lower 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 will tend to effectuate the declared policy of the Act.

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 part 920 continues to read as follows:

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

2. Section 920.213 is revised to read as follows:

§ 925.213 Assessment rate.

On and after August 1, 2018, an assessment rate of \$0.025 per 9-kilo volume-fill container or equivalent of kiwifruit is established for kiwifruit grown in California.

Dated: December 19, 2018.

Bruce Summers,

Administrator,

Agricultural Marketing Service.

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